

New York

Third Edition

Volume

1A

PJI 1:1 to PJI 2:142

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Negligence Actions**

2022

Pattern Jury Instructions

CIVIL

*Prepared by
Committee on Pattern Jury Instructions
Association of Justices of the
Supreme Court of the State of New York*

Hon. David Demarest, Chair

Hon. Jack M. Battaglia, Vice Chair

Hon. Helen E. Freedman, Vice Chair

Hon. Leonard B. Austin

Hon. John M. Curran

Hon. William G. Ford

Hon. Judith J. Gische

Hon. John R. Higgitt

Hon. Deborah H. Karalunas

Hon. Tanya R. Kennedy

Hon. Shirley Werner Kornreich

Hon. Patrick H. NeMoyer

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Hon. Phillip R. Rumsey

Hon. Bernice Siegal

Reporters

Hon. Jeffrey W. Gasbarro

Robert A. Markoff, Esq.



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New York Pattern Jury Instructions—Civil

VOLUME 1A THIRD EDITION

Prepared by Committee on Pattern Jury Instructions Association of
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Citations of NY PJI are noted in Shepard's

New York Statutes Citations

**PUBLISHER'S INTRODUCTION
TO THE 2022 EDITION OF
NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL**

New York Pattern Jury Instructions—Civil is used by judges throughout New York State to instruct juries in all kinds of civil cases. Practicing lawyers use it to develop strategies at all stages of a case, from discovery to settlement negotiations through jury trial. Its model charges and detailed commentaries set forth not only how juries are instructed, but the basis for each instruction in New York statutory and case law.

The Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of New York State welcomes input from the bench and bar, and encourages lawyers and judges to comment on these volumes. Suggestions may be sent directly to the New York Pattern Jury Instructions editor at Thomson Reuters at NY-PJI-Feedback@thomsonreuters.com and they will be shared with the committee for its consideration.

Changes and updates appearing in the 2022 Edition of New York Pattern Jury Instructions—Civil include:

- **SPECIAL ALERT TO THE BENCH AND BAR**—This edition contains significant revisions, updates, and new charges and commentary within the General Charges, including Charges Prior to Trial and Charges After Trial. See PJI 1:1 through PJI 1:31. The revisions include a departure from previous editions by eliminating the charge after trial where no charge prior to trial has been given. Charges have been added addressing Impartiality, see PJI 1:7A and Fair Juror and Absence of Implicit or Unconscious Bias, see PJI 1:7B. Expanded charges and commentary on Juror Note Taking, see PJI 1:13C, 1:25B and Juror Questioning, see PJI 1:13D are now included in the General Charge. The general charge and commentary on Interested Witnesses have been revised and re-numbered, see PJI 1:25C.
- Revised charges covering the Mental Hygiene Law—Involuntary Retention of Dangerous Sex Offenders Requiring Confinement. See PJI 8:8, 8:8.1, & 8:8.2.
- Updated charges on Intentional Torts—Defamation—Elements of Case—Plain Slander—Private Person and Speech of Public Concern. See PJI 3:23E and PJI 3:23F.
- Completely revised charge and commentary on General Instruction—Direct and Circumstantial Evidence. See PJI 1:70.
- Many other updates to commentary and addition of new case cites throughout the publication.

THE PUBLISHER
December 2021

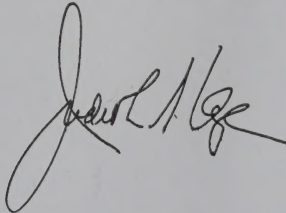
FOREWORD TO THIRD EDITION

The jury is an ancient institution that, across the nation, is today the focus of attention. All aspects of the jury system are being scrutinized, from summoning methods to selection procedures to—the subject at hand—instructions. The goal in each instance is to make jury service meaningful for individual jurors and to ensure that the jury system continues to render substantial justice for the community. This third Edition of Volume One of the New York Pattern Jury Instructions—Civil well serves these vital goals.

The value of this volume to the bench, bar and public cannot be overstated. With more than two thousand pages of carefully researched charges and commentary, the Third Edition provides a comprehensive yet comprehensible guide to the general principles governing civil trials and the law in negligence actions. Readers comparing the Third Edition and the Second will note how extensive its revisions are: many charges have been modified; some deleted; some (such as the municipal liability section) have been completely rewritten; some (such as the continuous treatment section) are totally new.

We are grateful to the hardworking committee of judges which has labored over the past six years to produce this important work: David O. Boehm, Lawrence J. Bracken, M. Dolores Denman, Martin Evans, Helen E. Freedman, Ira Gammernan, Harold J. Hughes, Bentley Kasal, Howard A. Levine, Thomas E. Mercure, Martin B. Stecher and Joseph P. Sullivan, and to the especially dedicated chair, Leon D. Lazer. Each page of this volume is testament to their commitment to scholarship, public service and the law.

Finally, for the committee and for all of us who reap the benefit of their effort, heartfelt thanks to Reporters Patrick M. Connors (Volume One Reporter) and Eileen R. Kaufman (Volume Two Reporter).

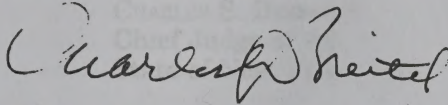
A handwritten signature in black ink, appearing to read "Judith S. Kaye", with a large, stylized flourish at the end.

JUDITH S. KAYE
Chief Judge of the
State of New York

FOREWORD TO SECOND EDITION

Since initial publication eight years ago, and the supplements published since 1966, volume one of the New York Pattern Jury Instructions—Civil has provided immeasurable benefit to both court and counsel in framing clear and precise instructions necessary to guide trial judges in instructing juries so that the applicable rules are intelligible to them. This revision of that volume, reflecting recent developments as well as other changes making for even clearer and more precise instructions, demonstrates anew the thorough research and careful draftsmanship which hallmarked the original volume.

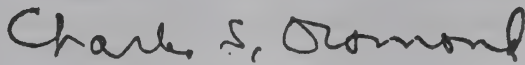
The committee, under the excellent leadership of former Justice Bernard Meyer, has performed its task pre-eminently. Judges Meyer, Feiden, Hawkins, Henry, Leff, Martuscello, Terry and Witmer, and Dean Thornton and Professor Farrell, have provided both bench and bar an invaluable tool with which to perform an integral part of their function. The revised volume is a professional work of high craftsmanship. For this, and its inestimable value to the People of the State, the Judicial Conference, the Administrative Board, and the judges of the State express their appreciation and gratitude.



CHARLES D. BREITEL
Chief Judge of the
State of New York

FOREWORD TO FIRST EDITION

The preparation of these materials and the making of this useful book is another illustration of the paradoxical truth: to get an unpaid public benet job done well and quickly, pick a man already busy with other tasks. Chairman Justice Meyer and his four committee members were and are, in their regular judicial work, among the most active and productive of that heavily burdened body of men: the Supreme Court of the State of New York. Yet, like Browning's busy man who longs for leisure but once at leisure "straightway he wants to be busy," each of them took on this extra task enthusiastically and intensively. The careful and tireless efficiency and thoroughness with which they accomplished it is proven by every line of the Instructions. Into it they put their learning, their experience, their devotion and their meagre and valuable leisure time. Let us all be thankful that we can call to special service such people as Justices Meyer, Henry, Lawless, Martuscello and Witmer and their able and learned Reporter, Professor Peter W. Thornton.

A handwritten signature in dark ink, reading "Charles S. Desmond". The script is cursive and fluid, with the first name "Charles" and last name "Desmond" clearly legible.

CHARLES S. DESMOND
Chief Judge of the
State of New York

PREFACE TO THIRD EDITION

This Third Edition of Volume 1 of New York Pattern Jury Instructions—Civil represents the culmination of six years of work by the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of New York State.

In preparing the Third Edition, the Committee has examined each charge and comment in the Second Edition and has made significant additions, deletions, revisions and other changes. The Committee has also made a serious effort to make the charges more comprehensible to jurors without affecting the correctness of the legal principles involved in the charges. The new edition is gender neutral.

At the outset of the Third Edition project, the Committee decided that as its work went forward the revisions and changes made would be inserted into the annual supplements each year until completion of the project. Consequently, the number of pages in the Volume 1 supplement ultimately exceeded the number of pages in the hardbound volume published as the Second Edition. Publication of The Third Edition now eliminates the user's problem of coordinating the hardbound Volume 1 with the annual supplement.

The enormity of the changes in statutory and case law since publication of the Second Edition of Volume 1 in 1974 has created the need to expand what was once a single Volume 1 into two volumes designated Volumes 1A and 1B. There was considerable reluctance on the part of the Committee to expand Volume 1 into two volumes, but there was no practical and convenient method of publishing the approximately 1650 pages of the Third Edition within a single cover. However, the policy of issuing a separate supplement each year to be used with the original volume will now be terminated with the Third Edition.

The format and section numbers contained in the Second Edition have been retained in the Third Edition because references to charges by PJI section number, both in the courtroom and in law offices, are now part of the legal culture of the State and changes in those numbers undoubtedly would cause confusion. Nevertheless, changes in case and statutory law and the need for special verdicts have mandated the addition of new charges, some new charge numbers, and extensive revision of some of the charges bearing the old numbers.

Creation of the new edition was accomplished by assigning to each member of the Committee a number of charges and comments to be revised. Thus, the original draft of each charge and comment was the product of the work of a member of the Committee. The original draft was then put to at least two—and often more than two—readings before the entire Committee. The end product is the work of the judges on the Committee, with significant assistance from the Reporters.

During the six years of work on the Third Edition, the Committee also issued annual Supplements to Volumes 1 and 2. To accomplish this,

the Committee conducted two day meetings for most of the months of each year and a full week meeting during the summer of each year. Two summer meetings were held at the offices of the Appellate Division, Third Department in Albany, one at Justice Denman's chambers in Buffalo, one at the offices of the Fourth Department in Rochester and two at the Touro Law Center in Huntington, New York. The Committee appreciates the assistance of the Appellate Divisions and Touro Law Center in providing their facilities.

The Committee members who took part in this project were Justices David O. Boehm, Lawrence J. Bracken, M. Dolores Denman, Martin Evans, Helen E. Freedman, Ira Gammernan, Harold J. Hughes, Bentley Kassal, Howard Levine, Thomas E. Mercure, Martin B. Stecher, Joseph P. Sullivan, and the chair, Leon D. Lazer.

The Committee is highly indebted to its reporters: Professors Patrick M. Connors and Eileen Kaufman. Professor Connors was the overall manager of the project and provided invaluable substantive and editorial assistance. Professor Kaufman, the Reporter for Volume 2, also provided important substantive and editorial assistance in the project. Reporter Emeritus, Professor Alan D. Scheinkman, continued working with the Committee and provided original draft sections as well as important advisory assistance.

A word is necessary concerning the personnel of the Committee, which has undergone significant changes since the publication of the Second Edition. In 1978, Justice Leon D. Lazer, subsequently appointed Associate Justice of the Appellate Division, Second Department, and Justice Frederick B. Bryant, joined the Committee. The following year, Justice Bernard S. Meyer, Chair of the Committee since its inception, resigned from the Committee incident to his appointment to the Court of Appeals. Justice Lazer was appointed as Chair and four new members were added to the Committee: Justices Lawrence J. Bracken, Harold J. Hughes, Bentley Kassal, and Richard D. Simons. In 1980, Justice Murray T. Feiden, a member of the Committee since 1970, retired from the Committee. In January, 1983, Justice Simons resigned from the Committee incident to his appointment to the Court of Appeals and Justice David O. Boehm was appointed in his place. In 1986, Justice Martin Evans was appointed to the Committee. In 1987, Justice James T. Leff, a member of the Committee since 1971, retired from the Committee. In 1988, Justice Bryant and Justice G. Robert Witmer, the last active founding member, retired from the Committee. That year, three new members were appointed: Justices Howard A. Levine, Thomas J. Lowery, Jr., and Martin B. Stecher. Following the untimely death of Justice Lowery in 1991, Justice M. Dolores Denman, Presiding Justice of the Appellate Division, Fourth Department, became a member of the Committee. In 1992, Justices Thomas E. Mercure and Ira Gammernan were appointed to the Committee. In 1993, Justice Levine resigned from the Committee incident to his appointment to the New York Court of Appeals. In 1994, Justice Kassal retired from the Committee and Justice Helen E. Freedman was appointed. In 1995, Justice Joseph P. Sullivan was appointed to the Committee. In 1997, Justice Stecher retired from the Committee and Justices Stephen G. Crane and Jerome C. Gorski

PREFACE TO THIRD EDITION

were appointed. Upon Justice Crane's resignation from the Committee in 1999, Justice Robert G. Hurlbutt was appointed to the Committee. Following the untimely death of Justice Denman in 2000, Justice Elizabeth W. Pine was appointed to the Committee. In 2001, Justices Robert J. Lunn and Alan D. Oshrin were appointed to the Committee. In 2003, Justice Oshrin died after a short illness and Justice Hughes retired after 24 years of service to the Committee. Justice David Demarest was appointed the same year. In 2004, Justice Boehm retired after 20 years of service to the Committee and Justices Patrick H. NeMoyer and Leonard B. Austin were appointed. In 2006, Justice Lunn retired after 5 years of service and later that year Justice Mercure retired after 15 years of service. Justices Angela M. Mazzarelli and Emily Pines were then appointed. In 2008, Justice Jerome C. Gorski retired after 11 years of service to the Committee and Justices Phillip R. Rumsey and Alan D. Scheinkman were appointed. In 2009, Justice Sheila Abdus-Salaam was appointed. Justice Lawrence J. Bracken retired in 2011 after 33 years of service to the Committee, and Justice Jack M. Battaglia was appointed the same year. Justice Martin Evans died in 2011 after a short illness. In 2013, Justice Abdus-Salaam retired from the Committee after having been appointed to the Court of Appeals. In the same year, Justice Elizabeth W. Pine retired after 13 years of service. Justices John M. Curran, L. Priscilla Hall and Shirley Werner Kornreich were appointed to the Committee. Significant personnel changes occurred in 2017. Justices Angela M. Mazzarelli, Robert G. Hurlbutt, Joseph P. Sullivan and Ira Gammerman all retired from the Committee after a total of 74 years of combined service. New members appointed that year were Justices Judith J. Gische, Jeffrey K. Oing and Deborah H. Karalunas. Justice Bernice Siegal was appointed to the Committee in 2018. In 2019, Justice L. Priscilla Hall retired from the Committee and was replaced by Justice William G. Ford. In 2020, Justice Oing retired from the Committee and was replaced with Justice Tanya R. Kennedy. Justice Scheinkman left the Committee in 2021 and was replaced by Justice John R. Higgitt.

In December, 2014, having led the Committee for 37 years, Justice Leon D. Lazer decided to retire as Chair. He continued, however, to lend his enormous intellect and legal acumen as a member. The Committee acknowledges his invaluable contributions through his insistence on excellence, his example of thorough preparation and his meticulous legal analysis, all of which have made PJI - Civil indispensable to the Bench and Bar. His name will forever be linked with these volumes, which are his legacy.

In January, 2015, the Committee selected Justice David Demarest as its next Chair.

The 2019 Edition of these volumes were designated the Hon. Leon D. Lazer Memorial Edition as we lost our longtime Chair in January of 2018. Justice Lazer remained a member of the Committee right up until his death in his 96th year. Having joined the Committee in 1978, he became its Chair the following year and continued in that position until he decided to step down in 2014. PJI was Justice Lazer's passion—he fathered its development over the years as it grew into the premier treatise that it is today. His contributions cannot be fully expressed here, but suffice it to say that he lives on in these pages and his work will continue to guide the Bench and Bar of New York State for

generations.

Professor Richard T. Farrell of Brooklyn Law School served as Reporter to the Committee from 1974 to 1983 and remained an active advisor to the Committee for several years. Professor Alan D. Scheinkman of Pace University School of Law served as Reporter to the Committee from 1984 to 1997. In 1988, Professor Eileen R. Kaufman of Touro College, Jacob D. Fuchsberg Law Center, was appointed as Volume 2 Reporter. Professor Patrick M. Connors of Albany School of Law was then appointed as Volume 1 Reporter and became manager of the Third Edition project. In 2001, John R. Higgitt, Esq., Appellate Court Attorney, Appellate Division, Second Department, was appointed Associate Reporter for Volume 1.

In 2003, Professor Patrick M. Connors retired after 15 years of service to the Committee. The Committee extends its gratitude to Professor Connors for his distinguished work that has so profoundly affected the quality of these volumes. Professor Connors was replaced by Lisabeth Harrison, former law clerk to Hon. Vito J. Titone and Hon. Domenick L. Gabrielli of the Court of Appeals and currently affiliated with Mintz & Gold LLP. After 18 years of service, Professor Eileen R. Kaufman retired. Volume 2 of this work is to a great degree the product of her dedication and scholarship, for which the Committee extends its gratitude. Professor Kaufman was replaced by Professor Rodger D. Citron of Touro College, Jacob D. Fuchsberg Law Center. Professor Citron retired after four years of distinguished service. In 2011, John R. Higgitt, Esq., Principal Court Attorney, Supreme Court, Bronx County (Civil Division), returned to serve the Committee as the Report for Volume 1, and Gennaro Savastano, Esq., Senior Appellate Court Attorney, Appellate Division, First Department, was appointed as Associate Reporter. Gennaro Savastano retired in 2012 after a year of distinguished service. He was replaced by David Paul Horowitz, Esq., Adjunct Professor of Law at Brooklyn Law School and affiliated with Ressler & Ressler in New York City. Mr. Horowitz retired in 2015 after three years of distinguished service. In 2017, Melissa B. Ringel, Esq., Director and Special Master of the Pre-argument Mediation Program at the Appellate Division, First Dept. was appointed as an additional Reporter.

In November, 2017, Reporter Lisabeth (Libby) Harrison tragically died, much too young. Libby's passing leaves a tremendous void, for in the 14 years that Libby served the Committee she proved to be an exceptional legal scholar and writer. She was responsible over the years for many new and revised charges and commentary and her mark will be forever on the books. Libby was more than a colleague, she was a friend to everyone, a mentor and a constant advocate for perfection in our work. With her vast knowledge and appreciation of the law, she challenged the judges to be better scholars. With her good humor, humility and humanity, she challenged each committee member to be a better person. The Bench and Bar owe Libby a debt of gratitude for her enduring contributions to these volumes.

Jeffrey A. Helevitz, Esq., Special Referee, Civil Part, First Judicial District and Jeffrey W. Gasbarro, Principal Law Clerk to the Hon. Francesca E. Connolly, Associate Justice, Second Department, were ap-

pointed Reporters in 2018. That year Reporter John R. Higgitt was appointed by the Governor to be a Judge of the New York Court of Claims. In 2019, Charles P. Cercone, Principal Appellate Court Attorney for the Fourth Department, was appointed to a reporter position. In 2021, Robert A. Markoff, Principal Law Clerk for the Second Department, was appointed to a reporter position.

This Volume also reflects efforts in past years of Professor Aaron D. Twersky, the late Professor David H. Schwartz and, more recently, Lee S. Kreindler, Esq. with reference to the Warsaw Convention. In more recent times, the Committee is appreciative of the work of Presiding Justice M. Dolores Denman and her staff for revising the Comment to section 2:217 to incorporate the substantial body of recent case law on Labor Law § 240. The Committee would like to acknowledge the work of Barry L. Porsch, Esq. for assembling the initial cases under Labor Law § 241(6) that are the subject of the listing in the Comment to 2:216A.

The Committee extends its gratitude to the Judges and Administrators of the Unified Court System for their continued support and cooperation.

December, 2021

THE PATTERN JURY INSTRUCTIONS

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William G. Ford

Judith J. Gische

John R. Higgitt

Deborah H. Karalunas

Tanya R. Kennedy

Shirley Werner Kornreich

Patrick H. NeMoyer

Emily Pines

Phillip R. Rumsey

Bernice Siegal

PREFACE TO SECOND EDITION

At the suggestion of Chief Judge Desmond, the Committee on Pattern Jury Instructions of the Association of Supreme Court Justices was established in November 1962. Mr. Justice Samuel W. Eager, then President of the Association, appointed a Committee consisting of Mr. Justice Bernard S. Meyer as Chairman, and Justices Aron Steuer, William B. Lawless, M. Henry Martuscello and G. Robert Witmer. Through the cooperation of the Judicial Conference, Professor Peter W. Thornton joined the Committee as its Reporter. In February 1963, Mr. Justice Steuer felt compelled by the pressure of court work to withdraw from the Committee, but agreed to remain as Advisor and has submitted valuable comments on the Committee's work, of all of which he received copies. In Mr. Justice Steuer's place, Mr. Justice Frederic T. Henry became a member of the Committee.

The Committee remained intact as a working unit from 1962-1971 and published the original two volumes. Their work together transformed acquaintanceships of the members with one another into warm and lasting friendships, and the preparation of those volumes was a source of great satisfaction to all.

Changes in the composition of the Committee were inevitable. Justice William B. Lawless, having retired from the bench and assumed the role of Dean of Notre Dame Law School, then returned to private practice. Because of the press of other duties he resigned from the Committee in January, 1971. At about the same time, Justice Joseph F. Hawkins became an active member and Justice James J. Leff joined several months later in March, 1971. The next addition was Justice Murray T. Feiden in December, 1972 followed by Justices Walter L. Terry and William R. Roy in January, 1973. Professor Richard T. Farrell became the Committee's Supplement Reporter in March, 1972.

The first meeting of the Committee was held on December 17, 1962 and before completion of this first volume, an additional twenty-two meetings, some of them four days in length, took place. The tentative table of contents adopted at the first meeting has been revised many, many times as the work progressed. To each member of the Committee were assigned specific charges for preparation. As each charge was prepared, it was circulated by its author to the other members of the Committee and placed on the agenda of the next meeting for discussion. Inevitably discussion resulted in changes and corrections, sometimes in wholesale revision. No charge was adopted in exactly the form originally prepared; in some cases the charge went through five, six or more versions before it received tentative final approval by the Committee.

Upon tentative final approval, the charge was circulated to three separate Coordinating Committees, one of United States District Judges, one of County Court Judges and one of New York City Civil Court Judges, for comment and criticism. It was also forwarded to

James M. Flavin, State Reporter, whose staff checked citations for accuracy and form, and also offered constructive criticism. Corrections or suggestions substantial in nature were referred back to the Committee for review before the charge was regarded as finally approved.

The Committee of District Judges appointed by Chief Judge Lumbard consisted of Judges John R. Bartels, Chairman, Dudley B. Bonsal and Wilfred Feinberg. To them goes credit not only for the Federal Annotations that appear at the end of some charges, but for the initial work on the charges dealing with the Federal Employers' Liability Act and the Federal Safety Appliance Acts. The Committee of County Judges consisted of Judges John R. Schwartz, Liston F. Coon, Louis M. Greenblott, Ellsworth M. Lawrence and George B. Parsons.

The Committee of Civil Court Judges appointed by Mr. Justice William Groat, Administrative Judge of the Civil Court, consisted of Judges Sidney Asch, Vincent Damiani, Daniel Fitzpatrick and Maurice Wahl, and Chief Law Assistant Aaron Weiss. In addition to their review work, the Civil Court Committee was responsible for the initial preparation of the Landlord and Tenant Charges.

A fourth Coordinating Committee, that of Surrogates, consisting of Judges Joseph A. Cox, Surrogate of New York County, John D. Bennett, Surrogate of Nassau County, Christopher C. McGrath, Surrogate of Bronx County, Pierson R. Hildreth, Surrogate of Suffolk County, Edward S. Silver, Surrogate of Kings County, and Gerald Saperstein, Surrogate of Cayuga County, reviewed and approved the Will Contest charges which appear in Volume 2, the initial drafts having been prepared by Professor Patrick J. Rohan of St. John's University School of Law.

The final responsibility for all of the material appearing in this work is that of the Committee. Its members nevertheless acknowledge their dependence upon a great many others, in addition to those referred to above, for assistance in many different ways. Initial preparation of the material on Public Authorities appearing in the Introductory Statement to the Municipal Liability section was by Mr. Justice Charles Lambiase, for many years prior to his election to the Supreme Court a Judge of the Court of Claims. The charge on malpractice by architects was reviewed by Judge Bernard Tomson of Nassau County District Court, an author of note in that field. For help in compiling material on work expectancy, the Committee expresses appreciation to Jack Karger, Senior Economist for the New York State Department of Labor. For assistance in unraveling the mysteries of present value in relation to damages, the Committee is indebted to Woodward & Fondiller, Inc., 420 Madison Avenue, New York, N.Y., Consulting Actuaries, and to its president, A. William Larson, Esq. The publisher's staff added unofficial citations, assisted with references to encyclopedias and texts and prepared the index and tables of cases and of statutes.

Research assistance to members of the Committee was sought through local bar associations and law schools. The Committee acknowledges its gratitude in this connection to Thomas Burke of the Georgetown University Law Center, Mrs. Elizabeth R. Clark, Esq., of Brooklyn, James J. Delaney, Esq., of Jackson Heights, John L. Doran,

PREFACE TO SECOND EDITION

Esq., of Baldwin, Ronald L. Fancher, Esq., of Buffalo, John M. Farrell, Jr., Esq., of Manhasset, David E. Flierl, Esq., of Buffalo, Victor T. Fuzak, Esq., of Buffalo, Abram R. Harpending, Esq., of Rochester, Eugene M. Harrington, Esq., of Long Beach, Salvatore Martorella, Esq., of Huntington, John B. McCrory, Esq., of Rochester, Stephen Seidner, Esq., of Brooklyn, Andrew J. Simons, Esq., of Brooklyn, Girard M. Ursitti, Esq., of Bualo, and Mitchell T. Williams, Esq., of Rochester.

Preparation of a work such as this involves a great deal of planning and organizing. The assistance of Thomas F. McCoy, State Administrator in the planning, and of Alfred A. Delaney, Administrative Officer of the Judicial Conference in the detail of preparing for the Committee's meetings is gratefully acknowledged. The laborious work of putting the tentatively approved material into mimeographed form for circulation fell to the Chairman's secretary, Mrs. Caroline Gunning, and Personal Officer, Leonard Bivona. Their contribution to keeping the work of the Committee progressing smoothly cannot be overemphasized.

The augmented Committee and reporters accepted appointments to assist in the continuing work of keeping the two volumes of PJI—Civil up to date through pocket parts, and to add new charges which were not originally contemplated. Four supplements were produced. As the Supplement to Volume 1 increased in size, and the original edition was almost exhausted, it was decided to revise Volume 1 so that the additions, corrections, and updatings could be integrated, and so that major changes in approach and format could be made in certain areas.

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HOW TO USE THESE VOLUMES

New York Pattern Jury Instructions Civil, the “PJI,” is designed to assist judges in preparing their jury charges and counsel in preparing their requests to charge. Over time, it has also proved to be a valuable research resource for both bench and bar. The PJI is the product of the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of the State of New York. The charges and comments are not the official expression of the Unified Court System. They are intended as guides. While these volumes have been described as an “authoritative” work, *Celle v Filipino Reporter Enterprises Inc.*, 209 F3d 163 (2d Cir 2000), see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013), trial judges are not required to use the charges. Trial judges are free to adopt, modify, or reject the charges, so long as they adequately convey the sum and substance of the applicable law, *Jackson v Sullivan*, 232 AD2d 954, 648 NYS2d 808 (3d Dept 1996); *Phillips v United Artists Communications, Inc.*, 201 AD2d 634, 607 NYS2d 976 (2d Dept 1994), see *Vivyan v Ilion Central School Dist.*, 94 AD3d 1432, 942 NYS2d 298 (4th Dept 2012). While the charges are the result of careful study and analysis by the Committee, their use by a trial judge remains subject to objection by trial counsel or reversal on appeal, as is true of any other determination made by the court during trial.

Most of the pattern charges state general principles, some of which may be irrelevant to the facts of a particular case and which, in some cases, should not be stated to the jury, see *Spadaccini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978). Each case has unique facts, and the interrelationship of the law and the evidence admitted at trial will determine whether and, if so, to what extent, a charge should be modified, or even rejected, see *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999). The charge must be carefully crafted and tailored to the claims, defenses, and evidence in each case, see *Altamirano v Door Automation Corp.*, 76 AD3d 401, 907 NYS2d 164 (1st Dept 2010). “The trial court’s instructions ‘should state the law as applicable to the particular facts in issue in the case at bar, which the evidence in the case tends to prove; mere abstract propositions of law applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar.’” *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970). The pattern charges are not intended for use as a rote mechanism for stating abstract legal principles to jurors. The Committee does not make or set the law. Its role is to report the controlling law and craft pattern charges based upon that law. Thus, the Committee does not predict how the Court of Appeals will resolve unsettled issues, or purport to resolve splits among the Departments of the Appellate Division.

The charge will be more comprehensible to the jury, and the jury’s use of the charge is facilitated, when the pattern charge is adapted to

the facts of the particular case by counsel in stating requests, and by the trial judge in preparing the charge. This task is the obligation of both judge and counsel, see *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970).

The Committee is mindful of the need to craft charges in a manner that is comprehensible to jurors, and strives to use language that jurors will understand, see Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions* (National Center for State Courts 2007) (originally published in 10 *Scribes J. Legal Writing* 1 [2005–2006]); O'Connor, *Juries: They May Be Broken but We Can Fix Them*, 44 *Fed. Law.* 20, 24 (June 1997); Elwork, Sales & Alumni, *Making Jury Instructions Understandable* (Michie 1982). This presents a continuing challenge. The Committee attempts, where possible, to provide direct and unambiguous statements in everyday language. Notwithstanding this goal, it is the legal correctness of the charge that is paramount. The Committee is loathe to deviate from the specific language expressed in the statute or by the court upon which the charge is based. There are instances when such language has not been modified in pursuit of comprehensibility to remain true to the principles expressed by the statute or court.

Use of the pattern charges, and their modification, where required, is facilitated by understanding the organization of the PJI, including its arrangement, format, and content. It is customary for trial counsel to use the section numbers in the PJI and title that identify each charge when making requests to charge to the court, for example “PJI 3:9. Intentional Torts—Interference With Person Or Property—Trespass To Chattels,” and trial judges use the same shorthand.

The PJI begins with a discussion of General Principles, followed by ten divisions:

1. General Charges;
2. Negligence Actions;
3. Torts Other than Negligence;
4. Contracts;
5. Divorce;
6. Landlord and Tenant;
7. Will Contests;
8. Mental Hygiene Law;
9. Employment Discrimination; and
10. Navigation Law.

Each section is formatted with the pattern charge, in boldface, followed by a Comment, in regular type. Frequently the black letter portion states a general principle. However, because jurors are more likely to grasp the meaning of a charge incorporating the facts they have heard in evidence, as opposed to a charge merely reciting abstract concepts, pattern charges suggesting illustrative facts are sometimes provided. It is important to remember that this second type of pattern charge only illustrates just one factual variation for the legal principle set forth in the charge.

Matter in the charge which is designed to be tailored to a particular case is set forth in the pattern charge in parentheses. Parentheses are used in two ways. First, parentheses, and, where necessary, double parentheses, may be used to highlight applicable alternatives to alert the judge that one or more, but not necessarily all, of the alternatives may be appropriate for inclusion in the charge, and the judge must determine what part of the matter in parentheses to use, see e.g. PJI 2:217. Second, parentheses may be used in charges to highlight illustrative factual material, see e.g. PJI 2:113. Brackets are used to highlight directions to the judge and are not part of the charge. Directions are printed in italicized, regular typeface, to alert the court that they are not to be read to the jury, see e.g. PJI 1:55.

Statutes are quoted in some of the charges. Where certain factual alternatives are excluded from a charge based upon the evidence in a particular case, care must be taken to exclude the corresponding portion of the statute.

Because change is a constant in the law, the PJI is revised and reissued annually. Nonetheless, when referencing statutes, cases, and other authorities included in the PJI, it is always important to ascertain whether the statute has been amended or repealed, or a case holding overruled or modified.

From time to time new or amended charges are posted on the OCA website at <http://www.nycourts.gov/judges/cpi/index.shtml> in advance of their publication in the print volumes or on Westlaw.

In some instances where the charge deals with a single fact pattern, other fact patterns commonly encountered are dealt with in the Comment, which may include alternative or additional charge material. When this occurs, the alternative or additional charge material is printed in boldface so that it will be readily apparent to the user, see e.g. PJI 2:90.

The Comments that follow the pattern charges serve several functions:

- (1) Presenting the authority on which the charge is based, together with secondary authorities providing a broader view of the subject;
- (2) Orienting the user to the relationship between the pattern charge and the general legal topic it relates to and to other related charges which may be used in the same case;
- (3) Advising the user of any assumptions made preparing the charge;
- (4) Highlighting when an issue is for the court and when it is for the jury;
- (5) Setting forth commonly encountered factual variations and advising how a particular factual variation requires a modification in the pattern charge; and
- (6) Noting important procedural considerations relating to, among others, statutes of limitations, pleadings, and motion practice.

Wherever possible, matter not necessary for the jury to consider has been omitted from the pattern charges. This furthers the goal of providing a comprehensible instruction that states the essentials with as little embellishment as possible.

On occasion charges are followed by one or more Caveats. Caveats are intended to caution the user and convey important information concerning the use or limitation of a particular charge, see e.g. PJI:1:3. Other uses include alerting the court to any differences between Departments of the Appellate Division, see e.g. PJI 2:85A, or factual variations impacting whether or not a particular charge is to be given, see e.g. PJI 2:82A, caveat 2.

After selection of the jurors (see VOIR DIRE-SELECTING THE JURY, Methods of Selection), the judge will typically give the jury a preliminary charge instructing the jurors about general principles of law, and the rules governing their conduct, interaction with each other, contact with non-jurors during the trial, and prohibit the use of independent research and outside sources, including social media.

At the conclusion of the testimony, and prior to summations, the court should conduct a charge conference concerning the proposed verdict sheets and the written requests from counsel for the court to instruct the jury on the law, see CPLR 4110-b. The court will then inform counsel of its intended charge and verdict sheet, and provide them with an opportunity to object to both. Preserving this process on the record for appellate review is important, and may include marking the requests to charge and proposed verdict sheets as court exhibits. For additional information on requests to charge, see GENERAL PRINCIPLES, Introductory Statement, Requests to Charge. All questions from the jurors, including those related to the charge, interactions with the jury during deliberations, and the verdict sheet as completed by the jury should also be marked as court exhibits, see GENERAL PRINCIPLES, Introductory Statement, Inquiry by Jury.

Following summations, the judge will instruct the jury on general provisions of law and specific factual and legal issues in the case, see e.g. PJI 1:20 *et seq.* For example, in a negligence case there are elements of negligent conduct, causation, and damages that are involved, in addition to many additional principles and facts that often must be charged. As an illustration, if an infant plaintiff contends that defendant automobile driver struck the infant while the defendant was passing another car on the right, and the defendant contends that the infant was riding a bicycle on the wrong side of the road and that the bicycle struck a parked car, causing the plaintiff to veer into the path of the defendant's automobile, the court's charge to the jury may include the following:

- (1) The charge prior to trial, see PJI 1:1 through 1:14;
- (2) Provisions of general application, see PJI 1:20 through PJI 1:29;
- (3) Burden of Proof, see PJI 1:23 and PJI 1:60;
- (4) Expert and interested witnesses, see PJI 1:25C and 1:90 through 1:94;

HOW TO USE THESE VOLUMES

- (5) Use of pre-trial deposition, see PJI 1:94;
- (6) Common law standard of care, see PJI 2:10 and 2:12;
- (7) The driver's duty to maintain a lookout, see PJI 2:77 and 2:77.1;
- (8) The effect of violation of Vehicle and Traffic Law § 1123(b) governing passing on the right, see PJI 2:26;
- (9) The parties' relative duty in an emergency, see PJI 2:14;
- (10) Proximate cause as it relates to the defendant's negligence, see PJI 2:70;
- (11) The effect of the comparative negligence of an infant generally, see PJI 2:36, 2:48;
- (12) Violation of a statute by persons under disability, in this case infancy, see PJI 2:49;
- (13) Proximate cause in relation to the infant plaintiff's comparative negligence, see PJI 2:70;
- (14) Damages generally, see PJI 2:277 and PJI 2:280;
- (15) The damages of the infant's parents on their derivative cause of action, see PJI 2:317 and PJI 2:318;
- (16) An itemized verdict sheet, see PJI 2:301; and
- (17) An explanation of the verdict, see PJI 1:97.

The table of contents can provide a useful template and organizational structure for crafting the charge. However, there is no set order in which the component portions of the charge must be given. It may be appropriate to use a pattern charge more than once, as might be the case in the example given. In other situations, to avoid repetition, the trial judge may elect to omit portions of a pattern charge that are covered adequately elsewhere in the charge. It is not required, or expected, that the charges will be used verbatim. They must be modified to the particular case and molded together with transitional sentences to create a coherent, intelligible instruction for the jury.

In almost all cases, it will be necessary to submit written questions to the jury in a special verdict form, commonly referred to as a verdict sheet, PJI 1:97. The verdict sheet is to be reviewed with and read to the jury or otherwise incorporated by the court into the charge before the jury begins deliberations. Many charges are followed by sample verdict forms which are labeled with the number of the charge and the letters "SV." See e.g. PJI 2:91 SV-1. The verdict sheet should be given to counsel prior to summation so that they may use them as appropriate. The verdict sheet should be marked as a court exhibit.

The Committee strives to craft neutral charges that do not favor one side over the other, avoiding, wherever possible, the use of words with qualitative implications or connotations. When a charge includes a statement of possible findings or verdicts, the possibilities for both sides are stated. With a few exceptions, the charges are stated affirmatively. There is seldom reason to advise a jury what it may not do. Generally, it will suffice to instruct the jury as to what must be found to warrant arriving at a decision on each issue.

Unless a particular fact situation requires otherwise, charges are stated in terms of one plaintiff and one defendant. Gender neutral

language is used wherever possible. Where names of parties would be appropriate in the charge, the letters AB generally have been used for the first party referred to, CD for the second party referred to, and so forth.

The Committee is receptive to suggestions and comments from the bench and bar. Suggestions are welcomed, and should be addressed to Pattern Jury Instructions Committee, c/o Hon. David Demarest, Chair, NY-PJI-Feedback@thomsonreuters.com.

GENERAL PRINCIPLES

Introductory Statement

Introduction

The purposes of the court's charge to the jury are to define and explain the issues in the case and explain the applicable principles of law and the processes to be used in deciding those issues so that the jurors understand what they are called upon to decide and the steps they are to follow in arriving at a verdict, see *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970). The charge also serves another function—it sets forth for the reviewing court the trial judge's view of the issues presented by the case and of the law governing those issues.

The court's charge is a “solemn and comparatively complex phase” of the trial that requires precision and concentration on the part of both the court and the jury, *People v Colon*, 71 NY2d 410, 526 NYS2d 932, 521 NE2d 1075 (1988). Toward that end, the court may, in its discretion, lock the courtroom during the charge to preserve tranquility and order, *id.*

These sources provide useful expositions of the judge-jury relationship and preparation of instructions: Association of Justices of the Supreme Court of the State of New York, *Bench Book for Trial Judges* (West); Botein, *Trial Judge* (Simon and Schuster 1952); Keeton, *Keeton on Judging in the American Legal System* (Lexis Law 1994); Munsterman, *Hannaford-Agor & Whitehead, Jury Trial Innovations* (National Center for State Courts 2d ed. 2006); National Conference of State Trial Judges, *The Judge's Book* (2d ed.); 1 O'Malley, *Grenig & Lee, Federal Jury Practice and Instructions*, ch. 7 app. (West 6th ed.) (adapted from Ray & Cox, *Beyond the Basics: A Text for Advanced Legal Writing* [West 2d ed.]).

The Need for Clarity and Precision

Two principles are of prime importance. The first is that the charge explain the applicable rule in language “easily understandable to the lay Jury,” *Stryzinski v Arnold*, 285 App Div 780, 141 NYS2d 11 (3d Dept 1955), and use that language as lay jurors would be apt to understand it, *People v Lupo*, 305 NY 448, 113 NE2d 793 (1953); *Corn Exchange Bank of City of New York v American Dock & Trust Co.*, 149 NY 174, 43 NE 915 (1896); *Lynch v Figge*, 200 App Div 92, 192 NYS 873 (2d Dept 1922). A cursory and perfunctory instruction, without elaboration or explanation, that particular evidence is “not binding on”

a party, *People v Powell*, 21 AD2d 789, 250 NYS2d 592 (2d Dept 1964); *People v Lombard*, 4 AD2d 666, 168 NYS2d 419 (1st Dept 1957), or that evidence is taken “for the purposes of credibility,” *Dugan v Dieber*, 32 AD2d 815, 302 NYS2d 423 (2d Dept 1969), or that scarcely touches upon a crucial issue, *Herr v Commercial Travelers Mut. Acc. Ass’n of America*, 31 AD2d 732, 297 NYS2d 294 (4th Dept 1968), is too cryptic to be intelligible to the jury. Instructions that contain ambiguous, confusing, contradictory or inadequate statements of law must be avoided, *Greenberg v Privilege Underwriters Reciprocal Exchange*, 169 AD3d 878, 93 NYS3d 686 (2d Dept 2019) (a “set of instructions that confuses or incompletely conveys the germane principles to be applied in a case requires a new trial”); see *J.R. Loftus, Inc. v White*, 85 NY2d 874, 626 NYS2d 52, 649 NE2d 1196 (1995); *Singh v Singh*, 294 AD2d 487, 742 NYS2d 384 (2d Dept 2002); *Smith v Midwood Realty Associates*, 289 AD2d 391, 734 NYS2d 237 (2d Dept 2001).

Technical terms, such as “*res ipsa loquitur*” and “imputed negligence,” should not be used, see *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455 (1941); *Butler v Albert*, 1 AD2d 43, 147 NYS2d 458 (3d Dept 1955). The fact that the language used is a direct quotation from an opinion of an appellate court or of a statute will not save an unclear charge, *Matter of Harry M.*, 96 AD2d 201, 468 NYS2d 359 (2d Dept 1983); *Stryzinski v Arnold*, 285 App Div 780, 141 NYS2d 11 (3d Dept 1955); *Laidlaw v Sage*, 30 NYS 496 (Gen Term 1894); *Massachusetts Bonding & Ins. Co., v 201 East Eighteenth Street Corp.*, 256 App Div 1077, 11 NYS2d 65 (2d Dept 1939); see *People v Hommel*, 41 NY2d 427, 393 NYS2d 371, 361 NE2d 1020 (1977); *Altamirano v Door Automation Corp.*, 76 AD3d 401, 907 NYS2d 164 (1st Dept 2010). “The test is always whether the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at its decision,” *People v Drake*, 7 NY3d 28, 817 NYS2d 583, 850 NE2d 630 (2006); *People v Gardner*, 59 AD2d 913, 399 NYS2d 146 (2d Dept 1977).

The second principle is that the charge be precise and specifically related to the factual issues in the case, *People v Baskerville*, 60 NY2d 374, 469 NYS2d 646, 457 NE2d 752 (1983); *People v Newman*, 46 NY2d 126, 412 NYS2d 860, 385 NE2d 598 (1978) (citing PJI); *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970) (citing PJI); *Dambmann v Metropolitan St. Ry. Co.*, 180 NY 384, 73 NE 59 (1905); *Johnson v Hickson*, 55 AD2d 671, 390 NYS2d 183 (2d Dept 1976), *aff’d*, 43 NY2d 906, 403 NYS2d 722, 374 NE2d 616 (1978) (citing PJI); *Altamirano v Door Automation Corp.*, 76 AD3d 401, 907 NYS2d 164 (1st Dept 2010); see *Schou v Whiteley*, 9 AD3d 706, 780 NYS2d 659 (3d Dept 2004); *Marigliano v New York*, 196 AD2d 533, 601 NYS2d 161 (2d Dept 1993) (abrogated on other grounds by, *Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769, 716 NYS2d 24 (2d Dept 2000)); *Doolittle v T.E. Conklin Brass & Copper Co., Inc.*, 103 AD2d 722, 478 NYS2d 625 (1st Dept 1984); *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979) (citing PJI); *Zipay v Benson*, 47 AD2d 233, 365 NYS2d 920 (3d Dept 1975); see *J.R. Loftus, Inc. v White*, 85 NY2d 874, 626 NYS2d 52, 649 NE2d 1196 (1995). Accordingly, the charge must be

limited to the evidence, *O'Connor v 595 Realty Associates*, 23 AD2d 69, 258 NYS2d 145 (1st Dept 1965); *Seneca v Mohawk*, 52 AD2d 1053, 384 NYS2d 564 (4th Dept 1976). Broad general statements of the law are inadequate, *Green v Downs*, supra (citing PJI); *Barnevo v Munson S.S. Line*, 239 NY 486, 147 NE 75 (1925); *Placakis v New York*, 289 AD2d 551, 736 NYS2d 379 (2d Dept 2001); *Rosenberg v Rixon*, 111 AD2d 910, 490 NYS2d 807 (2d Dept 1985) (citing PJI); *Bender v Nassau Hosp.*, 99 AD2d 744, 471 NYS2d 657 (2d Dept 1984); *Johnson v Artkraft Strauss Sign Corp.*, 45 AD2d 482, 359 NYS2d 773 (1st Dept 1974); *Buckingham v Donarry Realty Corp.*, 25 AD2d 722, 268 NYS2d 775 (1st Dept 1966). A jury has been properly charged when the instructions, viewed as a whole, adequately presented the pertinent legal principles to be applied and the factual issues to be resolved, *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015).

Elements of the Charge

The charge must contain the following elements:

1. An identification of the parties and their relationship to the litigation, see *Singh v Singh*, 294 AD2d 487, 742 NYS2d 384 (2d Dept 2002); *Kearse v Food Fair Stores, Inc.*, 104 AD2d 582, 479 NYS2d 368 (2d Dept 1984).

2. A balanced statement of the parties' respective contentions, *Lynn v McDonnell Douglas Corp.*, 134 AD2d 328, 520 NYS2d 804 (2d Dept 1987); *Doolittle v T.E. Conklin Brass & Copper Co., Inc.*, 103 AD2d 722, 478 NYS2d 625 (1st Dept 1984); *Bender v Nassau Hosp.*, 99 AD2d 744, 471 NYS2d 657 (2d Dept 1984); *Blaize v New York*, 80 AD2d 594, 436 NYS2d 34 (2d Dept 1981).

3. A statement of the issues raised by those contentions and what, under the governing rules of law, the jury must find for a party to prevail, *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970); see *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015); *Altamirano v Door Automation Corp.*, 76 AD3d 401, 907 NYS2d 164 (1st Dept 2010). Applicable statutes and pertinent principles of law must be explained by the court in its charge and related to the facts of the case, *Ellsworth v General Motors Corp.*, 85 AD2d 829, 446 NYS2d 438 (3d Dept 1981); *Manca v Spencer, White & Prentis, Inc.*, 37 AD2d 554, 323 NYS2d 85 (1st Dept 1971). It is error to charge a statute absent evidence that it was violated, *Doolittle v T.E. Conklin Brass & Copper Co., Inc.*, 103 AD2d 722, 478 NYS2d 625 (1st Dept 1984); *Wilmot v New York*, 73 AD2d 201, 426 NYS2d 8 (1st Dept 1980); *Carhart v Relmar Operating Corp.*, 66 AD2d 680, 411 NYS2d 33 (1st Dept 1978).

4. An explanation of the processes of decision, that is, the applicable burden of proof, effect of denial of motions, and, as appropriate, cautions as to prejudice, sympathy, and outside influences.

5. The manner in which damages are to be computed.

6. The form of the verdict. Although the use of a special verdict is within the discretion of the court, such verdicts have become mandatory in many and appropriate in most tort actions, see PJI 1:97. Special verdicts are essential where there are multiple theories, multiple parties, complex issues, or where their use would help jurors reach a decision, see *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470, 864 NE2d 600 (2007); *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980); *Harvey v Suds N' Fluff Laundromat, Inc.*, 194 AD2d 644, 599 NYS2d 86 (2d Dept 1993). Furthermore, such verdicts are required in medical and dental malpractice actions, CPLR 4111(d); see PJI 2:151B, 2:151C; in certain actions against a public employer or employee to recover damages for personal injury or wrongful death, CPLR 4111(e), see PJI 2:229A; and in all other types of actions to recover for personal injuries, property damage or wrongful death, CPLR 4111(f); see PJI 2:301. Likewise, special verdicts are imperative in cases involving apportionment of fault, claims for contribution, and the liability of joint tortfeasors to a plaintiff pursuant to CPLR Article 16, "Limited Liability of Persons Jointly Liable." The special verdict should contain interrogatories on all elements of the cause of action or defense where factual issues exist, see *Kosiorek v Bethlehem Steel Corp.*, 145 AD2d 935, 536 NYS2d 614 (4th Dept 1988); *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 480 NYS2d 328 (2d Dept 1984); see also *Staudacher v Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989).

The order in which the elements of the charge are to be stated is peculiarly within the discretion of the trial judge. The judge should avoid interspersing evidentiary and procedural rules at points where they would not be appropriate because they do not fit into the general pattern of the charge.

The charge should cover all theories of liability for which there is support in the evidence, *Hazewell v Coursen*, 81 NY 630 (1880); *Truesdale v Dueger*, 3 AD2d 985, 162 NYS2d 957 (4th Dept 1957); *Dino v Eastern Glass Co.*, 231 App Div 75, 246 NYS 306 (1st Dept 1930); see *Beneficial Finance Co. of New York, Inc. v Dadda*, 28 AD2d 1073, 283 NYS2d 943 (3d Dept 1967), and submit to the jury all questions of fact presented by the evidence, *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 (1993); *Metzger v Cushman's Sons*, 243 NY 118, 152 NE 695 (1926); *McNulty v Sunset Warehouses*, 256 App Div 821, 8 NYS2d 703 (2d Dept 1939); see *Duran v Temple Beth Sholom, Inc.*, 155 AD3d 690, 64 NYS3d 278 (2d Dept 2017). Care must be taken not to present several theories to the jury if the evidence supports only one, see *Davis v Caldwell*, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741 (1981); *Greenberg v Schlanger*, 229 NY 120, 127 NE 896 (1920); *Fallon v Damianos*, 192 AD2d 576, 596 NYS2d 134 (2d Dept 1993).

The court should not submit theories that are not within the ambit of the complaint unless a motion to conform the pleadings to the proof has been granted, *Weinberg v D-M Restaurant Corp.*, 53 NY2d 499, 442

NYS2d 965, 426 NE2d 459 (1981); *Voccia v Pleasure Boat Co.*, 239 App Div 165, 267 NYS 240 (1st Dept 1933), *aff'd*, 264 NY 656, 191 NE 612 (1934); *Ayala v Kaestner*, 224 AD2d 266, 637 NYS2d 722 (1st Dept 1996); *Reich v Prager*, 107 AD2d 555, 483 NYS2d 295 (1st Dept 1985); *Schongar v Montgomery Ward & Co.*, 271 App Div 912, 66 NYS2d 797 (3d Dept 1946); *Lifton v Title Guarantee & Trust Co.*, 263 App Div 3, 31 NYS2d 94 (1st Dept 1941). Nevertheless, where there is no prejudice to the adverse party, a variance between pleadings and proof may be disregarded, *Van Derzee v Knight-Ridder Broadcasting, Inc.*, 185 AD2d 1011, 586 NYS2d 839 (3d Dept 1992); *Sharkey v Locust Valley Marine, Inc.*, 96 AD2d 1093, 467 NYS2d 61 (2d Dept 1983); *Antonetti v Syracuse*, 52 AD2d 742, 382 NYS2d 189 (4th Dept 1976); see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984), and the trial court in the exercise of discretion may permit the pleadings to be amended, *Dittmar Explosives, Inc. v A. E. Ottaviano, Inc.*, 20 NY2d 498, 285 NYS2d 55, 231 NE2d 756 (1967); *Antonetti v Syracuse*, *supra*; see CPLR 3025.

In the absence of prejudice, a motion to increase the *ad damnum* clause may be granted either before or after the verdict, *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 444 NYS2d 571, 429 NE2d 90 (1981); see CPLR 3025, but without such a motion, damages may not exceed the *ad damnum*, *Reid v Weir-Metro Ambulance Service, Inc.*, 191 AD2d 309, 595 NYS2d 40 (1st Dept 1993). Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment, see *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998); *Loomis v Civetta Corinno Const. Corp.*, *supra*. A pleading asserting a claim for personal injury or wrongful death may contain only a general prayer for relief, CPLR 3017(c).

Care must also be taken not to take from the jury issues on which there is a factual question, *Gombert v New York Cent. & H.R.R. Co.*, 195 NY 273, 88 NE 382 (1909); *Kelley v Kronenberg*, 2 AD3d 1406, 770 NYS2d 217 (4th Dept 2003); *Spitzer v New York Cent. R. Co.*, 211 App Div 332, 207 NYS 312 (4th Dept 1925); *Boston Ins. Co. v Brooklyn Heights R. Co.*, 182 App Div 1, 169 NYS 251 (1st Dept 1918); see *Austin v Consilvio*, 295 AD2d 244, 744 NYS2d 164 (1st Dept 2002); *Vera v Knolls Ambulance Service Inc.*, 160 AD2d 494, 554 NYS2d 158 (1st Dept 1990).

Where the court has dismissed the action against some defendants or has dismissed a cause of action, the court, when charging the jury as to the remaining claims against the remaining defendants, should not advise the jury as to the reasons for the dismissal, see *Harding v Noble Taxi Corp.*, 182 AD2d 365, 582 NYS2d 1003 (1st Dept 1992); *Surplus Equipment, Inc. v Xerox Corp.*, 120 AD2d 582, 502 NYS2d 491 (2d Dept 1986). To avoid influencing the jury's determination on the remaining issues, the court should instruct the jury not to consider the claim that was dismissed, or that the defendants in question are no longer in the

case, and that no inference should be drawn, *Harding v Noble Taxi Corp.*, supra; *Surplus Equipment, Inc. v Xerox Corp.*, supra. PJI 2:275B may be adapted for this purpose.

Reviewing the Evidence

Factual contentions of the parties should be incorporated into the charge. The charge should discuss the evidence and, as has been noted, relate it to the principles of law and apply to each party's version of the facts the pertinent statutory and decisional law, *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970); *Rosas v Ishack*, 219 AD2d 633, 631 NYS2d 417 (2d Dept 1995); *Lynn v McDonnell Douglas Corp.*, 134 AD2d 328, 520 NYS2d 804 (2d Dept 1987); *Torem v 564 Cent. Ave. Rest., Inc.*, 133 AD2d 25, 518 NYS2d 620 (1st Dept 1987); see also *Leven v Marguerite*, 52 AD2d 970, 383 NYS2d 120 (3d Dept 1976). Fairness demands that the governing rules of law be stated in an impartial fashion, without undue emphasis, *Lyons v New York*, 29 AD2d 923, 289 NYS2d 2 (1st Dept 1968), *aff'd*, 25 NY2d 996, 305 NYS2d 509, 253 NE2d 221 (1969); *Kissner v Baxter*, 29 AD2d 905, 287 NYS2d 982 (3d Dept 1968); see *Altamirano v Door Automation Corp.*, 76 AD3d 401, 907 NYS2d 164 (1st Dept 2010). Where testimony is admitted for a limited purpose, the court should call attention to that fact in the charge, *Dougherty v Braddock Automatic Music Corp.*, 277 App Div 923, 98 NYS2d 514 (3d Dept 1950); *Williamson v Board of Ed. of Berne-Knox Jr. Sr. High School*, 50 AD2d 667, 375 NYS2d 221 (3d Dept 1975), *aff'd*, 40 NY2d 979, 390 NYS2d 924, 359 NE2d 432 (1976); see *Brandon v Caterpillar Tractor Corp.*, 125 AD2d 625, 510 NYS2d 165 (2d Dept 1986). In reviewing the evidence, the court should not characterize a witness or an issue in a manner that may be prejudicial to either party, *Brooks v Rochester Ry. Co.*, 156 NY 244, 50 NE 945 (1898); *Allis v Leonard*, 58 NY 288 (1874); *McCarthy v Miller*, 139 AD2d 500, 526 NYS2d 848 (2d Dept 1988); *Itkin v Ringer*, 12 AD2d 732, 208 NYS2d 406 (4th Dept 1960); *Spitzer v Schmitt*, 249 App Div 783, 292 NYS 64 (2d Dept 1936); *William J. Burns Intern. Detective Agency v Powers*, 176 App Div 114, 162 NYS 578 (1st Dept 1916). If the court chooses to marshal the evidence, it must give a balanced summary, *Navarro v New York*, 136 AD2d 483, 523 NYS2d 514 (1st Dept 1988); *Blaize v New York*, 80 AD2d 594, 436 NYS2d 34 (2d Dept 1981); see *Theodoropoulos v New York City Health & Hospitals Corp.*, 90 AD2d 792, 455 NYS2d 401 (2d Dept 1982).

The weight and interpretation of the evidence is for the jury, and it is, therefore, improper to instruct the jury that if they believe certain witnesses or one party's evidence they must reach a certain result, *People ex rel. DeMauro v Gavin*, 92 NY2d 963, 683 NYS2d 750, 706 NE2d 738 (1998); *Dominguez v Manhattan and Bronx Surface Transit Operating Authority*, 46 NY2d 528, 415 NYS2d 634, 388 NE2d 1221 (1979); *Kellegher v Forty-Second St., M. & St. N. Ave. R. Co.*, 171 NY 309, 63 NE 1096 (1902); *Dolan v Delaware & H. Canal Co.*, 71 NY 285 (1877); *Izzo v Jennings*, 271 App Div 914, 66 NYS2d 815 (3d Dept 1946); *Callahan v New York Rys. Corp.*, 235 App Div 219, 256 NYS 779 (1st

Dept 1932). Thus, when there is conflicting testimony concerning how an accident happened, the jury may believe plaintiff's testimony as to what happened and still not find the defendant negligent. Likewise, the court should not remark that one of two different versions is necessarily perjurious, for to do so takes away from the jury the question whether the witness was simply mistaken, *Smith v Lehigh Val. R. Co.*, 170 NY 394, 63 NE 338 (1902); *Villanti v Rusakowicz*, 57 AD2d 616, 393 NYS2d 771 (2d Dept 1977); *Navis v Rochester*, 277 App Div 667, 102 NYS2d 153 (4th Dept 1951). It should be noted, however, that while conflicting testimony by the same witness usually raises a mere question of credibility to be determined by the trier of the fact, *Ochs v Woods*, 221 NY 335, 117 NE 305 (1917); *Williams v Delaware, L. & W. R. Co.*, 155 NY 158, 49 NE 672 (1898); *Carpino v Baker*, 66 AD2d 201, 412 NYS2d 617 (1st Dept 1979), when self-contradictory testimony upon the vital or crucial issue in a case is given by the sole witness to an occurrence, it is no longer a question of credibility but rather one of sufficiency of proof, *Grace v New York*, 4 AD2d 1022, 168 NYS2d 847 (1st Dept 1957). It is error to charge that the evidence in the case is sufficient to sustain a verdict for plaintiff, *Niemann v Cordtmeyer*, 111 App Div 326, 97 NYS 670 (2d Dept 1906), or is sufficient to sustain a finding that defendant's negligence was not the proximate cause of plaintiff's injuries, *Crossett v Natali*, 31 AD2d 783, 297 NYS2d 200 (4th Dept 1969), although it is proper, when an issue for which there is no supporting evidence has been brought to the jury's attention, to instruct that there is no evidence in the case on that issue, *Kline v Bishop*, 278 App Div 277, 104 NYS2d 504 (4th Dept 1951); *Primoschitz v Harris Structural Steel Co.*, 247 App Div 633, 288 NYS 364 (1st Dept 1936); *Conti v Mahoney*, 137 AD2d 481, 524 NYS2d 230 (2d Dept 1988).

With respect to the testimony of interested witnesses, particularly parties to the litigation, the jury is free to discredit such testimony even if it is unimpeached or uncontradicted, see *Lee v City Brewing Corporation*, 279 NY 380, 18 NE2d 628 (1939); *Piwowski v Cornwell*, 273 NY 226, 7 NE2d 111 (1937); *Margiotta v Rock & Roll Livery, Ltd.*, 302 AD2d 500, 755 NYS2d 286 (2d Dept 2003); *Vasquez v Jacobowitz*, 284 AD2d 326, 726 NYS2d 128 (2d Dept 2001). Divergent accounts by interested witnesses raise a question of credibility to be resolved by the jury, *Ahr v Karolewski*, 48 AD3d 719, 853 NYS2d 172 (2d Dept 2008). A jury's rejection of an expert's opinion cannot be made arbitrarily, *Calderon v Irani*, 296 AD2d 778, 745 NYS2d 610 (3d Dept 2002). Thus, a jury's determination not to accept an expert's opinion must be supported by other testimony or by the cross-examination of the expert, *Warner v Kain*, 186 AD3d 1844, 131 NYS3d 726 (3d Dept 2020); *Quigg v Murphy*, 37 AD3d 1191, 829 NYS2d 800 (4th Dept 2007); *Baker v Shepard*, 276 AD2d 873, 715 NYS2d 83 (3d Dept 2000); *Zapata v Dagostino*, 265 AD2d 324, 696 NYS2d 194 (2d Dept 1999); *Mechanick v Conradi*, 139 AD2d 857, 527 NYS2d 586 (3d Dept 1988). A jury is free to reject an expert's opinion if it finds the facts to be different from those that formed the basis for the expert's opinion or if, after careful consideration of all the evidence, it disagrees with the expert's opinion, *Hoffner v Nelson*, 169 AD3d 1436, 92 NYS3d 514 (4th Dept 2019).

When prejudicial or erroneous remarks are made by counsel during summation, the court should rebuke offending counsel where appropriate and give proper instructions on the point to the jury, *Lyons v New York*, 29 AD2d 923, 289 NYS2d 2 (1st Dept 1968), *aff'd*, 25 NY2d 996, 305 NYS2d 509, 253 NE2d 221 (1969); *Hernandez v New York*, 156 AD2d 641, 549 NYS2d 139 (2d Dept 1989); *Scott v Mason*, 155 AD2d 655, 547 NYS2d 889 (2d Dept 1989); *Cohen v Covelli*, 276 App Div 375, 94 NYS2d 782 (1st Dept 1950). Where prejudicial remarks are made, objection is waived if counsel fails to move for a mistrial until after the verdict, *Califano v New York*, 212 AD2d 146, 627 NYS2d 1008 (1st Dept 1995); *Dunne v Lemberg*, 54 AD2d 955, 388 NYS2d 635 (2d Dept 1976); *Schein v Chest Service Co.*, 38 AD2d 929, 330 NYS2d 147 (1st Dept 1972).

Requests to Charge

Counsel must be given the opportunity to present requests to charge before summation, CPLR 4110-b. Written requests to charge may be filed by any party, and the court shall inform counsel of its intended charges prior to summation out of the hearing of the jury, *id*; see *Citron v Northern Dutchess Hosp.*, 198 AD2d 618, 603 NYS2d 639 (3d Dept 1993); *Spadaccini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978); see also *Cummings v Consolidated Edison Co. of New York, Inc.*, 125 AD2d 224, 509 NYS2d 29 (1st Dept 1986). The trial judge has discretion to limit the number of requests that a party can make, *O'Neill v Dry-Dock, E.B. & B.R. Co.*, 129 NY 125, 29 NE 84 (1891); *Angerosa v White Co.*, 248 App Div 425, 290 NYS 204 (4th Dept 1936), *aff'd*, 275 NY 524, 11 NE2d 325 (1937).

Under CPLR 4110-b, requests to charge may be made at the close of the evidence or at such earlier time during the trial as the court reasonably directs. Objections to the giving or the failure to give a charge must be made before the jury retires, CPLR 4110-b; see *Kalisch-Jarcho, Inc. v New York*, 58 NY2d 377, 461 NYS2d 746, 448 NE2d 413 (1983); *Wonsch v Snyder*, 53 AD2d 1031, 386 NYS2d 588 (4th Dept 1976). It is imperative, to permit effective appellate review, that all discussions concerning the charge be set forth clearly in the record so that the positions of the parties and the decision by the court are readily discernible, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Wyman by Wyman v J. Giarnella & Son, Inc.*, 170 AD2d 229, 565 NYS2d 112 (1st Dept 1991); see *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014).

The charge need not be phrased in the language of the request to charge, *Mullins v Siegel-Cooper Co.*, 183 NY 129, 75 NE 1112 (1905); *Getlin v St. Vincent's Hosp. & Medical Center of New York*, 117 AD2d 707, 498 NYS2d 849 (2d Dept 1986) (abrogated on other grounds by, *Devito v Feliciano*, 22 NY3d 159, 978 NYS2d 717, 1 NE3d 791 (2013)); *Lukasiewicz v Buffalo*, 55 AD2d 848, 390 NYS2d 341 (4th Dept 1976); *Keefer v Daum*, 262 App Div 1044, 30 NYS2d 507 (2d Dept 1941). If the court misapprehends counsel's meaning in a request, it is counsel's duty

to call the court's attention to the misapprehension. Failure to do so results in acquiescence with the court's interpretation of the request, *Booth v Boston & A.R. Co.*, 73 NY 38 (1878); *Cochran v Sess*, 49 App Div 223, 62 NYS 1088 (1st Dept 1900), rev'd on other grounds, 168 NY 372, 61 NE 639 (1901); *Garbaczewski v Third Ave. R. Co.*, 5 App Div 186, 39 NYS 33 (1st Dept 1896); see *Krall v Shaker Ridge Country Club, Inc.*, 51 AD2d 481, 382 NYS2d 126 (3d Dept 1976). Nevertheless, while the court is not required to charge in the precise language indicated in the charge conference held pursuant to CPLR 4110-b, a substantial change in the charge may require that the court either (a) advise counsel of the proposed change before summation, or (b) if the summation or charge has already been given, afford counsel an opportunity to reopen summations on that issue, see *Getlin v St. Vincent's Hosp. & Medical Center of New York*, 117 AD2d 707, 498 NYS2d 849 (2d Dept 1986) (abrogated on other grounds by, *Devito v Feliciano*, 22 NY3d 159, 978 NYS2d 717, 1 NE3d 791 (2013)); *Spadaccini v Dolan*, 63 AD2d 110, 407 NYS2d 840 (1st Dept 1978). Requests to charge need not be granted when repetitious of matters already charged, *Gaebler v Gallo*, 198 NY 344, 91 NE 787 (1910); *Gross v New York*, 24 AD2d 751, 263 NYS2d 705 (1st Dept 1965), aff'd, 18 NY2d 830, 275 NYS2d 837, 222 NE2d 599 (1966), especially when to do so would place undue emphasis on the particular point, *Koehler v Grace Line, Inc.*, 285 App Div 154, 136 NYS2d 87 (1st Dept 1954).

Failure to object to the charge with sufficient specificity generally will result in non-preservation of the issue, see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016); *Sabin-Goldberg v Horn*, 179 AD2d 462, 578 NYS2d 187 (1st Dept 1992); *Williams v New York*, 101 AD2d 835, 475 NYS2d 495 (2d Dept 1984); *Cornier v Spagna*, 101 AD2d 141, 475 NYS2d 7 (1st Dept 1984); *Lake Steel Erection, Inc. v Egan*, 61 AD2d 1125, 403 NYS2d 387 (4th Dept 1978); *Lech v Conny*, 55 AD2d 828, 390 NYS2d 306 (4th Dept 1976). Where a party fails to object to a jury charge, the law as stated in the charge becomes the law applicable to the rights of the parties in the litigation and the trial court should not set aside the verdict based on legal principles that it later decides should have been included in its charge, *Harris v Armstrong*, 64 NY2d 700, 485 NYS2d 523, 474 NE2d 1191 (1984); *Brown v Du Frey*, 1 NY2d 190, 151 NYS2d 649, 134 NE2d 469 (1956); *Kroupova v Hill*, 242 AD2d 218, 661 NYS2d 218 (1st Dept 1997) (failure to preserve objection). Furthermore, the failure to request supplemental or clarifying instructions may result in non-preservation or abandonment of the claim of error, see *Beltz v Beltz v Buffalo*, 61 NY2d 698, 472 NYS2d 604, 460 NE2d 1089 (1984); *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982); see also *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985). Even though a party objects at a charge conference to the language in the court's proposed charge, it fails to preserve its objection if it does not also object to the special interrogatories on that ground, *Batavia Turf Farms, Inc. v Genesee*, 239 AD2d 903, 659 NYS2d 681 (4th Dept 1997). But an objection to the content of the verdict sheet may preserve an issue related to the charge where

counsel's objection to the verdict sheet placed the charge-related issue squarely before the court and alerted the court to the relevant issue, *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 986 NYS2d 718 (4th Dept 2014). Even if the court agrees to give a particular charge and neglects to do so, the issue is not preserved in the absence of objection, *Kilburn v Acands, Inc.*, 187 AD2d 988, 590 NYS2d 611 (4th Dept 1992). There is no exception to the necessity for an objection to preserve an error in a charge merely because the law in effect at the time of trial subsequently changes, regardless of the retroactive effect of that change, *Gager v White*, 53 NY2d 475, 442 NYS2d 463, 425 NE2d 851 (1981); *People v Patterson*, 39 NY2d 288, 383 NYS2d 573, 347 NE2d 898 (1976), *aff'd*, 432 US 197, 97 Sct 2319 (1977); *Kroupova v Hill*, *supra*.

The Appellate Division has the power to review unpreserved charging errors in the interest of justice, *Martin v Cohoes*, 37 NY2d 162, 371 NYS2d 687, 332 NE2d 867 (1975), and is apt to exercise that power where an error is fundamental, see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016); *Clark v Interlaken Owners, Inc.*, 2 AD3d 338, 770 NYS2d 58 (1st Dept 2003); *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995); *Aragon v A & L Refrigeration Corp.*, 209 AD2d 268, 618 NYS2d 345 (1st Dept 1994); *Kearse v Food Fair Stores, Inc.*, 104 AD2d 582, 479 NYS2d 368 (2d Dept 1984); *Rivera v Bronx-Lebanon Hospital Center*, 70 AD2d 794, 417 NYS2d 79 (1st Dept 1979); *Rodriguez v Cato*, 63 AD2d 922, 406 NYS2d 100 (1st Dept 1978); see also *Kilburn v Acands, Inc.*, 187 AD2d 988, 590 NYS2d 611 (4th Dept 1992); *Staudacher v Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989). An error is considered fundamental if it precluded consideration of the central issues upon which the action is founded, *Vallone v Saratoga Hosp.*, *supra*; *Breitung v Canzano*, 238 AD2d 901, 660 NYS2d 765 (4th Dept 1997); *Kelly v Tarnowski*, *supra*; see *Boryszewski v Henderson*, 129 AD3d 1465, 10 NYS3d 776 (4th Dept 2015) (error is fundamental if so significant that jury was prevented from fairly considering issues at trial); *Kilburn v Acands, Inc.*, *supra*; *Stoop v Kurtz*, 121 AD2d 529, 503 NYS2d 594 (2d Dept 1986).

Inquiry by the Jury

When the jurors request a re-reading of the entire charge, they may not be required to specify a particular part of it, *Kerner v Surface Transp. Corporation*, 293 NY 881, 59 NE2d 786 (1944), but the court may ask the jurors to be more specific about their questions. When the jury asks a specific question, it should not be answered by having the entire charge read to them, *Sowell v Laurie*, 26 AD2d 923, 274 NYS2d 716 (1st Dept 1966); see *Barraza v 55 West 47th Street Co.*, 144 AD2d 296, 534 NYS2d 175 (1st Dept 1988), or by a refusal to give further instructions responsive to the specific question, *Lee v Mount Ivy Indus. Developers, Inc.*, 31 AD2d 958, 298 NYS2d 813 (2d Dept 1969), see *Meyer v Saint Francis Hosp.*, *Poughkeepsie*, 151 AD3d 1501, 55 NYS3d 539 (3d Dept 2017), but by a careful and lucid explanation of the problem and of the rules that the question indicates were not understood, *Kramer v Chatham Green, Inc.*, 38 AD2d 931, 330 NYS2d 144

(1st Dept 1972); *Gillman v Liberty Airport Authority*, 32 AD2d 296, 302 NYS2d 203 (3d Dept 1969); see *People v Pena*, 50 NY2d 400, 429 NYS2d 410, 406 NE2d 1347 (1980) (citing PJI); *Schwabach v Beth Israel Medical Center*, 72 AD2d 308, 424 NYS2d 208 (1st Dept 1980); *Friedl v Hennard*, 66 AD2d 1024, 411 NYS2d 731 (4th Dept 1978). It is not error to accept a jury verdict, even though the court has not yet responded to earlier inquiries from the jury, where the foreperson advises the court that the jury no longer has any need for the assistance it has requested, see *Fagiola v Jonassen*, 173 AD2d 590, 570 NYS2d 173 (2d Dept 1991), or where there is no serious prejudice from the failure to respond, *Havens v New York City Transit Authority*, 20 AD3d 391, 798 NYS2d 140 (2d Dept 2005).

When a jury requests exhibits or further instructions, the court must summon counsel for all parties and the court reporter and make the action taken a matter of record, *Sands v Statler Hilton Hotel*, 40 AD2d 620, 336 NYS2d 529 (4th Dept 1972). Without consent, the court may not communicate with the jury in the absence of the parties, *Maione v Pindyck*, 32 AD3d 827, 821 NYS2d 110 (2d Dept 2006); *Brown v Moodie*, 116 AD2d 980, 498 NYS2d 603 (4th Dept 1986); see *Snediker v Orange*, 89 AD2d 560, 452 NYS2d 111 (2d Dept 1982), *aff'd*, 58 NY2d 647, 458 NYS2d 517, 444 NE2d 981 (1982). Such improper communication in a civil case, however, does not require a new trial unless a party was prejudiced by the communication, *Garritano v Garritano*, 62 AD3d 657, 878 NYS2d 402 (2d Dept 2009); *Maione v Pindyck*, *supra*; see *Snediker v Orange*, *supra*. All jury instructions should be given in open court in the presence of counsel so that the parties know what instructions are given and have the opportunity to make objections or further requests, *Garritano v Garritano*, *supra*; *Maione v Pindyck*, *supra*, *Brown v Moodie*, *supra*; see CPLR 4110-b.

It is thus improper practice for the court, without giving counsel an opportunity to be present, to go to the jury room with the reporter to advise the jury of the court's ruling on a request made by the jury for an exhibit, *Blaha v Lettmoden*, 83 AD2d 619, 441 NYS2d 526 (2d Dept 1981); *Testa v Seidler*, 81 AD2d 715, 439 NYS2d 469 (3d Dept 1981); see *Linke v Savage*, 39 AD2d 326, 333 NYS2d 600 (4th Dept 1972) (citing PJI); see also *Snediker v Orange*, 89 AD2d 560, 452 NYS2d 111 (2d Dept 1982), *aff'd*, 58 NY2d 647, 458 NYS2d 517, 444 NE2d 981 (1982); *Chanatry v Williams*, 57 AD2d 730, 395 NYS2d 564 (4th Dept 1977). The ruling should not be sent to the jury room in writing or through the medium of the court reporter even though the parties so stipulate, *Fisher v Lober*, 11 AD2d 645, 201 NYS2d 270 (1st Dept 1960); see *Employers Mut. Liability Ins. Co. of Wis. v Di Cesare & Monaco Concrete Const. Corp.*, 9 AD2d 379, 194 NYS2d 103 (1st Dept 1959). The court may not abdicate its responsibility to supervise the jury's deliberations and to respond to jury requests by delegating its authority to its law secretary, see *People v Ahmed*, 66 NY2d 307, 496 NYS2d 984, 487 NE2d 894 (1985).

While unauthorized communications by court officers to juries war-

rant reversal in criminal actions, *People v Ahmed*, 66 NY2d 307, 496 NYS2d 984, 487 NE2d 894 (1985); *People v Ciaccio*, 47 NY2d 431, 418 NYS2d 371, 391 NE2d 1347 (1979), this rule is primarily based on the defendant's fundamental constitutional right to be present when the jury receives instructions or communications, *id.* Similar due process concerns have not been enunciated in civil cases, *Burtch v Shah*, 230 AD2d 223, 661 NYS2d 118 (4th Dept 1997). Although a juror's affidavit may not be used to attack a jury verdict absent exceptional circumstances, this rule is not followed when the affidavit concerns an unauthorized communication made by a judge or a court officer, *id.* The rationale supporting this rule is the legitimate distinction between the acts of the jurors themselves during the trial of a case or the deliberations of the jury, and the influences which are called into play by outside forces and which are extraneous to their deliberations, *id.* Where unauthorized communications by court officers interfere with the free deliberations of the jury, and cause unlawful coercion and duress, the verdict should be set aside and a new trial granted, *id.*

If the jury's deliberation may be expedited or assisted by having a copy of the court's instructions available during deliberation, the court, upon its own motion or the motion of a party, may direct that at least one copy of the instructions be furnished to the jury when it retires to consider its verdict, 22 NYCRR 220.11. If the court so directs, it shall state its reasons for doing so on the record, *id.* The procedure the court is to follow when providing the jury with a copy of the charge is set forth in 22 NYCRR 220.11. Playing a prerecorded charge to the jury in a civil case has been disapproved, see *Fogel v Lenox Hill Hosp.*, 127 AD2d 548, 512 NYS2d 109 (1st Dept 1987). The court found inherent danger in such a practice, including the concern that jurors may not pay as much attention to a tape recording as to the judge speaking first hand.

Inconsistencies in the Verdict

The better practice is for the court to ask the foreperson of the jury to hand up the completed verdict sheet to the court for an initial review and then return it to the foreperson. By following this procedure, any obvious errors on the verdict sheet will be brought to the attention of the court at a time when it can, after consulting with the parties, taken appropriate corrective action, *Motta by Motta v Eldred Central School District*, 172 AD3d 1575, 101 NYS3d 472 (3d Dept 2019). For a discussion of issues related to inconsistent verdicts, see Comment to PJI 1:97.

Perfecting the Verdict

A jury's verdict should be "perfected." To perfect a verdict, the verdict should be announced in open court, *National Equipment Corp. v Ruiz*, 19 AD3d 5, 794 NYS2d 2 (1st Dept 2005); see *Duffy v Vogel*, 12 NY3d 169, 878 NYS2d 246, 905 NE2d 1175 (2009); *Ricchueto v Monroe*, 267 AD2d 1012, 701 NYS2d 550 (4th Dept 1999). When requested, the jury must be polled, *Duffy v Vogel*, *supra*; *Garcia v Rosario*, 192 AD3d

538, 140 NYS3d 705 (1st Dept 2021); *National Equipment Corp. v Ruiz*, supra; *Ricchueto v Monroe*, supra; *Luppino by Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986); *Brigham v Olmstead*, 10 AD2d 769, 197 NYS2d 570 (3d Dept 1960). A party has an “absolute” right to have a jury polled, *Duffy v Vogel*, supra. Thus, if a party requests that the jury be polled, the court must grant the request and conduct the poll, id. A court’s failure to conduct the poll when requested to do so by a party is per se reversible error, id. Where a party requests that the jury be fully polled, it is reversible error to limit the poll to the single question of whether the foreperson’s reading of the verdict was inaccurate, *Garcia v Rosario*, supra. The “absolute” right to a jury poll may be expressly or implicitly waived by a party, *Duffy v Vogel*, supra; see *Holstein v Community General Hosp. of Greater Syracuse*, 20 NY3d 892, 956 NYS2d 475, 980 NE2d 523 (2012). The verdict should be entered by the clerk in the minute book, *National Equipment Corp. v Ruiz*, supra; see *Duffy v Vogel*, supra; *Ricchueto v Monroe*, supra; *Brighman v Olmstead*, supra.

Setting Aside the Verdict

CPLR 4404(a) permits a court, on the motion of a party or on the court’s own initiative, to set aside a jury’s verdict on the following grounds: (1) that the verdict is not supported by legally sufficient evidence; (2) that the verdict is contrary to the weight of the evidence; or (3) in the interest of justice.

In determining whether a verdict must be set aside because it is not supported by legally sufficient evidence, the relevant inquiry is whether there is simply no valid line of reasoning and permissible inferences that could lead rational people to the conclusion reached by the jury on the basis of the trial evidence, *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Campbell v Elmira*, 84 NY2d 505, 620 NYS2d 302, 644 NE2d 993 (1994); *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (1978); *Michael v He Gin Lee Architect Planner, PLLC*, 153 AD3d 704, 61 NYS3d 236 (2d Dept 2017); *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2d Dept 1985). Under this basic assessment of the verdict, if the evidence is such that it would not be utterly irrational for a jury to reach the result it determined, the court cannot conclude that the verdict is not supported by legally sufficient evidence, *Mazella v Beals*, supra; *Cohen v Hallmark Cards, Inc.*, supra; see *Killon v Parrotta*, 28 NY3d 101, 42 NYS3d 70, 65 NE3d 41 (2016); *Campbell v Elmira*, supra. In reviewing the sufficiency of the evidence, the court must afford the prevailing party every inference that may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to that party, *Alexander v Eldred*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984); *Douglas Elliman, LLC v Silver*, 136 AD3d 658, 24 NYS3d 207 (2d Dept 2016); see *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252, 686 NE2d 1346 (1997) (CPLR 4401); *Wolf v Persaud*, 130 AD3d 1523, 14 NYS3d 601 (4th Dept 2015); *Veeder v Community Health Plan*, 281 AD2d 756, 722 NYS2d 106 (3d Dept 2001). The determination whether a verdict is sup-

ported by legally sufficient evidence is a question of law, *Killon v Parrotta*, supra; see *Cohen v Hallmark Cards, Inc.*, supra; *Nicastro v Park*, supra. If the court concludes that the verdict is not supported by legally sufficient evidence, judgment must be entered against the party in whose favor the verdict was rendered, *Cohen v Hallmark Cards, Inc.*, supra; *Nicastro v Park*, supra; see *Killon v Parrotta*, supra.

Regarding the second ground for setting aside a verdict, whether a verdict is contrary to the weight of the evidence is a discretionary and factual determination, not a question of law, *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2d Dept 1985); see *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (1978). The criteria for setting aside a verdict as contrary to the weight of the evidence is less stringent than the basic assessment of a verdict employed when the court is determining whether the verdict is supported by legally sufficient evidence, *Nicastro v Park*, supra. The standard for determining if a verdict is contrary to the weight of the evidence is whether the evidence so preponderated in favor of the non-prevailing party that the verdict could not have been reached on any fair interpretation of the evidence, *Killon v Parrotta*, 28 NY3d 101, 42 NYS3d 70, 65 NE3d 41 (2016); *Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744, 631 NYS2d 122, 655 NE2d 163 (1995); *Evans v New York City Transit Authority*, 179 AD3d 105, 113 NYS3d 127 (2d Dept 2019); *Nicastro v Park*, supra. The discretionary power to set aside a verdict as contrary to the weight of the evidence must be exercised with caution, for in the absence of indications that substantial justice was not done, the prevailing party is entitled to the benefits of a favorable verdict, *Nicastro v Park*, supra. It is not enough to show that a different verdict would be reasonable, since the jury's verdict will be accorded deference if credible evidence exists to support its interpretation, *Warner v Kain*, 186 AD3d 1844, 131 NYS3d 726 (3d Dept 2020); *Fallon v Esposito*, 35 AD3d 1067, 826 NYS2d 802 (3d Dept 2006). If the court concludes that the verdict is contrary to the weight of the evidence, the remedy is a new trial, *Killon v Parrotta*, supra; *Evans v New York City Transit Authority*, supra; *Cohen v Hallmark Cards, Inc.*, supra; *Nicastro v Park*, supra. For an exhaustive discussion regarding weight-of-the-evidence review, see *Nicastro v Park*, supra; see also *Annunziata v Colasanti*, 126 AD2d 75, 512 NYS2d 381 (1st Dept 1987). Although the Second Department has clarified that a weight-of-the-evidence contention need not be preserved for appellate review by post-verdict motion pursuant to CPLR 4404(a), *Evans v New York City Transit Authority*, supra (overruling *Condor v New York*, 292 AD2d 332, 738 NYS2d 587 (2d Dept 2002) and *Bendersky v M & O Enterprises Corp.*, 299 AD2d 434, 751 NYS2d 269 (2d Dept 2002) to the extent those cases imposed a preservation requirement), case law from the Third and Fourth Departments holds that a weight-of-the-evidence contention must be preserved by post-verdict motion, *Cyrus v Wal-Mart Stores East, LP*, 160 AD3d 1487, 72 NYS3d 881 (4th Dept 2018); *Homan v Herzig*, 55 AD3d 1413, 865 NYS2d 189 (4th Dept 2008); *Creamer v Amsterdam High School*, 277 AD2d 647, 716 NYS2d 452 (3d Dept 2000). The Second and Fourth Departments have clarified that a weight-of-the-evidence contention need not be preserved for appellate review by

post-verdict motion pursuant to CPLR 4404(a), *Defisher v PPZ Supermarkets, Inc.*, 186 AD3d 1062, 129 NYS3d 599 (4th Dept 2020); *Alexandra R. v Krone*, 186 AD3d 981, 129 NYS3d 579 (4th Dept 2020) (nonjury trial); *Evans v New York City Transit Authority*, *supra*. The Third Department has held that a weight-of-the-evidence contention must be preserved by post-verdict motion, *Creamer v Amsterdam High School*, 277 AD2d 647, 716 NYS2d 452 (3d Dept 2000).

The third ground allows a court to set aside a verdict in the interest of justice and direct a new trial. A motion to set aside a verdict in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise, *Morency v Horizon Transp. Services, Inc.*, 139 AD3d 1021, 33 NYS3d 319 (2d Dept 2016) (improper impeachment); *Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 (2d Dept 2011) (inconsistent verdict); see *Wright v New York*, 168 AD3d 1025, 92 NYS3d 103 (2d Dept 2019) (substantial juror confusion); *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016) (faulty instruction on comparative negligence); *Peters v Wallis*, 135 AD3d 922, 24 NYS3d 178 (2d Dept 2016) (prejudicial conduct by attorney and party); *Ioffe v Seruya*, 134 AD3d 993, 21 NYS3d 712 (2d Dept 2015) (improper comments by court); *Scarpati v Kim*, 124 AD3d 866, 2 NYS3d 544 (2d Dept 2015) (juror confusion); *Reyes v New York*, 118 AD3d 770, 987 NYS2d 180 (2d Dept 2014) (faulty charge and verdict sheet). In considering such a motion, the judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected, and must look to his or her own common sense, experience and sense of fairness rather than to precedents in arriving at a decision, *Micallef v Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976); *Morency v Horizon Transp. Services, Inc.*, *supra*; *Duran v Temple Beth Sholom, Inc.*, 155 AD3d 690, 64 NYS3d 278 (2d Dept 2017); *Allen v Uh*, *supra*.

VOIR DIRE—SELECTING THE JURY**Methods of Selection**

Rule 202.33(f) of the Chief Administrator of the Courts provides three methods of jury selection: White's method; Struck method; and Strike and replace method. The strike and replace method, however, can be used only in judicial districts where the Chief Administrator, in his or her discretion, has determined that experience with that method in that judicial district has resulted in an efficient and orderly selection process. Subdivision (f)(4) permits the Administrative Judge of a judicial district to use other methods on an experimental basis so long as it is approved by the Chief Administrator.

Appendix E to the rule, which follows, describes in detail the two unconditionally approved methods, White's method and Struck method.

Appendix E**A. General Principles Applicable to Jury Selection**

Selection of jurors pursuant to any of the methods authorized by rule 202.33(f) of the Rules of the Chief Administrator shall be governed by the following:

(1) If for any reason jury selection cannot proceed immediately, counsel shall return promptly to the courtroom of the assigned trial judge or the Trial Assignment Part or any other designated location for further instructions.

(2) Generally, a total of eight jurors, including two alternates, shall be selected. The court may permit a greater number of alternates if a lengthy trial is expected or for any appropriate reason. Counsel may consent to the use of "nondesignated" alternate jurors, in which event no distinction shall be made during jury selection between jurors and alternates, but the number of peremptory challenges in such cases shall consist of the sum of the peremptory challenges that would have been available to challenge both jurors and designated alternates.

(3) All prospective jurors shall complete a background questionnaire supplied by the court in a form approved by the Chief Administrator. Prior to the commencement of jury selection, completed questionnaires shall be made available to counsel. Upon completion of jury selection, or upon removal of a prospective juror, the questionnaires shall be either returned to the respective jurors or collected and discarded by court staff in a manner that ensures juror privacy. With court approval, which shall take into consideration concern for juror privacy, the parties may supplement the questionnaire to address concerns unique to a specific case.

(4) During the voir dire each attorney may state generally the contentions of his or her client, and identify the parties, attorneys and the witnesses likely to be called. However, counsel may not read from any of the pleadings in the action or inform potential jurors of the amount of money at issue.

(5) Counsel shall exercise peremptory challenges outside of the presence of the panel of prospective jurors.

(6) Counsel shall avoid discussing legal concepts such as burden of proof, which are the province of the court.

(7) If any unusual delay or a lengthy trial is anticipated, counsel may so advise prospective jurors.

(8) If counsel objects to anything said or done by any other counsel during the selection process, the objecting counsel shall unobtrusively request that all counsel step outside of the juror's presence, and counsel shall make a determined effort to resolve the problem. Should that effort fail, counsel shall immediately bring the problem to the attention of the assigned trial judge, the Trial Assignment Part judge or any other designated judge.

(9) After jury selection is completed, counsel shall advise the clerk of the assigned Trial Part or of the Trial Assignment Part or other designated part. If counsel anticipates the need during trial of special equipment (if available) or special assistance, such as an interpreter, counsel shall so inform the clerk at that time.

B. "White's Method"

(1) Prior to the identification of the prospective jurors to be seated in the jury box, counsel shall ask questions generally to all of the jurors in the room to determine whether any prospective juror in the room has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(2) After general questions have been asked to the group of prospective jurors, jury selection shall continue in rounds, with each round to consist of the following: (1) seating prospective jurors in the jury box; (2) questioning of seated prospective jurors; and (3) removal of seated prospective jurors upon exercise of challenges. Jurors removed for cause shall immediately be replaced during each rounds. The first round shall begin initially with the seating of six prospective jurors (where undesignated alternates are used, additional prospective jurors equal to the number of alternate jurors shall be seated as well).

(3) In each round, the questioning of the seated prospective jurors shall be conducted first by counsel for the plaintiff, followed by counsel for the remaining parties in the order in which their names appear in the caption. Counsel may be permitted to ask follow-up questions. Within each round, challenges for cause shall be exercised by any party prior to the exercise of peremptory challenges and as soon as the reason therefor becomes apparent. Upon replacement of a prospective juror removed for cause, questioning shall revert to the plaintiff.

(4) Following questioning and the exercise of challenges for cause, peremptory challenges shall be exercised one at a time and alternately as follows: In the first round, in caption order, each attorney shall exercise one peremptory challenge by removing a prospective juror's name from a "board" passed back and forth between or among counsel. An attorney alternatively may waive the making of a peremptory challenge. An attorney may exercise a second, single peremptory challenge within the round only after all other attorneys have either exercised or waived their first peremptory challenges. The board shall continue to circulate among the attorneys until no other peremptory challenges are exercised. An attorney who waives a challenge may not thereafter exercise a peremptory challenge within the round, but may exercise remaining peremptory challenges in subsequent rounds. The counsel last able to exercise a peremptory challenge in a round is not confined to the exercise of a single challenge but may then exercise one or more peremptory challenges.

(5) In subsequent rounds, the first exercise of peremptory challenges shall alternate from side to side. Where a side consists of multiple parties, commencement of the exercise of peremptory challenges in subsequent rounds shall rotate among the parties within the side. In each such round, before the board is to be passed to the other side, the board must be passed to all remaining parties within the side, in caption order, starting from the first party in the rotation for that round.

(6) At the end of each round, those seated jurors who remain unchallenged shall be sworn and removed from the room. The challenged jurors shall be replaced, and a new round shall commence.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Designated alternate jurors shall be selected in the same manner as described above, with the order of exercise of peremptory challenges continuing as the next round following the last completed round of challenges to regular jurors. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

C. "Struck Method"

(1) Unless otherwise ordered by the court, selection of jurors shall

be made from an initial panel of 25 prospective jurors, who shall be seated randomly and who shall maintain the order of seating throughout the voir dire. If fewer prospective jurors are needed due to the use of designated alternate jurors or for any other reason, the size of the panel may be decreased.

(2) Counsel first shall ask questions generally to the prospective jurors as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses. A response from a juror that requires further elaboration may be the subject of further questioning of that juror by counsel on an individual basis. Counsel may exercise challenges for cause at this time.

(3) After the general questioning has been completed, in an action with one plaintiff and one defendant, counsel for the plaintiff initially shall question the prospective jurors, followed by questioning by defendant's counsel. Counsel may be permitted to ask follow-up questions. In cases with multiple parties, questioning shall be undertaken by counsel in the order in which the parties' names appear in the caption. A challenge for cause may be made by counsel to any party as soon as the reason therefor becomes apparent. At the end of the period, all challenges for cause to any prospective juror on the panel must have been exercised by respective counsel.

(4) After challenges for cause are exercised, the number of prospective jurors remaining shall be counted. If that number is less than the total number of jurors to be selected (including alternates, where non-designated alternates are being used) plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties (such sum shall be referred to as the "jury panel number"), additional prospective jurors shall be added until the number of prospective jurors not subject to challenge for cause equals or exceeds the jury panel number. Counsel for each party then shall question each replacement juror pursuant to the procedure set forth in paragraph 3.

(5) After all prospective jurors in the panel have been questioned, and all challenges for cause have been made, counsel for each party, one at a time beginning with counsel for the plaintiff, shall then exercise allowable peremptory challenges by alternately striking a single juror's name from a list or ballot passed back and forth between or among counsel until all challenges are exhausted or waived. In cases with multiple plaintiffs and/or defendants, peremptory challenges shall be exercised by counsel in the order in which the parties' names appear in the caption, unless following that order would, in the opinion of the court, unduly favor a side. In that event, the court, after consulting with the parties, shall specify the order in which the peremptory chal-

lenges shall be exercised in a manner that shall balance the interests of the parties.

An attorney who waives a challenge may not thereafter exercise a peremptory challenge. Any Batson (see discussion of *Batson v Kentucky*, 476 US 79, 106 S Ct 1712 (1986), *infra*) or other objections shall be resolved by the court before any of the struck jurors are dismissed.

(6) After all peremptory challenges have been made, the trial jurors (including alternates when non-designated alternates are used) then shall be selected in the order in which they have been seated from those prospective jurors remaining on the panel.

(7) The selection of designated alternate jurors shall take place after the selection of the six jurors. Counsel shall select designated alternates in the same manner set forth in these rules, but with an initial panel of not more than 10 prospective alternates unless otherwise directed by the court. The jury panel number for designated alternate jurors shall be equal to the number of alternates plus the maximum number of peremptory challenges allowed by the court or by statute that may be exercised by the parties. The total number of peremptory challenges to alternates may be exercised against any alternate, regardless of seat.

Differences Between Methods

The principal difference between Strike and Replace and White's method is that when a jury is selected using Strike and Replace the jurors are not sworn until all challenges on all selection rounds have either been exercised or waived. Thus, an attorney can indicate, during the voir dire, that the jury as presently constituted is satisfactory, reserving the right to exercise a peremptory challenge with respect to a prospective juror not previously challenged. Under White's method jurors not challenged on a particular round are sworn and cannot be challenged thereafter. The principal advantage of White's method is that jurors once sworn need not remain during the balance of the voir dire and thus cannot later be tainted by anything said by counsel or prospective jurors. The disadvantage of both the Strike and Replace method and White's method is that challenges are exercised by round and challenged jurors are excused, presumably to be returned to the general jury pool or released from service. Thus, unless a question is immediately raised with respect to the exercise of a peremptory challenge, a juror who is excused as a result of a peremptory challenge later disallowed (see discussion of *Batson v Kentucky*, 476 US 79, 106 S Ct 1712 (1986), *infra*) may no longer be available at the time the Batson ruling is made. Further, a pattern of discriminatory challenges may not be discernable on the early rounds. Under the Struck method all peremptory challenges are exercised at the same time. Thus, if there is

a pattern of discriminatory challenges, such pattern becomes readily apparent. If a Batson issue is raised and a peremptory challenge is disallowed the juror against whom the challenge was exercised is still available to be seated, see *People v Chin*, 3 AD3d 574, 771 NYS2d 158 (2d Dept 2004). However, if the juror against whom the disallowed peremptory challenge has been excused and is unavailable, providing an additional peremptory challenge to the nonchallenging party is an acceptable remedy, *id.*

Paragraph 17 of Appendix E provides that “. . . unless otherwise ordered by the Court a selection of jurors shall be made from an initial panel of 25 prospective jurors” If a jury of six with two alternates is being selected, each side will have four challenges, and, therefore, an initial panel of 25 should be sufficient. If, however, more than two alternates are being selected, the initial panel must be increased. For example, if ten jurors, six initially selected and four alternates, are to be selected, each side will have five challenges. Thus, it will be necessary to have at least 20 prospective jurors after all challenges for cause are exercised. For a jury of ten, therefore, it is recommended that the initial panel be at least 35 and preferably 40 prospective jurors.

Nondesignated Alternates

To the extent possible, it is recommended that non designated alternates be used. Although CPLR 4105 and 4106 provide that the first six persons whose names are drawn and approved are to be sworn and constitute the jury and that one or two additional jurors (unless the court in its discretion orders otherwise) are to be selected as alternates, the court can direct the selection of nondesignated alternates. If no objection is raised by counsel there is deemed consent to the method of jury selection and if counsel, when asked on the record if the jury is satisfactory agree that it is, there is a waiver of any objection to the use of nondesignated alternates. Nondesignated alternates make jury selection, particularly by the Struck method, more efficient and serve to enhance the interest of all jurors on the panel. Where a party requests that the court, in accordance with CPLR 4105 and 4106, empanel the first six jurors that were selected and designate the remaining jurors as alternates, the court should grant that request and eschew using nondesignated alternates, *Piacente v Bernstein*, 127 AD3d 1365, 6 NYS3d 793 (3d Dept 2015). CPLR 4106 does not prescribe the particular method for drawing the name of an alternate juror. Thus, when replacing a sitting juror with an alternate during the course of the trial, it is unclear whether the court must randomly draw the name of an alternate or whether the court must draw the alternate in the order of selection, *Rivera v New York City Transit Authority*, 92 AD3d 516, 938 NYS2d 535 (1st Dept 2012).

Time Limitations

Rule 202.33(d), “Time Limitations,” provides that the trial judge

shall establish time limitations for the questioning of prospective jurors during the voir dire. The trial court has discretion in setting such time limits, *Zgrodek v McInerney*, 61 AD3d 1106, 876 NYS2d 227 (3d Dept 2009). Time limitations have been specifically approved in a civil case, *Horton v Associates in Obstetrics and Gynecology P.C.*, 229 AD2d 734, 645 NYS2d 354 (3d Dept 1996), and in a number of criminal cases, *People v Jean*, 75 NY2d 744, 551 NYS2d 889, 551 NE2d 90 (1989) (15 minutes for each attorney during first two rounds, ten minutes for third round); *People v Rodriguez*, 184 AD2d 317, 584 NYS2d 831 (1st Dept 1992) (9½ minutes on each of first two rounds and eleven minutes on third round); *People v Moore*, 155 AD2d 725, 547 NYS2d 685 (3d Dept 1989) (10 minute limitation on voir dire); *People v Brown*, 131 AD2d 582, 516 NYS2d 498 (2d Dept 1987) (15 minutes on the second round, ten minutes on the third round); but see *People v Steward*, 17 NY3d 104, 926 NYS2d 847, 950 NE2d 480 (2011) (trial court abused its discretion in imposing 5-minute limitation on questioning of jurors during each round of voir dire in serious felony case); *People v Rampersant*, 182 AD2d 373, 581 NYS2d 784 (1st Dept 1992) (permitting prosecutor and defense attorney to ask only one question directed at entire third panel did not provide fair opportunity to question prospective jurors and required reversal). However, limiting questioning in each round to 15 minutes is unreasonable in a damages trial involving close factual and medical issues, expert evidence, multiple injuries and several questions about causation, *Zgrodek v McInerney*, *supra*.

It should be noted that the trial court supervises the entire voir dire in criminal cases and generally preceeds questioning by counsel with both general and specific questioning of the prospective jurors, see *People v Boulware*, 29 NY2d 135, 324 NYS2d 30, 272 NE2d 538 (1971).

Judicial Supervision

Rule 202.33(e) provides that “to ensure an efficient and dignified selection process, the trial judge shall preside at the commencement of the voir dire and open the voir dire proceeding.” The judge shall then, in the exercise of his or her discretion, decide whether to continue to supervise the voir dire and may preside over a part or all of the remainder of the voir dire. The denial of such an application constitutes reversible error, *Brooks v Mount Vernon*, 280 AD2d 631, 720 NYS2d 832 (2d Dept 2001); *Guarnier v American Dredging Co.*, 145 AD2d 341, 535 NYS2d 705 (1st Dept 1988). CPLR 4107 provides that upon application of any party the judge shall be present during the entire voir dire. The trial court has wide discretion as to the extent to which it participates in the voir dire and may, indeed, conduct most of the voir dire itself, *Bichler v Eli Lilly and Co.*, 79 AD2d 317, 436 NYS2d 625 (1st Dept 1981), *aff’d*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982).

Allocation of Challenges

CPLR 4109 provides that the plaintiff or plaintiffs shall have a combined total of three peremptory challenges plus one peremptory

challenge for every two alternate jurors. The defendant or defendants (other than any third-party defendant or defendants) shall have a combined total of three peremptory challenges plus one peremptory challenge for every two alternate jurors. The court has discretion, prior to the voir dire, to grant an equal number of additional challenges to both sides as may be appropriate. If a side has two or more parties, the court has discretion to allocate that side's combined total of challenges between or among those parties.

Since its amendment in 1996, CPLR 4109 gives each side three peremptory challenges for the first six jurors selected, those sides being the plaintiff (or plaintiffs) on one side, and multiple defendants on the other. The former CPLR 4109 gave "each party" three preemptory challenges, L 2006, ch 655. The number of additional challenges for the alternate jurors is reduced from one for each alternate to one for every two alternates. Any additional challenges allowed must be accorded equally to both sides. Query, how many challenges does a third-party defendant have, if it has any at all? One possible solution to the omission of allocation of peremptory challenges to third-party defendants is to consider the defendants and third-party defendants as one side, allocating additional challenges to the third-party defendant with an equal number of additional challenges being allocated to the plaintiff. Solutions may vary depending upon the relationship between the interests of the third-party defendant and the interests of the other parties, see 50 Siegel's Prac Rev 1.

Qualifications of Jurors

In New York jury service is a civil right that is a privilege and duty of citizenship protected by the State Constitution, *People v Guay*, 18 NY3d 16, 935 NYS2d 567, 959 NE2d 504 (2011); *People v Hecker*, 15 NY3d 625, 917 NYS2d 39, 942 NE2d 248 (2010); *People v Kern*, 75 NY2d 638, 555 NYS2d 647, 554 NE2d 1235 (1990). A person's ability to serve as a juror, however, must be balanced against a party's fundamental constitutional rights and the State's obligation to provide a fair trial, *People v Guay*, *supra*. Under Judiciary Law § 510, in order to qualify as a juror a person must: (1) be a citizen of the United States and a resident of the county in which he or she was called to serve, (2) be not less than 18 years of age, (3) not have been convicted of a felony, and (4) be able to understand and communicate in the English language.

A prospective juror's hearing impairment relates to his or her ability to understand and communicate in the English language. When confronted with a situation involving a prospective juror's hearing impairment, a court must determine whether the individual has the ability to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court, *People v Guay*, 18 NY3d 16, 935 NYS2d 567, 959 NE2d 504 (2011). If a judge is made aware of a reasonable accommodation that would allow a hearing-impaired prospective

juror to fulfill these duties without interfering with the party's trial rights, such measures should be taken, see *id*; *People v Guzman*, 76 NY2d 1, 556 NYS2d 7, 555 NE2d 259 (1990). In furtherance of the need to accommodate such prospective jurors, a hearing impairment does not per se preclude an individual from serving as a juror, see *People v Guay*, *supra*; *People v Guzman*, *supra*.

Challenges For Cause Based on Juror Partiality

When potential jurors state that they question or doubt they can be fair in the case, trial judges should either elicit some unequivocal assurance of their ability to be impartial on the record when that is appropriate, or excuse the juror when that is appropriate, *People v Johnson*, 17 NY3d 752, 929 NYS2d 16, 952 NE2d 1008 (2011); *People v Arnold*, 96 NY2d 358, 729 NYS2d 51, 753 NE2d 846 (2001); *People v Johnson*, 94 NY2d 600, 709 NYS2d 134, 730 NE2d 932 (2000); see *People v Nicholas*, 98 NY2d 749, 751 NYS2d 820, 781 NE2d 884 (2002); *People v Wilson*, 7 AD3d 549, 776 NYS2d 98 (2d Dept 2004); *People v Borges*, 90 AD3d 1067, 935 NYS2d 621 (2d Dept 2011). Prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused, *People v Johnson*, *supra*; *People v Nicholas*, *supra*; *People v Arnold*, *supra*; *People v Wilson*, *supra*. Additionally, it is an abuse of discretion to deny a for-cause challenge where a juror has personal and professional relationships with several witnesses expected to testify at trial, *People v Furey*, 18 NY3d 284, 938 NYS2d 277, 961 NE2d 668 (2011). By contrast, where prospective jurors unambiguously state that, despite preexisting opinions that might indicate bias, they will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible, *People v Nicholas*, *supra*; *People v Arnold*, *supra*. For more than a century, a juror's use of the word "think" has been challenged as equivocal, *People v Chambers*, 97 NY2d 417, 740 NYS2d 291, 766 NE2d 953 (2002) ("I don't think it would be a problem." "No, I don't think so."). When a prospective juror qualifies a "yes" or "no" response regarding the ability to be fair with words such as "I think" or "I'll try," additional questions at voir dire should be posed to dispel any doubt as to equivocation, assure an impartial jury, and avoid the delay, and risk, of appeals, *id*; see *People v Harris*, 19 NY3d 679, 954 NYS2d 777, 978 NE2d 1246 (2012); *People v Nicholas*, *supra*; *People v Bludson*, 97 NY2d 644, 736 NYS2d 289, 761 NE2d 1016 (2001). These principles, although stated in criminal cases, also appear to apply in civil cases.

CPLR 4110 provides two categories for challenges for cause. Subsection (a) governs challenges to the favor of a juror who is an employee of a party, is a shareholder or stockholder of a corporate party, or is interested in an insurance company that may be subject to liability in the action, see *Salm v Moses*, 13 NY3d 816, 890 NYS2d 385, 918 NE2d 897 (2009). Subsection (b) provides that a juror who is related within the sixth degree by consanguinity or affinity to a party shall be disqualified from sitting.

Batson Rulings

In *Batson v Kentucky*, 476 US 79, 106 SCt 1712 (1986), the Supreme Court held that a defendant could challenge a prosecutor's unconstitutional use of peremptory challenges to remove a juror of the defendant's racial group. It is well settled that, to establish a prima facie case of discrimination in the selection of jurors under *Batson*, a defendant asserting a claim must show that the exercise of peremptory challenges by the prosecution removes one or more members of a cognizable racial group from the venire and that facts and other relevant circumstances support a finding that the use of these peremptory challenges excludes potential jurors because of their race, *People v Hecker*, 15 NY3d 625, 917 NYS2d 39, 942 NE2d 248 (2010); *People v Smocum*, 99 NY2d 418, 757 NYS2d 239, 786 NE2d 1275 (2003); *People v James*, 99 NY2d 264, 755 NYS2d 43, 784 NE2d 1152 (2002); *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002) (discussing rules for determining what type of evidence will establish prima facie case of discrimination); see *People v Childress*, 81 NY2d 263, 598 NYS2d 146, 614 NE2d 709 (1993). Although there are no fixed rules for determining what evidence will establish a prima facie case of discrimination, a party asserting a claim under *Batson* should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed, *People v James*, supra. The prosecutor is then required to offer a race-neutral reason for each and every challenge, *People v Hecker*, supra; *People v James*, supra; *People v Brown*, supra. If a party does not specifically question a particular strike, the adverse party is not required to provide an explanation for it, *People v Hecker*, supra; *People v James*, supra; *People v Manigo*, 165 AD2d 660, 560 NYS2d 38 (1st Dept 1990). Evidence sufficient to make a prima facie showing shifts the burden of going forward to the adverse party, but the ultimate burden of persuasion must be carried by the party alleging the intentional discrimination, *People v James*, supra. In subsequent cases, the Supreme Court held that the constitutional violation involved related to the equal protection rights, not only of the defendant, but also of the excluded juror, and that the excluded juror need not belong to the defendant's racial group, *Powers v Ohio*, 499 US 400, 111 SCt 1364 (1991); that the violation occurred whether the discriminatory peremptory challenge was exercised by the prosecutor or the defendant, *Georgia v McCollum*, 505 US 42, 112 SCt 2348 (1992); *People v Kern*, 75 NY2d 638, 555 NYS2d 647, 554 NE2d 1235 (1990); that the violation occurred regardless of whether the discriminatory peremptory challenge excludes a juror from a criminal or civil case, *Edmonson v Leesville Concrete Co., Inc.*, 500 US 614, 111 SCt 2077 (1991); *Smith v United Skates of America, Inc.*, 276 AD2d 620, 714 NYS2d 724 (2d Dept 2000), and that the violation occurs when the juror is excluded not only on the basis of race but on the basis of gender, *J.E.B. v Alabama ex rel. T.B.*, 511 US 127, 114 SCt 1419 (1994); *People v Hecker*, supra, or ethnicity, *Hernandez v New York*, 500 US 352, 111 SCt 1859 (1991). Moreover, in New York State, service on a jury trial is a civil right which cannot be arbitrarily denied, New York State Constitution, article I, § 1; Civil Rights Law § 13; *People v James*, supra; *People v Kern*, supra.

For civil cases discussing the Batson issue, see *Superior Sales & Salvage, Inc. v Time Release Sciences, Inc.*, 224 AD2d 922, 637 NYS2d 584 (4th Dept 1996); *Ancrum v Eisenberg*, 206 AD2d 324, 615 NYS2d 14 (1st Dept 1994); *Siriano v Beth Israel Hosp. Center*, 161 Misc2d 512, 614 NYS2d 700 (Sup 1994); *O'Neill v New York*, 160 Misc2d 1086, 612 NYS2d 303 (NY City Civ Ct 1994).

The rule established by the above cases is that neither the plaintiff nor the defendant in a civil case may use a peremptory challenge to remove a juror solely on the basis of the juror's race, gender or ethnicity. When the issue is raised the first question, addressed to the party attacking the challenge is, "What is the cognizable group to which the challenged juror belongs?" The group must be cognizable under the equal protection clause (i.e., not teachers, lawyers, tennis players, etc.).

The defendant and the challenged juror need not be members of the same cognizable group for the defendant to raise a Batson challenge, *Powers v Ohio*, 499 US 400, 111 SCt 1364 (1991); *People v Hecker*, 15 NY3d 625, 917 NYS2d 39, 942 NE2d 248 (2010); *People v Kern*, 75 NY2d 638, 555 NYS2d 647, 554 NE2d 1235 (1990); *People v Blunt*, 162 AD2d 86, 561 NYS2d 90 (2d Dept 1990).

The following have been held to be cognizable groups: African-Americans *People v Hecker*, 15 NY3d 625, 917 NYS2d 39, 942 NE2d 248 (2010); *People v Bolling*, 79 NY2d 317, 582 NYS2d 950, 591 NE2d 1136 (1992); *Ancrum v Eisenberg*, 206 AD2d 324, 615 NYS2d 14 (1st Dept 1994); Asian-Americans, *People v Hecker*, *supra*; Muslims, *People v Langston*, 167 Misc2d 400, 641 NYS2d 513 (Sup 1996); Native Americans, *U.S. v Iron Moccasin*, 878 F2d 226 (8th Cir 1989); *U.S. v Chalan*, 812 F2d 1302 (10th Cir 1987); Italian-Americans, *U.S. v Biaggi*, 673 F Supp 96 (EDNY 1987), *aff'd*, 853 F2d 89 (2d Cir 1988); Jews, *Joseph v State*, 636 So 2d 777 (Fla App 3rd Dist 1994); Latinos, *Hernandez v New York*, 500 US 352, 111 SCt 1859 (1991). "Minorities" does not define a cognizable group, *People v Smith*, 81 NY2d 875, 597 NYS2d 633, 613 NE2d 539 (1993).

If the group named is cognizable, the second question, again addressed to the party alleging discrimination, is, "What are the facts or inferences which establish a prima facie case that the challenge has been exercised solely because of the membership of the prospective juror in the cognizable group." A party asserting a claim under Batson should articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed, *People v Hecker*, 15 NY3d 625, 917 NYS2d 39, 942 NE2d 248 (2010); *People v James*, 99 NY2d 264, 755 NYS2d 43, 784 NE2d 1152 (2002). The court at this point must operate as a fact finder considering all the facts and inferences to determine whether a prima facie case of discrimination has been established. There are no fixed rules for determining what type of evidence will establish a prima facie case of discrimination, *People v Smocum*, 99 NY2d 418, 757 NYS2d 239,

786 NE2d 1275 (2003); *People v James*, supra; *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002). Factors that may be considered include a disproportionate use of challenges to members of a cognizable group, see *People v Brown*, supra; *People v Wint*, 225 AD2d 362, 638 NYS2d 651 (1st Dept 1996). Although as part of their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination, *People v Smocum*, supra. A disproportionate number of strikes used against members of a particular racial or ethnic group may be indicative of a discriminatory pattern, but such a fact is rarely conclusive in the absence of other facts or circumstances, *People v Brown*, supra. In addition, the Court must consider the absence of any apparent relationship between an issue in the case and the challenged juror's background or voir dire responses; failure to challenge other jurors giving similar answers on voir dire who do not belong to the cognizable group; any difference in the manner in which jurors who are members of the cognizable group are questioned; the fact that the challenged jurors are heterogeneous, having in common only their membership in the cognizable group. For these and other factors which should be considered, see *People v Brown*, supra; *People v Childress*, 81 NY2d 263, 598 NYS2d 146, 614 NE2d 709 (1993); *People v Jenkins*, 75 NY2d 550, 555 NYS2d 10, 554 NE2d 47 (1990); *People v Scott*, 70 NY2d 420, 522 NYS2d 94, 516 NE2d 1208 (1987); *State v Richardson*, 342 NC 772, 467 SE2d 685 (1996); *Ex parte Branch*, 526 So 2d 609 (Ala 1987). In *People v Brown*, supra, the Court concluded that defendant's Batson objection based on a numerical argument was unsupported by factual assertions or comparisons that would serve as a basis for a prima facie case of impermissible discrimination. The fact that satisfactory reasons were given for striking two jurors does not defeat a party's prima facie case as to a third juror, *People v Smocum*, supra. Improper removal of even a single juror may be a violation of equal protection, id.

Once a prima facie case of discrimination is found, the party exercising the challenge must offer a reason or reasons unrelated to the juror's membership in the cognizable group for the exercise of the peremptory challenge, *People v Smocum*, 99 NY2d 418, 757 NYS2d 239, 786 NE2d 1275 (2003); *People v James*, 99 NY2d 264, 755 NYS2d 43, 784 NE2d 1152 (2002); *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002). While those reasons must be unrelated to the jurors membership in the cognizable group they need not be related to the issues in the case nor need they be compelling, persuasive or even plausible, see *Purkett v Elem*, 514 US 765, 115 SCt 1769 (1995); *People v Allen*, 86 NY2d 101, 629 NYS2d 1003, 653 NE2d 1173 (1995). Stated otherwise, although the race-neutral reason for exercising a peremptory challenge need not rise to the level of a challenge for cause, it must be legitimate and not merely a pretext for discrimination, *People v James*, supra. If a defendant does not specifically question a particular strike, the party is not required to provide an explanation for it, *People v James*, supra; *People v Manigo*, 165 AD2d 660, 560 NYS2d 38 (1st Dept 1990). If the party exercising the challenge cannot meet the burden of

establishing a race-neutral explanation for each challenged peremptory, an equal protection violation is established, *People v Smocum*, supra. If, however, race-neutral reasons are given, the inference of discrimination is overcome, *id.* At this stage, the reasons need be only facially permissible, *id.*

Once an explanation is offered that is unrelated to the juror's membership in the cognizable group the party disputing the challenge has the burden of establishing that the reason or reasons proffered by the attorney exercising the disputed challenge are pretextual and not the genuine reason for the challenge, *People v Hecker*, 15 NY3d 625, 917 NYS2d 39, 942 NE2d 248 (2010); *People v James*, 99 NY2d 264, 755 NYS2d 43, 784 NE2d 1152 (2002); *Torres v Educational Alliance, Inc.*, 300 AD2d 469, 752 NYS2d 80 (2d Dept 2002). This requires the trial judge to evaluate the credibility of the attorney exercising the challenge, see *People v Smocum*, 99 NY2d 418, 757 NYS2d 239, 786 NE2d 1275 (2003); *Ancrum v Eisenberg*, 206 AD2d 324, 615 NYS2d 14 (1st Dept 1994). There is, however, no set procedure that the court is to use to investigate the issue of genuineness, see *People v Hameed*, 88 NY2d 232, 644 NYS2d 466, 666 NE2d 1339 (1996) (cross examination of attorney exercising disputed challenge cannot be compelled). If the court accepts the race neutral reasons provided by the party, the adverse party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination, *People v Hecker*, supra; *People v James*, supra. It is incumbent upon the adverse party to be clear about any person still claimed to be improperly challenged, *id.* Courts may determine that the proffered reasons are pretextual without further arguments by the moving party, but the moving party has the ultimate burden of persuading the court that the reasons are merely a pretext for intentional discrimination, *People v Smocum*, supra.

If the court concludes that the party disputing the alleged discriminatory challenge has established that the reasons proffered by the challenging attorney are pretextual the challenge should be disallowed and the juror seated. Once a Batson issue is raised a complete record should be made. For a discussion of the specific objections to be raised in a Batson challenge, see *People v James*, 99 NY2d 264, 755 NYS2d 43, 784 NE2d 1152 (2002). It is the moving party's burden to make a record that supports a finding of pretext, *People v Smocum*, 99 NY2d 418, 757 NYS2d 239, 786 NE2d 1275 (2003). The Court of Appeals has underscored the importance both of the trial court's attention to each of Batson's well articulated, sequential steps, and of trial counsels' attention to placing their objections on the record so that they may be addressed by the Court, *id.*

The Batson procedure effectuates its purpose only if the above steps are followed in sequence, *People v Smocum*, 99 NY2d 418, 757 NYS2d 239, 786 NE2d 1275 (2003). As noted above, the first step requires the moving party to establish a prima facie case of purposeful discrimination in the exercise of peremptory challenges, *id.* Second, the non-moving party must give a race-neutral reason for each potential juror chal-

lenged, *id.* In step three, the court determines whether the reason given is merely a pretext for discrimination, *id.* The Court of Appeals has noted that “it makes no sense” to revisit the issue of whether a *prima facie* case has been made once the prosecutor has come forward with race-neutral reasons, *id.* At that point, the presumption of discrimination raised by the movant’s initial *prima facie* case has been rebutted, and to revisit the adequacy of the step one showing “unnecessarily evades the ultimate question of discrimination,” *id.* Similarly, when courts combine steps two and three by requiring the non-moving party to provide non-pretextual race-neutral reasons, they inappropriately shift the ultimate burden from the moving party, *id.*; *People v Payne*, 88 NY2d 172, 643 NYS2d 949, 666 NE2d 542 (1996). In *People v Smocum*, *supra*, the trial court appeared to have combined steps two and three by immediately concluding that the reasons provided by the prosecutor as to two jurors were acceptable, without first allowing defense counsel to make an argument that the reasons were pretextual. The Court held that this did not provide a “meaningful inquiry into the question of discrimination,” and cautioned trial courts to “avoid undue haste and compression in this crucial process,” *id.* While a Batson claim can be raised at any time during the jury selection process, *People v Perez*, 37 AD3d 152, 829 NYS2d 61 (1st Dept 2007), the remedy may be limited by the timing of the claim, *People v Luciano*, 44 AD3d 123, 125, 840 NYS2d 589 (1st Dept 2007), *aff’d* on other grounds, 10 NY3d 499, 860 NYS2d 452, 890 NE2d 214 (2008). For example, where a Batson violation has occurred but disallowing the improper challenge and seating the subject juror is not feasible because the juror has been released from service, then granting an additional peremptory challenge to the other party is an adequate remedy to ensure equal protection, *People v Chin*, 3 AD3d 574, 771 NYS2d 158 (2d Dept 2004). The trial court is vested with discretion to determine whether forfeiture of the peremptory challenge used to strike a juror which is successfully challenged on Batson grounds is an adequate remedy for the violation, but the trial court must exercise its discretion in determining whether to assess the penalty, *People v Luciano*, 10 NY3d 499, 860 NYS2d 452, 890 NE2d 214 (2008).

Judiciary Law § 524(a) provides that a person who has served on a “grand or petit jury in any court of the unified court system or in a federal court shall not be competent to serve again as a trial or grand juror in any court of the unified court system for six years subsequent to the last day of such service,” see *People v Wynter*, 95 NY2d 504, 719 NYS2d 637, 742 NE2d 112 (2000). Judiciary Law § 524 disqualifies individuals who fulfilled their jury service obligations within the previous six years by responding to a summons for jury duty through either actual physical attendance or telephone standby service, *id.*; see Judiciary Law § 525(c); 22 NYCRR §§ 128.8, 128.9(b).

DIVISION 1. GENERAL CHARGES

A. CHARGE PRIOR TO TRIAL

Introductory Statement

The basic pretrial charge in a civil case follows (PJI 1:1–1:14). It is highly recommended that such a charge be given, see *People v Cardinale*, 35 AD2d 1073, 316 NYS2d 369 (4th Dept 1970). The desirability of a preliminary charge has been stated thus:

“It is well and good for Trial Judges to give jurors the benefit of an introductory and explanatory address . . . It is also more than helpful, and in some cases essential, that jurors be familiarized with pertinent rules and procedures peculiar to the law and the courts and perhaps the particular matter at hand.” *People v Newman*, 46 NY2d 126, 412 NYS2d 860, 385 NE2d 598 (1978) (citing PJI); see also CPL § 270.40 (preliminary instruction required in all criminal cases).

Substantive law (e.g., a definition of negligence) has been omitted from the pre-trial charge because small variations in proof may cause substantial variation in the substantive law rules. The better practice, however, is to include some statements of the applicable substantive law to orient the jurors to the issues in the case.

The pre-trial charge does not obviate the need for detailed instructions at the end of the case, *People v Newman*, 46 NY2d 126, 412 NYS2d 860, 385 NE2d 598 (1978) (citing PJI); *People v Cardinale*, 35 AD2d 1073, 316 NYS2d 369 (4th Dept 1970).

PJI 1:1. Introduction to Jury

Members of the jury, we are about to start the trial of this case, about which you have heard some details during jury selection. Before the trial begins, however, I will provide you with certain instructions to help you understand what you will hear and see, and to guide your conduct during the trial.

Comment

The following charges can be given in any order the Court determines is appropriate.

PJI 1:2. Parties

The (party, parties) who (brings, bring) a lawsuit (is, are) called plaintiff(s). In this action the plaintiff(s) (is, are) [name party or parties] who sue(s) to recover for [insert claim(s)]. The (party, parties) against whom the suit is brought (is, are) called defendant(s). In this action the defendant(s) (is, are) [name party or parties]. [Where appropriate, add explanation as to additional parties, such as the following]: defendant(s) claim(s) that (a) third (party, parties), [name party or parties] is (are) responsible for the occurrence and has (have) brought an action against (him, her, it, them)].

[The charges that follow generally refer to plaintiff as “AB” and defendant as “CD.” The Court may refer to the parties by name or as plaintiff or defendant, as appropriate.]

PJI 1:2A. Unified Trial—Plaintiff’s Comparative Fault Where Defendant’s Fault Previously Has Been Determined

Prior to trial, the Court determined that CD was at fault in causing the (accident, injury, [or other appropriate characterization of the event]). You will decide the question of whether AB also was at fault in causing the (accident, injury, [or other appropriate characterization of the event]) and, if so, what percentage of fault each party bears for causing the (accident, injury, [or other appropriate characterization of the event]).

Comment

See Comment after PJI 1:2C.

PJI 1:2B. Split Trial—Liability

In this case you will decide only the question of liability, that is, which (party, parties), if any, (is, are) responsible for the (accident [or other appropriate characterization of the event]) that brings these parties to court. You are being asked to

decide only the question of fault. Should there be mention of an injury you will consider that reference only in deciding how the (accident [or other appropriate characterization of the event]) happened and not for any other purpose. This procedure is being followed at my direction, and you should draw no conclusions against any party from that fact.

**PJI 1:2C. Split Trial—Plaintiff’s Comparative Fault
Where Defendant’s Fault Previously Has Been
Determined**

Prior to trial, the Court determined that CD was at fault in causing the (accident [or other appropriate characterization of the event]). Thus, you will decide only the question of whether AB also was at fault in causing the (accident [or other appropriate characterization of the event]) and, if so, what percentage of fault each party bears for causing the (accident [or other appropriate characterization of the event]). Should there be any mention of an injury you will consider that reference only in deciding how the (accident [or other appropriate characterization of the event]) happened and not for any other purpose.

Comment

Direction of a split or bifurcated trial lies within the discretion of the court, CPLR 603, 4011, and is to be “encouraged” in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action, 22 NYCRR § 202.42(a); *Castro v Malia Realty, LLC*, 177 AD3d 58, 109 NYS3d 314 (2d Dept 2019); see *Zbock v Gietz*, 162 AD3d 1636, 79 NYS3d 441 (4th Dept 2018); *Patino v Nassau*, 124 AD3d 738, 3 NYS3d 43 (2d Dept 2015); *Johnson v Hudson River Const. Co., Inc.*, 13 AD3d 864, 786 NYS2d 250 (3d Dept 2004); *Fetterman v Evans*, 204 AD2d 888, 612 NYS2d 479 (3d Dept 1994); see also *Hernandez v Carter and Parr Mobile, Inc.*, 224 AD2d 586, 638 NYS2d 686 (2d Dept 1996). In personal injury cases, a separate trial of the issue of liability may save time, and may avoid undue prejudice by eliminating sympathy, see *Smerechniak v Hempstead*, 77 AD2d 944, 431 NYS2d 139 (2d Dept 1980). In addition, a split trial focuses the jury’s attention at the liability stage upon such questions as apportionment of fault, as to which see PJI 2:36 (comparative negligence); PJI 2:275 (contribution). When the court finds that a bifurcated trial should be held, PJI 1:2C should be used.

The court may determine the sequence in which issues shall be tried. CPLR 4011. Ordinarily, where the trial is bifurcated, the issue of liability should be tried first, unless the court orders otherwise, 22 NYCRR § 202.42(b), with the damages phase, if necessary, to follow immediately thereafter before the same judge and jury, unless the judge, for reasons stated on the record, finds such procedures impracticable, 22 NYCRR § 202.42(e). During the voir dire conducted before the liability phase, counsel may be allowed to question prospective jurors as to damages, if the same jury is to determine damages, 22 NYCRR § 202.42(c); see *Pavis v Scott*, 82 AD2d 800, 439 NYS2d 215 (2d Dept 1981). In opening to the jury on the liability phase, counsel may not discuss the question of damages. If the verdict on the liability phase makes it necessary to consider the issue of damages, counsel are entitled to address the jury on that subject before evidence is taken, 22 NYCRR § 202.42(d).

Historically the bench and bar perceived that precedent in the Second Department, in contrast to the other Departments, is inflexibly or nearly inflexibly in favor of bifurcation, *Castro v Malia Realty, LLC*, supra, see *Patino v Nassau*, supra. However, the Second Department has clarified that its precedent should not be interpreted as being inflexibly in favor of bifurcation and has stressed that a trial court must use its discretion to determine whether a personal injury trial should be unified or bifurcated in accordance with the standard set forth in 22 NYCRR § 202.42(a), *Castro v Malia Realty, LLC*, supra; see *Matthew H. v Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015).

When exercising its discretion in deciding whether to conduct a unified or bifurcated trial, a trial court should determine whether the nature of plaintiff's alleged injuries is probative of the issue of liability and should also evaluate the relative importance of evidence of the injuries to the parties' dispute, *Matthew H. v Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015); *Patino v Nassau*, 124 AD3d 738, 3 NYS3d 43 (2d Dept 2015). In addition, the probative value of that evidence to the issue of liability and its centrality to the parties' dispute should be weighed against the degree to which the gravity of the injuries will likely engender sympathy for plaintiff and thereby pose a risk of prejudice to defendant, *Patino v Nassau*, supra. A party opposing bifurcation and seeking a unified trial on the issues of liability and damages must show that the nature of the injuries has an important bearing on the issue of liability, *Gogatz v New York City Transit Authority*, 288 AD2d 115, 733 NYS2d 345 (1st Dept 2001); *Barrera v Skaggs-Walsh, Inc.*, 279 AD2d 442, 719 NYS2d 90 (2d Dept 2001); see *Zbock v Gietz*, 162 AD3d 1636, 79 NYS3d 441 (4th Dept 2018).

The relevance of the injuries sustained on the issue of liability may be so extensive that a full trial should be held, see *Bennetti v New York City Transit Authority*, 22 NY2d 742, 292 NYS2d 122, 239 NE2d 215 (1968) (error to exclude evidence of injuries that had direct bearing on force of impact and relative speeds of bus and vehicle); *Castro v Malia Realty, LLC*, 177 AD3d 58, 109 NYS3d 314 (2d Dept 2019) (unified trial

appropriate where nature of plaintiff's injuries has important bearing on issue of liability); *Fu v Washington*, 163 AD3d 1388, 81 NYS3d 666 (3d Dept 2018) (unified trial appropriate where same witnesses required for both liability and damages); *Zbock v Gietz*, 162 AD3d 1636, 79 NYS3d 441 (4th Dept 2018) (no abuse of discretion to deny bifurcation where damages for pre-impact terror and injuries intertwined with proof of liability); *Matthew H. v Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015) (error to deny motion for unified trial in strict liability action where evidence of injuries had an important bearing on questions of dog's vicious propensities and whether defendant had knowledge thereof); *Galarza v Crown Container Co., Inc.*, 90 AD3d 703, 934 NYS2d 465 (2d Dept 2011) (unified trial appropriate where nature of injuries has important bearing on issue of liability); *Carpenter v Essex*, 67 AD3d 1106, 888 NYS2d 278 (3d Dept 2009) (bifurcation inappropriate where it would prolong adjudication, take an emotional toll on families, with liability and damages "entwined"); *Totaro v Scarlatos*, 63 AD3d 1144, 882 NYS2d 258 (2d Dept 2009) (trial on assault and battery claim should not have been bifurcated where evidence of injuries was relevant to issue of whether defendant acted in self-defense); *Johnstone-Mann v Stout*, 63 AD3d 1713, 882 NYS2d 609 (4th Dept 2009) (error to order bifurcated trial where evidence of injuries and resulting amnesia necessary to enable jury to consider whether plaintiff should be held to lesser degree of proof on issue of liability); *Pasquaretto v Cohen*, 37 AD3d 440, 829 NYS2d 214 (2d Dept 2007) (unified trial appropriate where nature of injuries has important bearing on issue of liability); *Shea v 5008 Broadway Associates*, 292 AD2d 292, 739 NYS2d 155 (1st Dept 2002) (error to bifurcate where nature and extent of burns inextricably intertwined with liability, requiring medical proof to show causal connection between incident and injury); *Lind v New York*, 270 AD2d 315, 705 NYS2d 59 (2d Dept 2000) (unified trial appropriate where injuries from being crushed by wheel of bus relevant to manner in which accident occurred and necessary to refute driver's anticipated testimony and corroborated plaintiff's claim that bus struck her bicycle and rolled over her); *Brown v Congel*, 241 AD2d 880, 660 NYS2d 507 (3d Dept 1997) (no abuse of discretion to deny bifurcation where nature of injuries from assault had important bearing on liability); *Schaeffer v Lipton*, 217 AD2d 845, 629 NYS2d 515 (3d Dept 1995) (legal malpractice damages intertwined with causation requiring unified trial); *Addesso v Belting Associates, Inc.*, 128 AD2d 489, 512 NYS2d 416 (2d Dept 1987) (error to bifurcate where plaintiff had minimal recollection of accident, and evidence of injuries required to evaluate vehicle speed and force of impact); *Mignott v Sears, Roebuck & Co.*, 101 AD2d 731, 475 NYS2d 44 (1st Dept 1984) (error to bifurcate where mirror fell on plaintiff's head, and sole alleged injury, psychiatric dysfunction, had important bearing on liability); *Costa v Hicks*, 98 AD2d 137, 470 NYS2d 627 (2d Dept 1983) (evidence of injuries relevant on speed of vehicles, essential element of plaintiff's proof on issue of due care); *Raudzens v New York City Transit Authority*, 85 AD2d 722, 445 NYS2d 824 (2d Dept 1981) (closely related issues of cause and nature of injury and amnesia contraindicated split trial); *Williams v Adams*, 46 AD2d 952, 362 NYS2d 68 (3d Dept 1974) (evidence of injuries relevant on issue of

defendant's conduct at time of accident); *Williams v New York*, 36 AD2d 620, 318 NYS2d 536 (2d Dept 1971) (extent of injuries relevant on issue of excessive force in battery action).

Where the defendant's fault has been determined by summary judgment prior to trial and the plaintiff's comparative fault remains an issue, see *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018), the court should consider whether, in its discretion, it would be more expedient to conduct a unified trial, as the jury necessarily will be required to reach the issue of damages.

On the other hand, a trial has been bifurcated where there was no need for medical testimony as to the severity of the injuries in order to establish liability and the gravity of the injuries was such as to prejudice defendants in determining liability, *Patino v Nassau*, 124 AD3d 738, 3 NYS3d 43 (2d Dept 2015); *Jochsberger by Fine v Morandi*, 157 AD2d 706, 549 NYS2d 806 (2d Dept 1990); see *Jackson v Montefiore Medical Center*, 109 AD3d 762, 971 NYS2d 528 (1st Dept 2013) (bifurcation warranted where damages distinct from how accident happened); *Mohammed v Command Sec. Corp.*, 83 AD3d 605, 921 NYS2d 252 (1st Dept 2011) (same); *Darwak v Benedictine Hosp.*, 247 AD2d 771, 669 NYS2d 417 (3d Dept 1998) (bifurcation appropriate where medical malpractice injuries had no important bearing on liability); *Fetterman v Evans*, 204 AD2d 888, 612 NYS2d 479 (3d Dept 1994) (bifurcation warranted where assault injuries not intertwined with liability); *Martell v Chrysler Corp.*, 186 AD2d 1059, 588 NYS2d 682 (4th Dept 1992) (bifurcated trial verdict affirmed where evidence of injuries was allowed to extent related to products liability); *Smith v Sullivan*, 99 AD2d 776, 472 NYS2d 28 (2d Dept 1984) (error to order unified trial where severity of impact of hitting head on pool bottom not determinative of extent of injuries).

As a general principle, the liability phase of a bifurcated trial is not the proper juncture at which to adjudicate issues regarding the severity of the injuries of the party prosecuting the case, *Perez v State*, 215 AD2d 740, 627 NYS2d 421 (2d Dept 1995) (citing PJI). During the liability portion of a bifurcated trial arising out of an automobile accident, the fact finder should be concerned with the apportioning of fault among the parties whose negligence it finds to have been a proximate cause of the accident, *id.* Issues that pertain to the extent of the injuries suffered by a plaintiff should generally be left for the damages phase of the trial unless such issue is resolved by a summary judgment motion prior to trial, *id.* For a discussion of the Appellate Divisions' treatment of the "serious injury" requirement as either an element of liability or an element of damages, see Introductory Statement preceding PJI 2:88A–G.

Generally, evidence of the nature and extent of the injuries sustained should be excluded; but if some evidence of the injuries sustained is relevant on the issue of liability, the trial judge may allow evidence of such injuries, and give an appropriate limiting instruction

when the evidence is introduced, *Bennetti v New York City Transit Authority*, 22 NY2d 742, 292 NYS2d 122, 239 NE2d 215 (1968); see *Zbock v Gietz*, 162 AD3d 1636, 79 NYS3d 441 (4th Dept 2018) (where plaintiff sought damages for pre-impact terror, unified trial appropriate since nature of injuries intertwined with proof of liability); *Patino v Nassau*, 124 AD3d 738, 3 NYS3d 43 (2d Dept 2015); *Martell v Chrysler Corp.*, 186 AD2d 1059, 588 NYS2d 682 (4th Dept 1992); *Smith v Sullivan*, 99 AD2d 776, 472 NYS2d 28 (2d Dept 1984); PJI 1:65, 1:66 (evidence admitted for limited purpose).

Schechter v Klanfer, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971) requires the jury to decide whether the plaintiff's claim of loss of memory is "supported by the objective nature and extent of the physical injuries plaintiff sustained," see PJI 1:62. When the *Schechter* rule is invoked, some evidence of injury must be allowed, see *Pretto v Leiwant*, 80 AD2d 579, 435 NYS2d 778 (2d Dept 1981) (because plaintiff claimed retrograde amnesia, court ordered that, upon retrial, issues of liability and damages be tried together); see also *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986) (citing PJI).

PJI 1:2D. Split Trial—Damages

The question of liability already has been decided. Thus, in this part of the case you will decide only the nature and extent of AB's injuries and what amount of money will fairly and justly compensate AB for all resulting loss. Should there be mention of how the (accident, injury [*or other appropriate characterization of the event*]) happened, you will consider that reference only in deciding the amount of money, if any, that will fairly and justly compensate AB.

Comment

Caveat: The issue of whether the plaintiff sustained a "serious injury" within the meaning of the Insurance Law is not addressed in this preliminary charge, see Comment to PJI 2:88.

Once liability has been decided in a bifurcated trial, there is no obstacle to the same jury, even though non-unanimous on the question of liability, deciding and assessing damages, provided the jury is instructed as set forth in PJI 1:2D that the defendant's liability has already been decided and that damage issues must be decided based on the premise of liability, *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 480 NYS2d 328 (2d Dept 1984) (citing PJI).

As to bifurcation where a plaintiff seeks punitive damages, see Comment, PJI 2:278, Bifurcation.

PJI 1:3. Openings and Evidence

When I have completed these instructions, the attorneys will make opening statements in which each will outline for you what (he, she) expects to prove. The purpose of opening statements is to tell you about each party's contentions so you will have a better understanding of the evidence as it is introduced. What is said in opening statements is not evidence. The evidence upon which you will base your decision(s) will come from the testimony of witnesses here in court or in sworn testimony given before trial, or in the form of photographs, documents, or other exhibits admitted into evidence.

In this case, (plaintiff AB, defendant CD) makes an opening statement first and is followed by [defendant CD, plaintiff AB]. After the opening statements, (AB, CD) will introduce evidence in support of (his, her, its) claim. Normally a party must produce all (his, her, its) witnesses and complete (his, her, its) entire case before the opposing party introduces any evidence, although exceptions are sometimes made. After the opposing party has completed the introduction of all (his, her, its) evidence, the other party may, but is not required to, present witnesses and exhibits. If (he, she, it) does so, then the other party may, but is not required to, offer additional evidence for the purpose of rebuttal. A witness is examined by the party who calls that witness to testify, and then may be questioned by the opposing party in cross-examination. Additional questioning may occur.

Comment

Each party has the right to make an opening statement, CPLR 4016. It is error to deny a party an opportunity to make an opening statement, *De Vito v Katsch*, 157 AD2d 413, 556 NYS2d 649 (2d Dept 1990); *Lohmiller v Lohmiller*, 140 AD2d 497, 528 NYS2d 586 (2d Dept 1988). The party having the burden of proof is entitled to open first (usually the plaintiff), and is determined by the trial court, with reference to the pleadings, *Lake Ontario Nat. Bank v Judson*, 122 NY 278, 25 NE 367 (1890). While defense counsel may move to dismiss at the close of plaintiff's opening, *De Vito v Katsch*, *id.*, such motions are

disfavored and rarely granted, see *Rosario by Vasquez v New York*, 157 AD2d 467, 549 NYS2d 661 (1st Dept 1990). Dismissal is appropriate only where it becomes obvious that the action lacks a legal basis, or where a complaint is conclusively defeated either by a clearly and factually admitted defense, or by an admission or concession so ruinous to plaintiff's case that dismissal is warranted, *Jones v Davis*, 307 AD2d 494, 763 NYS2d 136 (3d Dept 2003); *JLJ Recycling Contractors Corp. v Babylon*, 302 AD2d 430, 754 NYS2d 897 (2d Dept 2003); *Giambona v Stein*, 265 AD2d 775, 697 NYS2d 399 (3d Dept 1999) (admissions must be so self-defeating as to irreparably preclude all possibility of judgment); *De Vito v Katsch*, supra; *Gleyzer v Steinberg*, 254 AD2d 455, 679 NYS2d 154 (2d Dept 1998). When a claim or defense asserted in an opening statement has been challenged as inadequate, counsel should be offered the opportunity to correct or enhance the opening statement by making an offer of proof, *De Vito v Katsch*, supra.

PJI 1:4. Objections, Motions

At times during the trial, an attorney may object to a question or to the introduction of an exhibit or make motions concerning legal questions that apply to this case. Arguments in connection with objections or motions sometimes are made outside the presence of the jury. Any ruling I make will be based solely on the law and therefore you must not conclude from any ruling or from anything I say during the trial that I favor (either, any) party to this lawsuit.

PJI 1:5. Summations

After all the evidence is in, the attorneys will speak to you in a closing statement or summation. In summing up, the lawyers will point out what they contend the evidence has shown, what inferences or conclusions they contend you should draw from the evidence, and what conclusions they contend you should reach as your verdict. What attorneys say in summation, like what they say in jury selection, opening statements, or in the making of objections or motions during the trial, is only argument and not evidence. Under our system, (defendant CD, plaintiff AB) sums up first, followed by (plaintiff AB, defendant CD).

Comment

CPLR 4016 provides that at the close of all the evidence on the is-

sues tried, an attorney for each party may make a closing statement in inverse order to opening statements.

PJI 1:6. Function of Court and Jury

After summations, I will instruct you on the rules of law that apply to this case. You then will retire for your deliberations. Your function as jurors is to decide what has or has not been proved and to apply the rules of law I give you to the facts as you find them to be. The decision(s) you reach will be your verdict. Your decision(s) will be based on the testimony you hear and the exhibits received in evidence during the trial. You are the sole and exclusive judges of the facts and nothing I say or do should be taken by you as any indication of my opinion as to the facts. Neither I nor anyone else can take over your responsibility to determine the facts. My role is to preside impartially and not to express any opinion concerning the facts. Any opinion of mine on the facts would, in any event, be totally irrelevant because the facts are for you to decide. On the other hand, and with equal emphasis, I instruct you that in accordance with the oath you took as jurors you must accept the rules of law I give you whether or not you agree with them. You are not to ask anyone else about the law. You must not consider or accept any advice about the law from anyone other than me.

Comment

As a practical matter, trial courts sometimes must take a more active role in the presentation of evidence to clarify a confusing issue or to avoid misleading the trier of fact, *People v Arnold*, 98 NY2d 63, 745 NYS2d 782, 772 NE2d 1140 (2002). While neither the nature of our adversary system nor the requirement of a fair trial precludes a trial court from assuming an active role in the truth-seeking process, the court's discretion is not unfettered, *id.* The overarching principle restraining the court's discretion is that the function of the judge is to protect the record at trial, not to make it, *id.* The trial judge may ask questions of the witnesses, but must avoid giving the appearance of partiality when exercising this discretionary power, *People v Yut Wai Tom*, 53 NY2d 44, 439 NYS2d 896, 422 NE2d 556 (1981); *Troyano v Burris*, 196 AD3d 525, 147 NYS3d 419 (2d Dept 2021); *Porcelli v Northern Westchester Hosp.*

Center, 110 AD3d 703, 977 NYS2d 32 (2d Dept 2013); *Mantuano v Mehale*, 258 AD2d 566, 685 NYS2d 467 (2d Dept 1999); *LaMotta v New York*, 130 AD2d 627, 515 NYS2d 554 (2d Dept 1987); *Accardi v New York*, 121 AD2d 489, 503 NYS2d 818 (2d Dept 1986); see *Papa v New York*, 194 AD2d 527, 598 NYS2d 558 (2d Dept 1993). Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial, *People v Arnold*, *supra*; *Doe v Department of Educ. of City of New York*, 54 AD3d 352, 862 NYS2d 598 (2d Dept 2008); *Vazquez v Costco Companies, Inc.*, 17 AD3d 350, 792 NYS2d 593 (2d Dept 2005), see *Troyano v Burris*, *supra*. There is no absolute bar to a trial court asking a particular number of questions of a seated witness or recalling a witness to the stand when doing so advances the goals of truth and clarity, *People v Arnold*, *supra*. A court may not, however, assume the advocacy role traditionally reserved for counsel and, to avoid this, the court's discretion to intervene must be exercised sparingly, *id.*; see *People v Smith*, 181 AD3d 828, 118 NYS3d 444 (2d Dept 2020).

In those unusual circumstances in which a court feels compelled to call its own witness over the objection of a party, it should explain why and invite comment from the parties, *People v Arnold*, 98 NY2d 63, 745 NYS2d 782, 772 NE2d 1140 (2002). This will provide an appellate court with a basis to review the trial court's exercise of discretion, *id.* In *People v Arnold*, the Court of Appeals held that the trial court abused its discretion because it assumed the parties' traditional role of deciding what evidence to present and introduced evidence that had the effect of corroborating the prosecution's witnesses and discrediting defendant on a key issue. Although it did not appear from the record that the trial judge intended to give an advantage to either side, the court held the judge abused his discretion in calling a police officer on a key issue when both parties chose not to do so, *id.*; see *State v Richard F.*, 180 AD3d 1339, 119 NYS3d 640 (4th Dept 2020).

PJI 1:7. Consider Only Competent Evidence

As the sole judges of the facts, you must decide which of the witnesses you believe, what portion of their testimony you accept and what weight you give to it. At times during the trial I may sustain objections to questions, and you may hear no answer, or, where an answer has been given, I may instruct that it be stricken or removed from the record and that you disregard it. You may not draw any inference or conclusion from an unanswered question nor may you consider testimony that has been stricken or removed from the record in reaching your decision(s). The law requires that your decision(s) be made solely on the evidence

before you. Any items I exclude from your consideration will be excluded because they are not legally admissible.

PJI 1:7A. Impartiality

A lawsuit is a civilized method of determining disputes. It is basic to the administration of any system of justice that the decisions on both the law and the facts be made fairly and honestly. You as the jurors and I as the court have a heavy responsibility—to act impartially and ensure a just result is reached in deciding the dispute(s) between the plaintiff(s) and the defendant(s) in this case.

PJI 1:7B. Fair Juror and Absence of Implicit or Unconscious Bias

As a fair and impartial juror you must guard against the application of any stereotypes or attitudes about people or groups that might lead you to render a decision based on those stereotypes or attitudes. Keep in mind that bias is not always obvious or conscious. In assessing the testimony and other evidence in the case, you must not be swayed by those stereotypes or attitudes.

Comment

See UCS Anti-Discrimination and Anti-Harassment Policy.

PJI 1:8. Weighing Testimony

The law does not require you to accept all the evidence I will admit. In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and decide how much weight, if any, you choose to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness' recollection is faulty, or because the witness

has not expressed himself or herself clearly. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all the experience and background of your lives. In your everyday affairs, you decide for yourselves the reliability or unreliability of things people tell you. The same tests you use in your everyday dealings are the tests you should apply in your deliberations. In deciding how much weight, if any, you will give to a witness' testimony, you may consider the interest or lack of interest of that witness in the outcome of this case, the bias or prejudice of the witness, if there be any, the age, the appearance, the manner in which the witness gives testimony on the stand, the opportunity and ability the witness had to observe the facts about which he or she testifies, and the probability or improbability of the witness' testimony when considered in light of all the other evidence in the case. If it appears there is a conflict in the evidence, you should decide whether and to what extent the apparent conflict can be reconciled by fitting the different versions together. If you cannot do so, you will have to decide which of the conflicting versions you will accept, if any.

Comment

A juror may consider his or her everyday experiences in weighing testimony, *Selzer v New York City Transit Authority*, 100 AD3d 157, 952 NYS2d 26 (1st Dept 2012) (citing PJI).

PJI 1:9. Conduct During the Time you Serve as a Juror

To help make sure a just result is reached when you decide this case, consistent with the oath you took as a juror, there are several rules that must govern your conduct during the time you serve as a juror.

PJI 1:10. Do Not Visit or View Scene

Because this case involves something that happened at a particular location, you may be tempted to visit the location. You may not do so. Even if

you live near the location, you must not go to it or pass by it until the case is over. In addition, do not attempt to view the scene by using any computer programs. Viewing the scene either in person or through a computer program would be unfair to the parties because the location as it looked at the time of the (accident, injury, [*or other appropriate characterization of the event*]) and as it now looks may be very different. This case involves a location as it existed at the time of the (accident, injury, [*or other appropriate characterization of the event*]), not as it exists today. Also, in making an unauthorized visit or viewing, you might get a mistaken impression, leading to unfairness to the parties who need you to decide this case solely on the evidence I admit for your consideration. Thus, you must rely only on the evidence admitted here in court to determine the circumstances and conditions under which the (accident, injury, [*or other appropriate characterization of the event*]) occurred.

Comment

Caveat: Where the trial is or is likely to be the subject of media attention, the charge should be expanded to instruct the jury not to read, listen to or watch reports in any format about the case.

Based on *Alford v Sventek*, 53 NY2d 743, 439 NYS2d 339, 421 NE2d 831 (1981) (jurors should continue to be admonished not to view the accident scene prior to rendering their verdict); *People v Crimmins*, 26 NY2d 319, 310 NYS2d 300, 258 NE2d 708 (1970); *People v De Lucia*, 20 NY2d 275, 282 NYS2d 526, 229 NE2d 211 (1967); *Adams Laundry Machinery Co. v Prunier*, 74 Misc 529, 134 NYS 475 (Sup 1911), *aff'd*, 153 App Div 930, 138 NYS 1105 (3d Dept 1912), *aff'd*, 214 NY 637, 108 NE 1088 (1915). An unauthorized view by the jury of the scene of the incident creates the possibility that the jury has been exposed to changed circumstances or to facts not in evidence and which the parties do not have the opportunity to rebut, *Alford v Sventek*, *supra*; *Adams Laundry Machinery Co. v Prunier*, *supra*; *Marino v Erie*, 258 AD2d 941, 685 NYS2d 537 (4th Dept 1999). It also makes the jurors unsworn witnesses not subject to cross examination, see *Alford v Sventek*, *supra*. Nevertheless, while an unauthorized visit to the scene is inherently prejudicial in a criminal case, *People v Crimmins*, *supra*; *People v De Lucia*, *supra*, it is not inherently prejudicial in a civil case, *Alford v Sventek*, *supra*.

For a supplemental charge where the court has decided to have the jury visit the scene of the accident or incident, see PJI 1:104A.

PJI 1:11. Discussion Among Jurors—Keep an Open Mind—Independent Research

In fairness to the parties to this lawsuit, it is very important for you keep an open mind throughout the trial. You must reach your decision(s) and verdict on the evidence only as it is admitted during this trial, and then only after you have heard the summations of the attorneys and my instructions to you on the law. Then you will exchange your views and opinions with the other members of the jury to reach your decision(s) and verdict.

While it is human nature for you to form tentative opinions about the witnesses, testimony and other evidence as the trial progresses, and there is a strong temptation to discuss those opinions during the course of the trial, the law does not permit it. The reason for this is that if you engage in premature discussions, without the benefit of all the evidence, the summations by the lawyers, and my final instructions on the law, your discussions will not be fully informed. That would be unfair to the parties.

For this reason, among others, do not do any independent research on any topic you might hear about in this case, whether by consulting others, reading any material or conducting internet searches of any kind. Some of the topics you are not to discuss or research are the law or any of the issues in the case. You also must not discuss or do research about the parties, the lawyers, the witnesses, or me. After you have rendered your verdict and have been discharged, you will be free to do any research you choose, or to share your experiences. Remember these rules while you are serving as a juror, whether in the courtroom or elsewhere, including whenever you use a computer or other personal electronic device. It is vital that you carefully follow these directions. The law requires that you consider only the testimony and other evidence admitted at this trial. Not only does

our law mandate it, but the parties depend on you to fairly and impartially consider only the admitted evidence. To do otherwise, by allowing outside information, which may be incomplete, inaccurate, or otherwise unreliable, to affect your judgment, would be unfair and prejudicial to the parties and could require a re-trial of this case.

All cell phones, smartphones, laptops, tablets or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating.

Comment

Caveat: If the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice.

The jury's consideration of materials not in evidence may result in setting aside a verdict where there is a likelihood of prejudice, *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 643 NYS2d 211 (2d Dept 1996) (juror disseminated information to jury from outside source that was not in evidence or otherwise properly before jury), or where a juror used outside information to influence a jury decision, *Olshantesky v New York City Transit Authority*, 105 AD3d 600, 964 NYS2d 101 (1st Dept 2013) (jury consulted online dictionary to define term critical to its verdict); *Ryan v Orange County Fair Speedway*, supra; *Fitzgibbons v New York State University Const. Fund*, 177 AD2d 1033, 578 NYS2d 317 (4th Dept 1991); *Maslinski v Brunswick Hosp. Center, Inc.*, 118 AD2d 834, 500 NYS2d 318 (2d Dept 1986) (jury read definition of "mal-practice" contained in several medical dictionaries). A new trial was not required, however, where jurors consulted a dictionary for the meaning of "proximate" but the court retrieved the dictionary from the jury and instructed it to decide the case solely on the evidence and the court's instructions, *Sansone v Lake*, 124 AD2d 990, 508 NYS2d 957 (4th Dept 1986); see *Desmond v Nassau Hosp.*, 157 AD2d 828, 550 NYS2d 730 (2d Dept 1990).

To prevail on a claim that a verdict was tainted by improper outside influence, a party is not required to demonstrate prejudice to a certainty; the facts in each case must be examined to determine the nature of the improper materials and the likelihood that prejudice would be engendered, *Edbauer v Board of Educ. of North Tonawanda City School Dist.*, 286 AD2d 999, 731 NYS2d 309 (4th Dept 2001); see *People v Neulander*, 34 NY3d 110, 111 NYS3d 259, 135 NE3d 302 (2019) (new trial required where, during trial, juror sent and received hundreds of text messages about case, ignoring trial court's repeated instructions not to discuss case with any person, coupled with juror's attempted cover-up; conduct may have affected substantial right of defendant to trial by impartial jury).

There are only a few New York appellate cases concerning the consequences of a juror's use of social media. In *People v Wilson*, 93 AD3d 483, 939 NYS2d 463 (1st Dept 2012), the First Department upheld denial of defendant's CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct. The juror had made Facebook postings advising her friends that she was on a jury, but not discussing the case. Some of the juror's friends made "foolish" replies; however, the juror testified unequivocally that she was not affected by their replies, did not discuss the case with anyone during the trial, and decided the case impartially, based only on the evidence. In *People v Cosme*, 173 AD3d 445, 102 NYS3d 187 (1st Dept 2019), the First Department held the trial court providently exercised its discretion in dismissing an alternate juror who engaged in substantial misconduct involving trial related social media posts. In *People v Ramirez*, 177 AD3d 460, 112 NYS3d 723 (1st Dept 2019), a juror self-disclosed that during the trial he made Facebook postings about the proceedings, including his personal feelings. After questioning the juror in the presence of all counsel, the court concluded there was no reason to disqualify the juror.

See comment PJI 1:105.

PJI 1:12. Discussion with or by Others

Do not talk, either among yourselves or with anyone else, about anything related to this case. You may tell people you are a juror and give them information about when you will be required to be in court, but you must not talk with anyone about any other matters related to this case.

You must not provide any information about this case to anyone by any means whatsoever. This means you must not discuss or give or get information about any matter related to this case by telephone, text message, email, or any internet services or social media, including, for example, blogs, chat rooms, Google, Facebook, Twitter, LinkedIn, Instagram, TikTok, or any other platform.

You must not permit any person who is not a juror to talk about this case in your presence, and if anyone does so despite your telling that person not to, report that to me as soon as you are able. However, you must not discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.

PJI 1:13. Conversation with Parties, Attorneys or Witnesses

Although it is a normal human tendency to talk to people with whom you come in contact, during the time you serve on this jury, do not talk, whether in or out of the courtroom, with any of the parties or their attorneys or any witness. By this I mean not only do not talk about the case, but do not talk to them at all, even to pass the time of day. In no other way can all parties be assured of the absolute impartiality they are entitled to expect from you as jurors. If a lawyer, party or witness does not acknowledge you, that person is not being rude, but is merely following my instructions not to speak with you.

The parties and the attorneys involved in this case, or people working with them on this case, may properly look at a juror's public website, public social media, posts or blogs, or your social media profiles that are publicly accessible. This may have occurred during jury selection, and also may occur during the course of this trial, during deliberations, and after the trial has ended. While the parties and attorneys may look at your public media, they may not communicate with you through public media or any other way during the trial and deliberations.

In fact, nobody may communicate with you about the case for any reason in any manner during the course of this trial or during the time you are deliberating. If you believe anyone has attempted to communicate with you, in any manner about the case, let me know as soon as possible. You should not communicate about the case with anyone other than me or the court officer.

Comment

As to conversations with a witness, see, *People v Young*, 218 AD2d 767, 630 NYS2d 568 (2d Dept 1995); *People v Matiash*, 197 AD2d 794, 602 NYS2d 977 (3d Dept 1993); *Morrow v Dotts*, 208 App Div 788, 203 NYS 382 (2d Dept 1924) (new trial granted). As to conversation with a

party or counsel, see *Turner & Winchell v Beardsley*, 19 Wend 348 (NY 1838); *Garcia v Brooklyn Hosp.*, 270 AD2d 386, 704 NYS2d 635 (2d Dept 2000) (denying new trial); *Sincock v Boehme*, 9 AD2d 579, 189 NYS2d 571 (3d Dept 1959); *Werner v Interurban St. Ry. Co.*, 99 App Div 592, 91 NYS 111 (2d Dept 1904) (reinstating verdict); *Fleischmann v Samuel*, 18 App Div 97, 45 NYS 404 (2d Dept 1897) (denying new trial). Holding such a conversation may also be punished as a civil contempt, Judiciary Law § 753(6); *Matter of Werra*, 123 Misc 788, 206 NYS 455 (Sup 1924), *aff'd*, 208 App Div 856, 204 NYS 957 (2d Dept 1924).

PJI 1:13A. Juror Concerns

During this trial circumstances may arise when a juror has the need to bring a matter to my attention. Should any one of you find yourself in that situation, please notify our court officer, either orally or through a note, that you need to speak to me, and I will then instruct you further. Do not tell any other juror or anyone else about the matter you seek to bring to my attention.

PJI 1:13B. Alternate/Additional Jurors

Under the law only six jurors will deliberate on this case. We have selected additional jurors because at some time during the trial a juror may be unable to continue service due to some emergency. All of you are required to pay the same careful attention during the trial so that each of you will be fully familiar with the case. The fact that there are additional jurors does not mean that any juror is free to excuse himself or herself from the case. As a duly sworn juror it is your obligation to be available and attentive throughout the trial.

Comment

Based on CPLR 4105 and 4106.

CPLR 4105 provides that “[t]he first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.” CPLR 4106 states, in relevant part, that “alternate . . . jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as

regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors. After final submission of the case, the court may, in its discretion, retain such alternate juror or jurors to ensure availability if needed.”

Notwithstanding these statutory provisions, it is recommended that, to the extent possible, the court utilize nondesignated alternates, see PJI Voir Dire—Selecting The Jury, Nondesignated Alternates in this volume. However, this may only be accomplished by obtaining the consent or acquiescence of the parties to using nondesignated alternates. Where, however, a party requests that the court, in accordance with CPLR 4105 and 4106, empanel the first six jurors that were selected and designate the remaining jurors as alternates, the court must grant that request and may not use nondesignated alternates, *Piacente v Bernstein*, 127 AD3d 1365, 6 NYS3d 793 (3d Dept 2015). For the procedure for nondesignated alternates, see Uniform Rules for Trial Cts [22 NYCRR § 220.1 (c)] (Nondesignated alternate jurors; Designation of jurors); PJI Voir Dire—Selecting The Jury, Nondesignated Alternates, *supra*.

CPLR 4106 provides that, after deliberations have begun, a trial court may replace a deliberating juror with an alternate juror where the deliberating juror “becomes unable to perform the duties of a juror.” In determining whether discharge and replacement of a juror is appropriate, a trial court must, after receiving notice that a juror may not be able to perform his or her duty, and in consultation with the attorneys, on the record, make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and replaced with an alternate juror, *Garbie v Ahmad*, 168 AD3d 687, 91 NYS3d 222 (2d Dept 2019). Failure to make adequate inquiry prior to discharging a deliberating juror is error, requiring a new trial, *id.*

The court has discretion, with or without consent of counsel, to retain alternate jurors after final submission of the case to ensure the alternates’ availability, if needed, see CPLR 4106. The court may also substitute retained jurors for jurors who become unavailable after final submission, *id.* Alternate jurors who are discharged should be instructed not to communicate about the case with any sitting juror or anyone else until after they have been advised by the court that a verdict has been returned, see *Fader v Planned Parenthood of New York City, Inc.*, 278 AD2d 41, 717 NYS2d 166 (1st Dept 2000). Where the damages issue is to be decided by the same jury in a bifurcated trial, the alternate jurors should not be excused, see Uniform Rules for Trial Cts [22 NYCRR] § 202.42 (c) (Bifurcated trials).

PJI 1:13C. Juror Note-Taking

[If the Court has permitted juror notetaking, the following charge should be read:]

If you want to you may take notes and we will provide note taking materials to you. Whether you take notes or not, you should be aware that the court reporter records everything stated in the courtroom, and any portion of the transcript, at your request, will be read back to you during your deliberations. If you do take notes during the trial, you should not allow your notetaking to become a distraction from the proceedings. If any of you do take notes during the trial, those notes are only for your personal use and can only be used as an aid to your memory. Any difference between any juror's recollection and any juror's notes should always be settled by asking to have the court reporter's transcript on that point read back to you. The court transcript should govern your deliberations and determinations rather than a juror's notes. A juror's notes are not a substitute for the official record or for the governing principles of law that I will give to you during and at the end of the trial. Your notes are confidential and will be collected and secured at the end of each session and destroyed at the end of the trial.

Comment

Based on the Uniform Rules for Trial Courts [22 NYCRR] § 220.10. The Uniform Rules provide that the court shall decide whether note-taking at any stage of the proceeding shall be allowed. The decision shall be made after the jury has been sworn and before opening statements. In determining whether to allow the jury to take notes, the Court should consider the probable length of the trial and the complexity of the evidence likely to be admitted, 22 NYCRR § 220.10(b). Those Rules also provide that the notes are confidential and shall not be available for examination. The rule expressly provides that the instruction shall be repeated in the charge after trial if note-taking is permitted.

Case law addresses the court's discretion as to whether and when to allow jurors to take notes during the trial. *People v Hues*, 92 NY2d 413, 681 NYS2d 779, 704 NE2d 546 (1998) (citing PJI); *People v Tucker*, 77 NY2d 861, 568 NYS2d 342, 569 NE2d 1021 (1991); *People v DiLuca*, 85 AD2d 439, 448 NYS2d 730 (2d Dept 1982) (citing PJI); see *Bolm v Triumph Corp.*, 58 AD2d 1014, 397 NYS2d 498 (4th Dept 1977) (error to tell a single juror to take notes of the "key" portions of the charge). The Court of Appeals has held that a trial court, although not obligated to do so, has the discretion to permit note taking by jurors during a trial, *People v Hues*, supra. If a trial court determines that a particular case

warrants note-taking, the court can, sua sponte, instruct jurors that they are permitted to take notes during the trial, *id.*

There is some tension between the Uniform Rules and case law concerning note-taking. The Rules direct that the Court's determination as to note-taking be made at the beginning of the trial. Case law, however, recognizes that the issue might not be raised until some later point in the trial.

Whenever note-taking is permitted, preliminary cautionary instructions should be given, *People v Hues*, 92 NY2d 413, 681 NYS2d 779, 704 NE2d 546 (1998) (citing PJI); *People v DiLuca*, 85 AD2d 439, 448 NYS2d 730 (2d Dept 1982) (citing PJI); 22 NYCRR § 220.10(c). The instruction, as modified, should also be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberations, *People v Hues*, *supra*; *People v DiLuca*, *supra*; see PJI 1:25B. If the determination to allow note-taking is made during the trial, the pattern charge should be modified accordingly. If the court allows note-taking during its charge, the court should instruct the jury that any disagreement among them about the law, particularly between a juror's recollection and any notes, requires a readback of the charge, *People v Tucker*, 77 NY2d 861, 568 NYS2d 342, 569 NE2d 1021 (1991). Jurors may take notes during supplemental charges if cautionary instructions are given, *People v Tucker*, *supra*; *People v Brown*, 182 AD2d 563, 582 NYS2d 715 (1st Dept 1992). However, it is error for jurors to take notes on a judge's oral charge if no cautionary instructions are given, *People v Sundquist*, 175 AD2d 319, 572 NYS2d 410 (3d Dept 1991); *People v Anderson*, 151 AD2d 335, 542 NYS2d 592 (1st Dept 1989), or if the cautionary instruction failed to remind the jury that notes were only for the notetaker's personal use and that jurors had to request re-instruction if there was any disagreement, *People v Morales*, 159 AD2d 86, 559 NYS2d 869 (1st Dept 1990). It is also error to permit jurors to take notes when the requested portions of testimony are read back during deliberations where no cautionary instructions are given, *People v Stewart*, 179 AD2d 731, 578 NYS2d 638 (2d Dept 1992), *aff'd*, 81 NY2d 877, 597 NYS2d 634, 613 NE2d 540 (1993).

PJI 1:13D. Juror Questioning

[If the Court permits questioning by jurors, the following charge should be given.]

If any of you has a question you would like to ask a witness or the court, please write the question on a piece of paper, which the court officer will deliver to me. I will decide whether and how the question may be asked, and what procedure to follow.

Comment

Caveat: If PJI 1:13D has not been given and, during the course of

the trial the court decides to allow juror questioning, PJI 1:104 should be given at that time.

Whether and the extent to which jurors are permitted to ask questions is left to the discretion of the trial court, *People v Knapper*, 230 App Div 487, 245 NYS 245 (1st Dept 1930); see *People v Riley*, 92 AD2d 576, 459 NYS2d 332 (2d Dept 1983). If the trial judge decides to allow jurors to propound questions, the best practice is for the trial court to instruct the jury, prior to the taking of testimony, to submit all questions in writing, in order that the trial court can insure that the question is in legally proper form, and not prejudicial, *People v Wilds*, 141 AD2d 395, 529 NYS2d 325 (1st Dept 1988).

An example of instructions concerning juror questioning that has been used without objection follows and the court may adapt them to suit local practices:

“After everyone has finished asking their questions. I will give you the opportunity to ask the witness questions in writing as follows:

1. You may take a full sheet of paper from the back of the pad that has been provided to you to take notes.
2. On that paper, please write each of your question separately numbered.
3. Use only the pen which has been provided to you.
4. Do not place your name or jury number anywhere on the paper. It must be completely anonymous.
5. Please be sure that you write your questions legibly and neatly. If I cannot read it, I cannot ask it of the witness no matter how good the question may be.
6. There is no requirement that you submit any questions. It is to give you an opportunity to better understand the witness’ testimony. The choice to ask a question or questions is purely yours.
7. After you have finished your questions, give the sheet to the court officer who will shuffle them to further assure anonymity. The questions will then be stapled and marked as a court exhibit.
8. I will then adjourn to my chambers with counsel and our court reporter to review the questions. I

will read each question aloud to counsel, make an initial ruling as to the propriety of the question and then I will hear counsel's objections, if any, as to whether the question is proper under our rules of evidence. At the appropriate time, I will give counsel the opportunity to voice their objections on the record.

9. I will rule on each objection and decide whether to ask the question or not. In so doing, I will make a red check mark in the margin if I rule in favor of asking the question and a red X in the event I decide to ask the question.
10. Just as I sustained objections made by attorneys during the trial, I will apply the same standard to your questions. If there is an objection, I will note that one was made and by whom. I will state my ruling.
11. Do not be upset or insulted if one or more of your questions is not allowed. In fact, I have found that most jury questions are perceptive and clear. However, such a decision shall be made as fairly as I have throughout the trial. Further, you should not speculate as to which attorney objected to any particular question. The odds are you will be incorrect since in the first instance it is my call and it does not matter. The key is that you will have an opportunity to ask questions of witnesses. Also, do not speculate as to what the answer to an unasked question would be.
12. Once I have asked all of your questions which I permit, the party who called the witness will be given the opportunity to follow up with the witness solely with regard to your questions. Then, in the same order, the other attorneys will likewise be permitted to follow up on your questions. Then, the witness will be excused.

N.B.—The juror questions should be asked by the trial judge who can follow-up on juror questions but should indicate that it is the court's question."

For another example see, CJI2d, Juror Questions to Witnesses, [https://nycourts.gov/judges/cji/1-General/CJI2d.Jury Questions.pdf](https://nycourts.gov/judges/cji/1-General/CJI2d.Jury%20Questions.pdf).

PJI 1:14. Conclusion

The description of trial procedure, the rules governing your conduct and the legal principles I have described for you will, I believe, make it easier for you to understand the trial as it proceeds and to reach a just result at its conclusion.

PATTERN JURY INSTRUCTIONS

B. CHARGE AFTER TRIAL

[Where the particular case calls for a charge concerning admission against interest (PJI 1:55, PJI 1:56), the effect of presumption on burden of proof (PJI 1:63), evidence admitted for a limited purpose (PJI 1:65, PJI 1:66), direct and circumstantial evidence (PJI 1:70), failure to produce evidence (PJI 1:75), privilege (PJI 1:76), expert witnesses (PJI 1:90), the appropriate pattern charge(s) should be inserted where the court deems appropriate.]

[The following charges can be given in any order the Court determines is appropriate.]

PJI 1:20. Introduction

Members of the jury, we now come to that portion of the trial when you are instructed on the law that applies to the case, after which you will retire for your deliberations. You have heard and seen all the evidence introduced by the parties and through arguments of their attorneys you have learned the conclusions each party believes should be drawn from the admitted evidence.

PJI 1:21. Review Principles Stated

You will recall that at the beginning of the trial I stated certain principles. Briefly, they were that you are bound to accept the rules of law as I give them to you whether or not you agree with them. You are not to ask anyone else about the law. You must not consider or accept any advice about the law from anyone other than me.

During this trial, I have ruled on the admission of evidence and on motions made with respect to the applicable law. You must not conclude from any ruling I have made, any questions I might have asked or anything I have said that I favor any party to this lawsuit.

Your view of the evidence and your decision(s) on the issue(s) of fact will decide this case. During the trial, I may have sustained objections to ques-

tions without allowing the witness to answer or where an answer was made, instructed that it be removed or stricken from the record, and that you disregard it and dismiss it from your minds. In reaching your decision(s), you may not draw any inference or conclusion from an unanswered question, nor may you consider testimony that has been removed or stricken from the record. The law requires that your decision(s) be made solely on the admitted evidence. Anything I excluded from your consideration was excluded because it was not legally admissible.

In deciding how much weight, if any, you choose to give to the testimony of any particular witness, there is no magical formula that can be used. The tests used in your everyday affairs to decide the reliability or unreliability of statements made to you by others are the tests you will apply in your deliberations. In deciding how much weight, if any, to give to a witness' testimony, you may consider the interest or lack of interest of that witness in the outcome of this case, the bias or prejudice of the witness, if there be any, the age, the appearance, the manner in which the witness gave testimony on the stand, the opportunity and ability the witness had to observe the facts about which he or she testified, and the probability or improbability of the witness' testimony when considered in the light of all the other evidence in the case. If it appears there is a conflict in the evidence, you will have to consider whether and to what extent the apparent conflict can be reconciled by fitting the different versions together; otherwise, you will have to decide which of the conflicting versions, if any, you will accept.

By the processes I have just described and any further instructions I may give, you, as the sole judges of the facts, decide which of the witnesses you believe, what portion of their testimony you accept and what weight you give to it.

PJI 1:22. Falsus in Uno

If you find that any witness has willfully testified falsely as to any important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one important matter is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of the witness' testimony as you deem true and disregard what you deem is false.

Comment

Based on *Deering v Metcalf*, 74 NY 501 (1878); *Washington Mut. Bank v Holt*, 113 AD3d 755, 979 NYS2d 612 (2d Dept 2014); *DiPalma v State*, 90 AD3d 1659, 936 NYS2d 464 (4th Dept 2011); *Petrovski v Fornes*, 125 AD2d 972, 510 NYS2d 366 (4th Dept 1986) (citing PJI); *Accardi v New York*, 121 AD2d 489, 503 NYS2d 818 (2d Dept 1986) (citing PJI).

It is improper for a trial court to deny a defendant's request to instruct the jury that, should it disbelieve any material part of a witness' testimony, it might, in its discretion, reject the entire testimony, *People v Bruno*, 77 AD2d 922, 431 NYS2d 106 (2d Dept 1980). In addition, it is error for the court to decline a defendant's request for a falsus in uno charge on the ground that there is no evidence that any witness lied about a material fact, *People v Santiago*, 13 AD3d 81, 785 NYS2d 449 (1st Dept 2004). There is no requirement that independent evidence establish to the court's satisfaction that a witness testified falsely before the court grants a request for the falsus in uno instruction, *id.* The instruction is not mandatory, but is routinely included in a standard jury charge, *id.*

PJI 1:23. Burden of Proof

The burden of proof rests on AB. That means AB must establish by a fair preponderance of the credible evidence that the claim (he, she, it) makes is true. The credible evidence means the testimony and exhibits you find believable and reliable. The preponderance of the evidence means the greater part of the evidence. It does not mean the greater number of witnesses or the greater length of time taken by any party.

The phrase refers to the quality of the evi-

dence, that is, its convincing quality, the weight and effect it has on your minds, not to the quantity. The law requires that for AB to prevail on a claim, the evidence that supports (his, her, its) claim must appeal to you as more nearly representing what took place than the evidence opposed to (his, her, its) claim. If it does not, or if it weighs so evenly that you are unable to say there is a preponderance on any side, then you must decide the question against AB. It is only if the evidence favoring AB's claim outweighs the evidence opposed to it that you can find in favor of AB.

Comment

Caveat: For cases where more than one party has a burden of proof, PJI 1:60 or an appropriate variation, should be substituted. On some issues the burden may differ from the general rule here stated, see, for example, PJI 1:61 (death cases), PJI 1:62 (plaintiff's loss of memory) and PJI 1:64 (clear and convincing evidence). In such cases, the appropriate charge should be used and PJI 1:23 should be omitted. For the effect of a presumption on the burden of proof, see PJI 1:63.

Every charge must include instructions as to the burden of proof, see *J. Baranello and Sons v Chase Manhattan Bank, N.A.*, 119 AD2d 550, 500 NYS2d 727 (2d Dept 1986). The pattern charge, and the considerations outlined in it, were cited with approval in *Pagnotta v Diamond*, 51 AD3d 1099, 857 NYS2d 773 (3d Dept 2008) and *Torem v 564 Cent. Ave. Rest., Inc.*, 133 AD2d 25, 518 NYS2d 620 (1st Dept 1987). It is error, requiring reversal, for a court to omit entirely the core of the burden of proof doctrine, i.e., which way the jury should decide when the evidence is evenly balanced, *Roman v Bronx-Lebanon Hospital Center*, 51 AD2d 529, 379 NYS2d 81 (1st Dept 1976). An even balance of evidence requires a finding for the defendant on the issue of defendant's negligence, *Rinaldi & Sons, Inc. v Wells Fargo Alarm Service, Inc.*, 39 NY2d 191, 383 NYS2d 256, 347 NE2d 618 (1976); see *Weinberger v New York State Olympic Regional Development Authority*, 133 AD3d 1006, 19 NYS3d 625 (3d Dept 2015).

The burden of proof portion of the above charge also finds statutory support in § 1-201, subd 8 of the Uniform Commercial Code, which provides: " 'Burden of establishing' a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence".

In a negligence action, while plaintiff has the burden of proving defendant's negligence, defendant has the burden of establishing plaintiff's comparative fault, see CPLR 1411, 1412; PJI 2:36; *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018). *Care*

must be taken in charging the jury with respect to burden of proof in a negligence case in which the comparative fault of plaintiff is in issue, see *Rodriguez v New York*, supra.

Whether a prima facie case has been made out is for the trial judge to determine, see CPLR 4401, thus there is no need to instruct the jury on the subject.

PJI 1:24. Return to Courtroom

If, during your deliberations, your recollection of any part of the testimony should fail, or if you have any question about my instructions to you on the law, then you have the right to return to the courtroom for the purpose of having the testimony read to you or your question addressed.

Comment

Jurors are permitted to request that testimony or all or part of the charge be read back, see *People v Pena*, 50 NY2d 400, 429 NYS2d 410, 406 NE2d 1347 (1980) (citing PJI); see also *People v Taylor*, 26 NY3d 217, 22 NYS3d 140, 43 NE3d 350 (2015) (common-law principles of procedural fairness generally require court to furnish jury with information requested during deliberations); *Zobre v Schuttig*, 41 AD2d 573, 339 NYS2d 648 (3d Dept 1973) (denial of jury's request for readback required new trial).

When the jurors request a re-reading of the entire charge or a witness' testimony, they may not be required to specify a particular part of it, *Kerner v Surface Transp. Corporation*, 293 NY 881, 59 NE2d 786 (1944). However, the court, after consulting with counsel on the record, may ask the jurors to be more specific about their questions, see *Cronan v Koerber*, 65 AD2d 879, 410 NYS2d 431 (3d Dept 1978) (partial reading of testimony sufficient where jury indicated read back satisfied its request). In any event, when a re-reading is requested, the court must respond, *Bloch v New York*, 68 AD2d 932, 414 NYS2d 592 (2d Dept 1979).

When a jury requests exhibits or further instructions, the court must summon counsel for all parties and the court reporter and make the action taken a matter of record, *Sands v Statler Hilton Hotel*, 40 AD2d 620, 336 NYS2d 529 (4th Dept 1972). Without consent, the court may not communicate with the jury in the absence of the parties, *Maione v Pindyck*, 32 AD3d 827, 821 NYS2d 110 (2d Dept 2006); *Brown v Moodie*, 116 AD2d 980, 498 NYS2d 603 (4th Dept 1986); see *Snediker v Orange*, 89 AD2d 560, 452 NYS2d 111 (2d Dept 1982), *aff'd*, 58 NY2d 647, 458 NYS2d 517, 444 NE2d 981 (1982). Such improper communication in a civil case, however, does not require a new trial unless a party

was prejudiced by the communication, *Garritano v Garritano*, 62 AD3d 657, 878 NYS2d 402 (2d Dept 2009); *Maione v Pindyck*, supra; see *Snediker v Orange*, supra. All jury instructions should be given in open court in the presence of counsel so that the parties know what instructions are given and have the opportunity to make objections or further requests, *Garritano v Garritano*, supra; *Maione v Pindyck*, supra, *Brown v Moodie*, supra; see CPLR 4110-b.

If there is any doubt as to the meaning of a jury note, the court should seek clarification from the jury, *People v Taylor*, 26 NY3d 217, 22 NYS3d 140, 43 NE3d 350 (2015). When the jury asks a specific question, it should not be answered by having the entire charge re-read, *Sowell v Laurie*, 26 AD2d 923, 274 NYS2d 716 (1st Dept 1966); see *Gutierrez v New York*, 288 AD2d 86, 733 NYS2d 152 (1st Dept 2001); *Barraza v 55 West 47th Street Co.*, 144 AD2d 296, 534 NYS2d 175 (1st Dept 1988), or by a refusal to give further instructions responsive to the specific question, *Lee v Mount Ivy Indus. Developers, Inc.*, 31 AD2d 958, 298 NYS2d 813 (2d Dept 1969); see *People v Pena*, 50 NY2d 400, 429 NYS2d 410, 406 NE2d 1347 (1980) (citing PJI); *Schwabach v Beth Israel Medical Center*, 72 AD2d 308, 424 NYS2d 208 (1st Dept 1980); *Kramer v Chatham Green, Inc.*, 38 AD2d 931, 330 NYS2d 144 (1st Dept 1972); *Towli v Ford Motor Co.*, 30 AD2d 319, 292 NYS2d 8 (1st Dept 1968), but by a careful and lucid explanation of the problem and of the rules that the question indicates were not understood, *Meyer v Saint Francis Hosp., Poughkeepsie*, 151 AD3d 1501, 55 NYS3d 539 (3d Dept 2017) (reversal where court failed to respond to a jury inquiry in the manner discussed with counsel and also failed to fully or adequately answer multiple questions asked by jury); *Gillman v Liberty Airport Authority*, 32 AD2d 296, 302 NYS2d 203 (3d Dept 1969). Where a trial court improperly denies a jury's request for a readback of testimony or all or part of the charge, or refuses to provide the jury with further instructions, and the error prejudices the rights of one or more parties, a new trial is warranted, *Kerner v Surface Transp. Corporation*, 293 NY 881, 59 NE2d 786 (1944); *Bloch v New York*, 68 AD2d 932, 414 NYS2d 592 (2d Dept 1979); *Zobre v Schuttig*, 41 AD2d 573, 339 NYS2d 648 (3d Dept 1973); *Kramer v Chatham Green, Inc.*, supra.

The court may accept a jury verdict, even though the court has not yet responded to earlier inquiries from the jury, where the foreperson advises the court that the jury no longer has any need for the assistance it requested, see *Fagiola v Jonassen*, 173 AD2d 590, 570 NYS2d 173 (2d Dept 1991); see also *Cruz v Adelphi University*, 292 AD2d 487, 739 NYS2d 273 (2d Dept 2002) (jury continued to deliberate after its request for readback was granted and reached verdict; jury was apparently able to resolve issues without readback), or where there is no serious prejudice from the failure to respond, *Havens v New York City Transit Authority*, 20 AD3d 391, 798 NYS2d 140 (2d Dept 2005).

PJI 1:25. Consider Only Testimony and Exhibits

In deciding this case, you may consider only

the exhibits that were admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom (*if testimony has been read or shown to the jury include the following*) or as was read to you or shown to you during the trial. Under our rules of practice an examination before trial or testimony that was recorded before the trial was taken under oath and is entitled to equal consideration by you even though it was taken before the trial and outside this courtroom). However, arguments, remarks, and summation(s) of the attorneys are not evidence, nor is anything I now say or may have said with regard to the facts, evidence. As I instructed you previously, it is important to remember that you may not use any internet services or social media, including for example, Google, Facebook, Twitter, LinkedIn, Instagram or TikTok or other media platforms, to discuss or give or get information about the case or its participants or to research topics concerning the trial. Electronic devices including any cell phones, smartphones, laptops or any other personal electronic devices must be turned off while you are deliberating. Allowing outside information which may be incomplete, inaccurate, or otherwise unreliable to affect your judgment is unfair and prejudicial to the parties and could require this case to be retried.

Comment

Caveat: In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice.

The pattern charge was approved with respect to deposition testimony, Matter of Matteo, 134 AD2d 261, 520 NYS2d 594 (2d Dept 1987) (citing PJI). The matter in parentheses should be deleted when no pretrial testimony is used. When a deposition is read for impeachment purposes rather than as evidence in chief, the rules stated in PJI 1:66 apply. In such a case, the matter in parentheses will be deleted and PJI 1:66 should be modified and inserted at an appropriate point in the charge. If the plaintiff uses the deposition of the defendant as part of the plaintiff's evidence, such use does not constitute making the defendant the plaintiff's own witness, so as to bind the plaintiff to the version of the facts contained in the defendant's deposition, *Spampinato v A. B. C. Consol. Corp.*, 35 NY2d 283, 360 NYS2d 878, 319 NE2d 196

(1974). For a further discussion of the use of depositions, see Comment, PJI 1:94.

PJI 1:25A. Juror's Use of Professional Expertise

Although as jurors you are encouraged to use all of your life experiences in analyzing testimony and other evidence and reaching a fair verdict, you may not communicate any professional expertise you might have or other facts not in evidence to the other jurors. You must base your discussions and decisions solely on the evidence admitted during the trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case.

Comment

Based on *People v Maragh*, 94 NY2d 569, 708 NYS2d 44, 729 NE2d 701 (2000); see *People v Arnold*, 96 NY2d 358, 729 NYS2d 51, 753 NE2d 846 (2001).

The Court of Appeals has urged trial courts to provide a charge to alleviate the potential for improper juror activity, *People v Arnold*, 96 NY2d 358, 729 NYS2d 51, 753 NE2d 846 (2001). If a juror upon inquiry in voir dire indicates an inability or unwillingness to follow the above instructions, that provides grounds for a challenge for cause, id; see “Voir Dire- Selecting the Jury—Challenges For Cause For Juror Partiality” in material preceding PJI 1:1 in this volume.

The jury must reach its verdict solely on evidence received in open court, not from outside sources, *People v Arnold*, 96 NY2d 358, 729 NYS2d 51, 753 NE2d 846 (2001). In *People v Maragh*, 94 NY2d 569, 708 NYS2d 44, 729 NE2d 701 (2000), after conflicting expert medical testimony, two jurors who were registered nurses informed the other members of the jury that, in their medical experience and estimation, the reported volume of blood loss could have caused the victim's death. The Court stated that in past cases examining juror misconduct, it had determined that “the complained of conduct must be something more than an application of everyday experience, for that is precisely what peer jurors are instructed and expected to use in their assessment of evidence,” id. The Court observed, however, that a “grave potential for prejudice” is present when a member of the jury is a professional and shares expertise to evaluate evidence and draw expert conclusions about material issues in the case that are distinct from and additional to evidence adduced at trial, id. In this situation, jurors are likely to defer to the evaluations of other jurors with expertise, thereby diminishing consideration of their own everyday experiences and judgment and the evidence actually adduced at trial. The Court concluded that reversible

error can occur where each of the following three elements are present: (1) a juror conducts personalized assessments not within the common ken of juror experience and knowledge, (2) the assessments concern a material issue in the case, and (3) the juror communicates those assessments to the rest of the jury panel as if they were evidence, *id.* Jurors may not communicate their professional assessments to the other jurors because it would violate the rights of litigants to have their cases decided only on the evidence adduced and would substitute these jurors' own professional opinions in place of expert proof admitted at trial, *People v Arnold*, *supra*; *People v Maragh*, *supra*.

The Court of Appeals has noted that New York does not require jurors to check their life experiences at the courtroom door and that one of the goals of New York's jury reform was to eliminate all automatic exemptions from service, bringing to the jury room a wide array of individuals with specialized knowledge and training, *People v Arnold*, 96 NY2d 358, 729 NYS2d 51, 753 NE2d 846 (2001). The Arnold Court also noted that its previous decision in *People v Maragh*, 94 NY2d 569, 708 NYS2d 44, 729 NE2d 701 (2000) should not be read as requiring trial courts to automatically excuse individuals with specialized knowledge and training, *People v Arnold*, *supra*. Maragh does require, however, that jurors not engage in experimentation, investigation and calculation that necessarily rely on facts outside the record and beyond the understanding of the average juror, *People v Maragh*, *supra*. This applies equally if the jury conducts unauthorized experiments at the crime scene, or if an "expert" juror performs scientific analysis that requires knowledge of facts beyond those presented at trial and convinces the other jurors to disregard the trial testimony and instead rely on the "expert" juror's expertise, *id.*

In *People v Arnold*, 96 NY2d 358, 729 NYS2d 51, 753 NE2d 846 (2001), the Court of Appeals additionally noted that there is no reversible error in the above circumstances unless a juror has specialized knowledge concerning a material issue in the case. In addition, the Court of Appeals noted that trial courts should investigate and address potential jury misconduct problems as early as possible, *id.* The question of whether a juror engaged in misconduct by improperly undertaking the role of an expert concerning a material issue in the case may not come to light before the verdict is rendered, *Campopiano v Volcko*, 61 AD3d 1343, 877 NYS2d 568 (4th Dept 2009). In such a case, a hearing may be necessary to determine whether to set aside the verdict and direct a new trial, *id.*

PJI 1:25B. Juror Note Taking

[If the court has permitted juror note-taking at any point during trial, the following charge should be read.]

You will recall that I previously permitted you to take notes during the trial and that I gave you

instructions about note-taking. Now that you are about to begin deliberations, I want to remind you about those instructions. Whether you have taken notes, or not, you should be aware that the court reporter has recorded everything that was stated in the courtroom. At your request, any portion of the transcript will be read back to you. If you took notes during the trial, you will be allowed to take those notes into the jury room with you. I want to stress, however, that those notes are only for your personal use and are simply an aid to your memory. Because the notes may be inaccurate or incomplete, they may not be given any greater weight than your independent recollection. Similarly, because the notes may be inaccurate or incomplete, they may not be given any greater weight or influence than the recollection of other jurors about the facts or the conclusions to be drawn from the facts in determining the outcome of the case. Those of you who have not taken notes should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has taken notes. Any difference between any juror's recollection and any juror's notes should always be settled by asking to have the court reporter's transcript on that point read back to you. The court transcript should govern your deliberations rather than a juror's notes. A juror's notes are not a substitute for the official record or the governing principles of law that I gave you during the trial and am now giving to you. Your notes are confidential and will be collected and destroyed once you have rendered your verdict.

Comment

Based on the Uniform Rules for Trial Court [22 NYCRR] § 220.10; *People v Hues*, 92 NY2d 413, 681 NYS2d 779, 704 NE2d 546 (1998).

Both the Uniform Rules for Trial Courts and the case law require that if note taking is permitted by the Court, the instruction regarding note-taking shall be repeated at the conclusion of the case, Uniform Rules for Trial Court [22 NYCRR] § 220.10; *People v Hues*, 92 NY2d 413, 681 NYS2d 779, 704 NE2d 546 (1998).

For general commentary on rules related to jury note-taking, see PJI 1:13C.

**PJI 1:25C. General Instruction—Interested
Witness—Generally**

The plaintiff and the defendant both testified before you. As parties to the action, both are interested witnesses, that is, they have an interest in the outcome of the case that may have affected their testimony.

[Where the Court finds that there are other witnesses, in addition to the parties, who are interested, the following should be inserted:]

[Even though not a party to the action, (name of witness) is an interested witness because (*state reason, e.g., as the person directly charged with having caused the injury to plaintiff, he/she may have a motive to shield himself/herself from blame.*)]

An interested witness is not necessarily less believable than a disinterested witness. The fact that (he, she) is interested in the outcome of the case does not mean that (he, she) has not told the truth. It is for you to decide from the demeanor of the witness on the stand and such other tests as your experience dictates whether or not the testimony has been influenced, intentionally or unintentionally, by (his, her) interest. You may reject the testimony if, after careful consideration of all the evidence in the case, including the cross-examination of the witness, you decide you do not believe the testimony or you find it is not reliable. On the other hand, you are not required to reject the testimony of such a witness and may accept all or such part of (his, her) testimony as you find believable and reliable and reject such part as you find unworthy of acceptance. The testimony is entitled to such weight as you decide it is worth.

Comment

Caveat 1: It is error to charge that a disinterested witness is

entitled to more credit than an interested witness, *People v Gerdvine*, 210 NY 184, 104 NE 129 (1914); *People v Viscio*, 241 App Div 499, 272 NYS 213 (3d Dept 1934), see *People v Ochs*, 3 NY2d 54, 163 NYS2d 671, 143 NE2d 388 (1957) or that a particular witness is, as a matter of law, disinterested, *People v Manning*, 278 NY 40, 15 NE2d 181 (1938).

Caveat 2: The general charges on the weighing of testimony and the assessment of credibility of a witness, see PJI 1:8, 1:41, are not a substitute for an interested witness charge, *Jett v New York*, 140 AD3d 511, 34 NYS3d 424 (1st Dept 2016).

Based on *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948); *People v Gerdvine*, 210 NY 184, 104 NE 129 (1914); *Wohlfahrt v Beckert*, 92 NY 490 (1883); *Kalam v K-Metal Fabrications, Inc.*, 286 AD2d 603, 730 NYS2d 299 (1st Dept 2001); *Deutsch v Horizon Leasing Corp.*, 145 AD2d 405, 535 NYS2d 383 (2d Dept 1988); *Calandra v Norwood*, 81 AD2d 650, 438 NYS2d 381 (2d Dept 1981); *People v Viscio*, 241 App Div 499, 272 NYS 213 (3d Dept 1934); *Hoes v Third Ave. R. Co.*, 5 App Div 151, 39 NYS 40 (1st Dept 1896); CPLR 4512.

While the interest that a witness, including a party, has in the outcome of the case and its effect on weighing credibility is generally for the jury to determine, if the testimony is not contradicted either directly or by inference or otherwise impeached, the court may make conclusions as a matter of law, on the underlying substantive issue of the case, see *Woodson v New York City Housing Authority*, 10 NY2d 30, 217 NYS2d 31, 176 NE2d 57 (1961); *Hull v Littauer*, 162 NY 569, 57 NE 102 (1900); *Abramovitz v Tenzer*, 144 App Div 170, 128 NYS 951 (1st Dept 1911); see also *Annunziata v New York*, 175 AD3d 438, 107 NYS3d 355 (2d Dept 2019).

The principle stated in the pattern charge does not require that the witness have a financial interest in the outcome of the case, but applies also to any person who, as an actor in the transaction at issue, has a motive to shield himself or herself from blame, even though not a party to the action, e.g., motorman, *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948); *Gaffney v New York Consol. R. Co.*, 220 NY 34, 114 NE 1047 (1917); trackwalker, *Volkmar v Manhattan Ry. Co.*, 134 NY 418, 31 NE 870 (1892); agents who represented plaintiff in a real estate transaction, *Noble v Marx*, 298 NY 106, 81 NE2d 40 (1948); building superintendent who created hazardous condition, *Jett v New York*, 140 AD3d 511, 34 NYS3d 424 (1st Dept 2016); pharmacist who sold medicine, *Wohlfahrt v Beckert*, 92 NY 490 (1883); nurse who attended plaintiff in hospital's emergency room charged as an actual tortfeasor in treatment of plaintiff, *Hill v Arnold*, 226 AD2d 232, 640 NYS2d 892 (1st Dept 1996), and such a witness is considered interested even though he or she is no longer employed by defendant, *Coleman v New York City Transit Authority*, *supra*; *Noble v Marx*,

supra; *Jett v New York*, supra; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 859 NYS2d 29 (1st Dept 2008).

An interested witness charge was necessary where several witnesses were former employees alleged to have been involved in the underlying negligence or had a financial interest in a defendant, *Kalam v K-Metal Fabrications, Inc.*, 286 AD2d 603, 730 NYS2d 299 (1st Dept 2001). However, the fact that a witness is a relative of the party who called the witness does not, of itself, entitle the adverse party to an interested witness charge because that situation involves potential bias rather than interest, *Perrin v Winne*, 123 AD2d 610, 507 NYS2d 19 (2d Dept 1986). A former managerial employee of a defendant is not necessarily an interested witness if not directly involved in the alleged underlying negligence, *Singh v Arbor Property Trust*, 12 AD3d 660, 784 NYS2d 877 (2d Dept 2004); see *Frank v State-Wide Ins. Co.*, 151 AD2d 458, 542 NYS2d 248 (2d Dept 1989) (senior vice president of party not, in and of itself, basis for interested witness charge). Similarly, a witness who has previously settled with a party is not necessarily an interested witness, *Hill v Arnold*, 226 AD2d 232, 640 NYS2d 892 (1st Dept 1996).

Expert witnesses may, of course, be impeached based on interest in the outcome of the case, see *Levo v Greenwald*, 107 AD2d 991, 484 NYS2d 712 (3d Dept 1985), *aff'd*, 66 NY2d 962, 498 NYS2d 784, 489 NE2d 753 (1985).

For a specific charge where the interested witness is an employee of a party, see PJI 1:92; where the interested witness is a compensated fact witness, see PJI 1:93.

[Where the evidence that was submitted may be considered "circumstantial" the Court should charge PJI 1:70 and/or 1:71.]

PJI 1:26. General Instruction—Special Verdicts & General Verdicts Supported by Written Interrogatories

This case will be decided on the basis of answers you give to written questions that will be submitted to you. Each of the questions calls for *[Insert appropriate phrase, such as: (a "Yes" or "No" answer), (some numerical figure), (some percentage), etc.]*. While it is important that the views of all jurors be considered, five of the six of you must agree on the answer to any question, but the same five persons need not agree on all the answers. When five of you have agreed on any answer, the foreperson of the jury will write the answer in the space provided for each answer and each of you

will sign in the appropriate place to indicate your agreement or disagreement. Each question will be followed by an instruction as to how you will proceed based upon your answer to that question.

If you disagree with an answer that five jurors have agreed upon, you should not stop deliberating and you should not stop voting on the rest of the questions that need to be answered. In other words, you should continue participating in the deliberations and voting on all questions that require answers. ([In a bifurcated case where the verdict on liability was not unanimous and the same jury will address damages, add:] You must still deliberate, even if you disagreed with one or more of the answers to the questions submitted to you during the liability phase of the trial.) When you have answered all the questions that require answers, report to the court.

Comment

Caveat 1: The pattern jury instructions contained in these volumes anticipate that, at the conclusion of the charge, the jury will be instructed with the charge above if, as is usually the case, the jury is to be given a verdict sheet with interrogatories. However, trial judges may want to modify each of the substantive instructions to include references to the specific questions that will be presented in the verdict sheet. For example, prior to instructing the jurors on the law of negligence they could be told that the first question they will be asked to answer is: "Was the defendant negligent?" Each question on the verdict sheet would then be appropriately placed in the charge preceding the specific instruction explaining it. Whether or not the charge is so modified, the judge may review the contents of the verdict sheet with the jurors and may distribute it.

Caveat 2: In the rare circumstance where a simple general verdict will be rendered without written interrogatories, PJI 1:95 should be substituted for this charge.

Based on NY Const Art I, Sec 2; CPLR 4113(a); see *Sharrow v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995); see also CPLR 4111(a), (b) (special verdicts); CPLR 4111(c) (general verdicts supported by written interrogatories).

For a more detailed discussion of verdicts, see Comment after PJI 1:95, *infra*.

PJI 1:26A. Five-Sixths Verdict—General Verdict

While it is important that the views of all jurors be considered, a verdict of five of the six members of the jury will be sufficient under the law. When five of you agree on a verdict, you may report your verdict to the court.

Comment

Caveat: This charge is to be used only in those cases where a general verdict is to be obtained. Otherwise, see PJI 1:26.

Absent the consent of all parties to the contrary, a verdict may not be rendered by less than five-sixths of the jurors constituting a jury, CPLR 4113(a); see *Waldman v Cohen*, 125 AD2d 116, 512 NYS2d 205 (2d Dept 1987). A jury's vote that contains fewer than five votes in favor of a party is tantamount to no verdict, *State v Exxon Corp.*, 7 AD3d 926, 777 NYS2d 539 (3d Dept 2004). The court should encourage the jury to reach a verdict. PJI 1:100. Where five-sixths of the jurors constituting a jury cannot agree after being kept together for as long as is deemed reasonable by the court, the court shall discharge the jury and direct a new trial, CPLR 4113(b); see *State v Exxon Corp.*, *supra* (court may not grant directed verdict pursuant to CPLR 4404(a) absent a verdict).

PJI 1:27. Exclude Sympathy

In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or, indeed, any consideration outside the case as it has been presented to you in this courtroom. Your verdict will be determined by the conclusion(s) you reach, no matter whom the verdict helps or hurts.

PJI 1:27A. Fair Juror and Absence of Implicit or Conscious Bias

You may recall that at the beginning of the trial I instructed you on the concept of a fair juror. As a fair and impartial juror you must guard against the application of any stereotypes or attitudes about people or groups that might lead you to render a biased decision based on those stereo-

types or attitudes. Keep in mind that bias, based upon stereotypes or attitudes, is not always obvious or conscious. In assessing the testimony and other evidence in the case, you must not be swayed by those stereotypes or attitudes.

PJI 1:28. Jury Function

As jurors, your duty is to decide, from all the testimony that you have heard and the exhibits that have been admitted into evidence, what the facts are. You are the sole and exclusive judges of the facts. Neither I nor anyone else can take over your responsibility to decide the facts of this case, which you will do by the answers you provide on the verdict sheet. As sole judges of the facts, you must decide which of the witnesses you believe, what portion of their testimony you accept, and what weight you give to it.

[Here insert those portions of the charge dealing with the specific case and outlining the contentions of the parties, the law applicable thereto and the rules for fixing damages. Then conclude with PJI 1:30.]

PJI 1:30. Conclusion

I have now outlined for you the rules of law that apply to this case and the processes by which you weigh the evidence and decide the facts. The first thing you should do in the jury room is choose a foreperson. The foreperson has several duties. It is the foreperson who keeps order in the jury room and makes sure that you each have an opportunity to speak and, just as important, to listen to your fellow jurors. When you have a question or request, the foreperson will write a note, place the date and time on it, and sign it. Similarly, the foreperson will mark your answers on the foreperson's copy of the verdict sheet. However, despite all these duties, the foreperson's view of the evidence and his or her vote is entitled to no greater weight than that of any other juror.

Your function—to reach a fair decision(s) from

the law and the evidence—is an important one. When you are in the jury room, listen to each other, and discuss the evidence and issues in the case among yourselves. It is the duty of each of you, as jurors, to consult with one another, and to deliberate with the goal of reaching agreement on a verdict, if you can do so without violating your individual judgment and your conscience. While you should not surrender conscientious convictions of what the truth is and of the weight and effect of the evidence and while each of you must decide the case for yourself and not merely consent to the decision(s) of your fellow jurors, you should examine the issues and the evidence before you with candor and frankness, and with proper respect and regard for the opinions of each other.

Remember in your deliberations that the dispute between the parties is, for them, a very important matter. They and the court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing, you carry out to the fullest your oaths as jurors to truly try the issues of this case and render a true verdict.

Comment

That portion of PJI 1:30 concerning the juror's duty during deliberation is based upon PJI 1:100 and the authorities cited in the Comment thereto. In the event of a deadlock, PJI 1:100 should be given.

[The Court at this point should excuse the jury and inquire of counsel, on the record, whether there are objections or corrections to the charge as given.]

CPLR 4110-b provides that “[n]o party may assign as error the giving or the failure to give an instruction unless he [or she] objects thereto before the jury retires to consider its verdict stating the matter to which he [or she] objects and the grounds of his [or her] objection.” This is not a mere technicality. Arguments made to the Appellate Divisions about trial court error in charging the jury are not considered on appeal, as they are not preserved for appeal if no objection to the jury charge is made before the jury retires to consider the verdict, see *Salov v Akinjide*, 172 AD3d 1127, 101 NYS3d 435 (2d Dept 2019); *Stryker Security Group Inc. v Elite Investigations Ltd.*, 170 AD3d 553, 97 NYS3d 63 (1st Dept 2019); *Reveyosos v Town Sports International, LLC*, 162 AD3d 510, 79

NYS3d 27 (1st Dept 2018); *Torres v Hickman*, 162 AD3d 821, 79 NYS3d 62 (2d Dept 2018). Notwithstanding the foregoing, appellate courts have rendered decisions on appeals where the courts have overlooked the lack of an objection at trial and reached the instructional issues in the interest of justice, *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 (2d Dept 2016) (new trial ordered); *Peguero v 601 Realty Corp.*, 58 AD3d 556, 873 NYS2d 17 (1st Dept 2009); *Staudacher v Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989).

See General Principles—Introductory Statement—Request to Charge in Preliminary Material in this volume.

PJI 1:31. Alternate/Additional Jurors

At this point, I am going to excuse our additional jurors. As I told you before, only six of you will be deliberating and additional jurors were required as a safeguard against the possibility that one or more of you might be unable to complete his or her service. Those of you who will not be deliberating must not communicate anything about the case in any fashion with the sitting jurors, other alternates or anyone else until after a verdict has been rendered or I may instruct you otherwise. I commend all of you for your faithful attendance and attention. On behalf of the Court and the parties, I thank you for your service.

Comment

Caveat: This charge should be modified depending on the court's decision as to whether alternate jurors will be retained for possible substitution after deliberations have begun.

Based on CPLR 4105 and 4106.

The court has discretion, with or without consent of counsel, to retain additional jurors after final submission of the case to ensure the alternates' availability, if needed, CPLR 4106. Alternate jurors who are discharged should be instructed not to communicate with any sitting juror until after they have been advised by the court that a verdict has been returned, see *Fader v Planned Parenthood of New York City, Inc.*, 278 AD2d 41, 717 NYS2d 166 (1st Dept 2000). If the damages issue is to be decided by the same jury in a bifurcated trial, the alternate jurors should not be excused but should be placed in a separate area to await the deliberating jurors' decision on liability, see Uniform Rules for Trial Cts [22 NYCRR] § 202.42(c) (Bifurcated trials); § 220.1(c) (Nondesigned alternative jurors; Designation of jurors).

CPLR 4106 provides that, after deliberations have begun, a trial court may replace a deliberating juror with an additional juror where the deliberating juror “becomes unable to perform the duties of a juror.” In determining whether discharge and replacement of a juror is appropriate, a trial court must, after receiving notice that a juror may not be able to perform his or her duty, make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and replaced with an alternate juror, *Garbie v Ahmad*, 168 AD3d 687, 91 NYS3d 222 (2d Dept 2019). Failure to make adequate inquiry prior to discharging a deliberating juror is error, requiring a new trial, *id.*

C. GENERAL INSTRUCTIONS NOT APPLICABLE TO ALL CASES**1. PRIOR TO RETRIAL****PJI 1:50. General Instruction—Prior to Retrial**

Members of the jury, the case which is about to be tried before you has been tried before. In the course of this trial there may be mention from time to time of the previous trial. The fact that there was a previous trial and the legal reasons why the case is being tried again have nothing to do with your decision of the issues which will be presented to you. I mention the fact now so that you will understand any reference made to the previous trial, but at the same time I tell you that you are not to speculate concerning the earlier trial nor consider it at all except to the extent that evidence concerning the earlier trial is admitted in this trial.

Comment

Based on *People v Corbo*, 17 AD2d 351, 234 NYS2d 662 (1st Dept 1962).

2. ADMISSION AGAINST INTEREST**PJI 1:55. General Instruction—Admission by a Party—By Statement**

Testimony has been introduced that (plaintiff, defendant) made a statement to AB at [*time and place*] concerning [*material fact*]. (Plaintiff, defendant) denies that he, she made such a statement (or, admits that he, she made such a statement, but says [*state explanation offered*]). If you find that (plaintiff, defendant) made such a statement and that (he, she) thereby admitted [*material fact*], you may consider that statement as evidence of ([*insert as appropriate, i.e.:*] negligence, liability under the contract).

In deciding whether such a statement was made, you will apply the rules I have already given you about the evaluation of testimony. You may accept either party's version of what happened in whole or in part or you may accept a part of the versions given by both. In deciding how much weight you will give to the statement, if any, you can consider ([*insert as appropriate:*] (plaintiff's, defendant's) physical condition at the time the statement was made, the words used, the person to whom the statement was made, the time that passed between the making of the statement and the (occurrence, accident), all of the other circumstances and conditions existing at the time and place, and the other facts in evidence, as well as the reasonableness of the (plaintiff's, defendant's) explanation of the statement). You may consider the statement to be conclusive and binding on (plaintiff, defendant), or you may ignore it altogether, or you may give it a weight between those two extremes, as you find proper under all the circumstances.

Comment

When used, this charge should be inserted in that portion of the general charge dealing with weight of testimony, and in view of its reference to the other rules of evaluation, should be the last such insertion.

Based upon *Gangi v Fradus*, 227 NY 452, 125 NE 677 (1920); see *Epstein v Cohen*, 288 NY 307, 43 NE2d 56 (1942); *Koester v Rochester Candy Works*, 194 NY 92, 87 NE 77 (1909); *Barzaghi v Maislin Transport*, 115 AD2d 679, 497 NYS2d 131 (2d Dept 1985) (hospital record containing admission by plaintiff to nurse as to cause of accident); 57 NYJur2d 548, 560, Evidence §§ 282–292 and Annot: 52 ALR2d 516; 53 ALR2d 1245; 54 ALR2d 1069; 73 ALR2d 1180.

Out-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the rule against hearsay and, in most instances, only if the proponent demonstrates that the evidence is reliable, *Nucci ex rel. Nucci v Proper*, 95 NY2d 597, 721 NYS2d 593, 744 NE2d 128 (2001). In determining reliability, the court ordinarily must decide whether the declaration was spoken under circumstances which render it highly probable, *id.* However, out-of-court admissions by a party, which are the subject of this charge, are presumptively reliable, *Reed v McCord*, 160 NY 330, 54 NE 737 (1899). Thus, they are admissible based on the fact that they were made by a party or a party's agent. To be distinguished are "declarations against interest," which may be made by any person and may be used by or against any party, regardless of the relationship between the declarant and a party to the action, *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993); *Basile v Huntington Utilities Fuel Corp.*, 60 AD2d 616, 400 NYS2d 150 (2d Dept 1977); *Prince, Richardson on Evidence* (11th ed. Farrell) §§ 8-203, 8-402. A declaration against penal interest may be admitted if (1) the declarant is unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant was aware at the time the statement was made that it was contrary to penal interest; (3) the declarant had competent knowledge of the underlying facts; and (4) there is sufficient proof independent of the utterance to assure its reliability, *People v Shabazz*, 22 NY3d 896, 977 NYS2d 141, 999 NE2d 504 (2013); see *Kelleher v F.M.E. Auto Leasing Corp.*, *supra*.

A plea of guilty to a traffic offense constitutes an admission of the act charged and, if unexplained, may be considered as some evidence of negligence, *McGraw v Ranieri*, 202 AD2d 725, 608 NYS2d 577 (3d Dept 1994); see *Feeley v St. Lawrence University*, 13 AD3d 782, 788 NYS2d 179 (3d Dept 2004); *Vogel v Gilbo*, 276 AD2d 977, 715 NYS2d 455 (3d Dept 2000); *Jones v Fraser*, 265 AD2d 773, 698 NYS2d 57 (3d Dept 1999). Such a plea is admissible regardless of an inadvertent or artful description of the underlying facts of the plea, *Miszko v Luma*, 284 AD2d 641, 725 NYS2d 459 (3d Dept 2001) (misdescription of direction of improper turn to which defendant pled guilty). A plea of guilty to a traffic offense that has been withdrawn by leave of court is also admissible in a subsequent civil action, *Cohens v Hess*, 92 NY2d 511, 683 NYS2d 161, 705 NE2d 1202 (1998). A person who pleads guilty to a traffic offense is permitted to explain the reasons for the plea, and it is for the jury to evaluate the testimony and decide what weight, if any, to give the plea, *Ando v Woodberry*, 8 NY2d 165, 203 NYS2d 74, 168 NE2d

520 (1960); *Alexander v Eldred*, 100 AD2d 666, 473 NYS2d 864 (3d Dept 1984), *aff'd*, 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 (1984); *Feeley v St. Lawrence University*, *supra*; *Allen v Harrington*, 156 AD2d 854, 550 NYS2d 79 (3d Dept 1989); see *Carlson v Schade*, 36 AD2d 852, 321 NYS2d 527 (2d Dept 1971) (jury must be informed of the nature or meaning of the admission); but see *Decker v Rassaert*, 131 AD2d 626, 516 NYS2d 710 (2d Dept 1987) (guilty plea is not admissible where VTL provision violated was inapplicable to facts of case). If, in opposition to plaintiff's motion for summary judgment, defendant offers no explanation or excuse for a plea of guilty to a traffic offense, summary judgment is appropriate, *Jones v Fraser*, *supra*. The fact of defendant's arrest has been held to be admissible as a foundation for his or her subsequent guilty plea, even where the arrest was for a more serious charge, *Allen v Harrington*, 156 AD2d 854, 550 NYS2d 79 (3d Dept 1989). A confession inadmissible in a criminal proceeding may, if voluntarily given, be admitted in a civil action, *Terpstra v Niagara Fire Ins. Co.*, 26 NY2d 70, 308 NYS2d 378, 256 NE2d 536 (1970); see also *Boyd v Constantine*, 81 NY2d 189, 597 NYS2d 605, 613 NE2d 511 (1993).

An offer to compromise or settle an action is not an admission of liability, *Smith v Satterlee*, 130 NY 677, 29 NE 225 (1891); *Prince, Richardson on Evidence* (11th ed. Farrell) § 8-218; see CPLR 3219 (tender in contract action shall not be made known to jury), 3220 (offer to liquidate damages in contract action shall not be made known to jury), 3221 (offer of judgment shall not be made known to jury). Similarly, evidence that first party benefits were paid to claimant pursuant to the no-fault insurance statute may not be considered as an admission in a subsequent personal injury action, *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986). A settlement reached between a tort defendant and the federal Occupational Safety and Health Administration with respect to charges of violations of work safety regulations is not admissible where the settlement expressly provided that it would not be taken as an admission in any other proceeding, *Kollmer v Slater Elec., Inc.*, 122 AD2d 117, 504 NYS2d 690 (2d Dept 1986). However, a fact admitted by a party during settlement negotiations is admissible against the party unless expressly stated to be "without prejudice" or unless the surrounding circumstances show that it was not intended as an admission, *White v Old Dominion S.S. Co.*, 102 NY 660, 6 NE 289 (1886); *Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165, 502 NYS2d 1017 (1st Dept 1986); *Bellino v Bellino Const. Co., Inc.*, 75 AD2d 630, 427 NYS2d 303 (2d Dept 1980); *Prince, Richardson on Evidence* (11th ed. Farrell) § 8-218; see *Universal Carloading & Distribution Co., Inc. v Penn Cent. Transp. Co.*, 101 AD2d 61, 474 NYS2d 502 (1st Dept 1984).

"[T]he hearsay statement of an agent is admissible against his or her employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of [the agent's] authority," *Loschiavo v Port Authority of New York & New Jersey*, 58 NY2d 1040, 462 NYS2d 440, 448 NE2d 1351 (1983); see *Tyrrell v Wal-Mart Stores Inc.*, 97 NY2d 650, 737 NYS2d 43, 762 NE2d

921 (2001) (where plaintiff failed to establish that unidentified employee was authorized to make alleged statement, statement did not constitute admission binding on employer); *Carpenter v D'Agostino Supermarkets, Inc.*, 270 AD2d 51, 704 NYS2d 57 (1st Dept 2000) (statement by store manager, who had general supervision over store's operation, admissible on issue of whether defendant had actual notice of claimed hazardous condition); *Johnson v Hallam Enterprises Ltd.*, 208 AD2d 1110, 617 NYS2d 405 (3d Dept 1994) (admission properly admitted where made by a person who was defendant's president, treasurer and the only person with complete managerial responsibility to run defendant's day-to-day operations); *Risoli v Long Island Lighting Co.*, 195 AD2d 543, 600 NYS2d 497 (2d Dept 1993) (statement by restaurant's assistant manager did not fall within "speaking agent" exception to hearsay rule); *Fruin-Colnon Corp. v Niagara Frontier Transp. Authority*, 180 AD2d 222, 585 NYS2d 248 (4th Dept 1992) (letter written by subconsultants who had been asked to express an opinion in preparation for litigation properly excluded); see *Sherman v Tamarack Lodge*, 146 AD2d 767, 537 NYS2d 249 (2d Dept 1989); *Prince, Richardson on Evidence* (11th ed. Farrell) § 8-208. Therefore, if notice to the employer of a defective condition is sought to be established through the statement of an agent, the agent must have "speaking authority," or the statement must fall under some other exception to the hearsay rule, as for example, the *res gestae* rule, see *Loschiavo v Port Authority of New York & New Jersey*, *supra*; *Tyrrell v Wal-Mart Stores, Inc.*, *supra* (plaintiff failed to establish that unidentified employee was authorized to make alleged statement or that statement fell within excited utterance exception to hearsay rule); *Marte v New York City Transit Authority*, 276 AD2d 755, 715 NYS2d 704 (2d Dept 2000) (subway conductor did not have authority to speak on behalf of transit authority); *Williams v Waldbaums Supermarkets, Inc.*, 236 AD2d 605, 653 NYS2d 962 (2d Dept 1997).

Admissions made by counsel on behalf of their clients are binding, *People v Brown*, 98 NY2d 226, 746 NYS2d 422, 774 NE2d 186 (2002); *Morel ex rel. Hernandez v Schenker*, 64 AD3d 403, 882 NYS2d 112 (1st Dept 2009).

Generally, during the course of the representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter, DR 7-104(a)(1). In the corporate context, however, a lawyer representing a party may informally interview employees of an adverse corporate party that is represented by counsel *except* for those corporate employees "whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel," *Niesig v Team I*, 76 NY2d 363, 559 NYS2d 493, 558 NE2d 1030 (1990). An adverse party may, however, interview all former employees of a corporate adversary, *id*; see *Camden v State of Md.*, 910 F Supp 1115, 106 Ed Law Rep 571 (DMd 1996) (lawyer's *ex parte* communications with former employees of represented

adversary prohibited “only insofar as a former employee has been extensively exposed to confidential information and only insofar as an adversary attorney knows [or . . . should reasonably know] of that fact.”). The rule enunciated by the Court of Appeals in *Niesig* also applies to communications with employees of the state who may be represented by the attorney general in the matter that is the subject of the litigation, see *Schmidt v State*, 279 AD2d 62, 722 NYS2d 623 (4th Dept 2000) (discussing application of *Niesig* rules to State DOT workers who were not yet “represented parties”).

An “informal judicial admission is a declaration made by a party in the course of any judicial proceeding (whether in the same or another case) inconsistent with the position [the party] now assumes,” *People v Brown*, 98 NY2d 226, 746 NYS2d 422, 774 NE2d 186 (2002). Such an admission is “not conclusive on the defendant in the litigation,” but “is merely evidence of the fact or facts admitted,” *id*; *Rosales v Rivera*, 176 AD3d 753, 110 NYS3d 47 (2d Dept 2019). By contrast, a formal judicial admission “takes the place of evidence” and is “conclusive of the facts admitted in the action in which [it is] made,” *People v Brown*, *supra*. “A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary,” *id*. Statements in an attorney’s affidavit are more properly admissible under the rule governing informal, rather than formal, judicial admissions, *id*; see *Rosales v Rivera*, *supra* (attorney’s assertion in prior motion practice that certain parties were solely at fault for accident treated as informal judicial admission).

A parent’s statement is incompetent as an admission against his or her infant child, *Hermance v Slopey*, 32 AD2d 573, 299 NYS2d 38 (3d Dept 1969). Even though an employee’s (or parent’s) statement is not admissible against the employer or child it will be admissible against the employee or parent, *Weldner v Whitman*, 18 AD2d 765, 235 NYS2d 103 (4th Dept 1962). In such a case the jury should be instructed, when the statement is admitted and again in the final charge, that they may consider it only against the employee and not against the employer, see PJI 1:65. As to admission by conduct, see PJI 1:56.

Statements in a pleading may constitute formal judicial admissions conclusive of the facts admitted in the suit in which they are made, see *Prince, Richardson on Evidence* (11th ed. Farrell) § 8-215. However, since CPLR 3014 permits inconsistent pleadings where there is such inconsistency, the formal pleadings do not constitute judicial admissions, *Collins v Caldor of Kingston, Inc.*, 73 AD2d 708, 422 NYS2d 524 (3d Dept 1979) (inconsistency between answer and third party complaint); *Scolite Intern. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417, 418 NYS2d 191 (3d Dept 1979) (inconsistency between answer and counterclaim). An admission of fact in an original pleading does not lose its effect as an admission when the pleading has been superseded by an amended pleading, *Kwiecinski v Chung Hwang*, 65 AD3d 1443, 885 NYS2d 783 (3d Dept 2009). However, the circumstances surrounding the original

admission and the amendment may be explained at trial, and the weight of the former is a question for the trier of fact, *id*; see *Lynch v Repetti*, 94 AD2d 790, 463 NYS2d 41 (2d Dept 1983). (statements made in sup-
 planted pleading may be treated as informal admissions). Under the
 prevailing body of case law, allegations made upon “information and
 belief” do not constitute formal or informal judicial admissions, see
Sound Communications, Inc. v Rack and Roll, Inc., 88 AD3d 523, 930
 NYS2d 577 (1st Dept 2011); *Empire Purveyors, Inc. v Weinberg*, 66
 AD3d 508, 885 NYS2d 905 (1st Dept 2009); *Scolite Intern. Corp. v*
Vincent J. Smith, Inc., *supra*; but see *Ficus Investments, Inc. v Private*
Capital Management, LLC, 61 AD3d 1, 872 NYS2d 93 (1st Dept 2009)
 (representation made on “information and belief” constitutes informal
 judicial admission). A statement made in a pleading in a prior or sepa-
 rate action is not an informal judicial admission, *Re/Max of New York,*
Inc. v Weber, 177 AD3d 910, 112 NYS3d 769 (2d Dept 2019). *Skelka v*
Metropolitan Transit Authority, 76 AD2d 492, 430 NYS2d 840 (2d Dept
 1980), held that a party’s testimonial admission which contradicted his
 own testimony or that of his witnesses was not to be deemed a
 conclusive judicial admission and should be treated as any other adverse
 item of evidence in the case. A plea of guilty has collateral estoppel ef-
 fect on the same issue in a subsequent civil action, *Merchants Mut. Ins.*
Co. v Arzillo, 98 AD2d 495, 472 NYS2d 97 (2d Dept 1984). A conviction
 after trial may have collateral estoppel effect depending upon the
 seriousness of the offense, *Gilberg v Barbieri*, 53 NY2d 285, 441 NYS2d
 49, 423 NE2d 807 (1981); *S. T. Grand, Inc. v New York*, 32 NY2d 300,
 344 NYS2d 938, 298 NE2d 105 (1973).

Statements made by a party in a deposition or in answers to inter-
 rogatories may be used against the party “for any purpose” by an adver-
 sary, CPLR 3117(a)(2); 3131; see *Feldsberg v Nitschke*, 49 NY2d 636,
 427 NYS2d 751, 404 NE2d 1293 (1980) (depositions); *United Bank Ltd.*
v Cambridge Sporting Goods Corp., 41 NY2d 254, 392 NYS2d 265, 360
 NE2d 943 (1976); *Bigelow v Acands, Inc.*, 196 AD2d 436, 601 NYS2d
 478 (1st Dept 1993) (interrogatories). If, however, a party’s answer to
 an interrogatory is used against another party, it constitutes hearsay,
Matter of Eighth Judicial Dist. Asbestos Litigation, 197 AD2d 901, 602
 NYS2d 452 (4th Dept 1993).

PJI 1:56. General Instruction—Admission by a Party—By Conduct

Testimony has been introduced that (plaintiff,
 defendant) offered money to the witness AB pro-
 vided that (he, she) would (absent himself, herself
 from this trial, testify falsely in (plaintiff’s, defen-
 dant’s) favor). (Plaintiff, defendant) denies that
 (he, she) made such an offer. You must first decide
 whether the offer was made, and in making that
 decision you will apply the rules I have already
 given you about the evaluation of testimony.

If you find that the offer of money was made you will next consider how much weight you wish to give to it in evaluating the (plaintiff's, defendant's) case. In making that decision, you will take into consideration (plaintiff's, defendant's) explanation of the offer and all of the facts and circumstances concerning it that are in evidence. Such an offer may be considered by you as an admission by (plaintiff, defendant) that (his, her) case is weak and that (his, her) evidence is dishonest. The offer tends to discredit (plaintiff's, defendant's) witnesses and casts doubt upon (his, her) position. The fact that you find that such an offer was made does not, however, mean that you must find in favor of (the opposing party, defendant, plaintiff) because (plaintiff, defendant) may have thought (he, she) had a weak case when in fact (he, she) might have had a strong one. If you find that such an offer was made, you will give that fact such weight as you think is right under all of the circumstances. You may consider it to be conclusive and binding with respect to (plaintiff's claim, defendant's defense); you may ignore it altogether; or you may give it a weight between those two extremes.

Comment

Based on *Nowack v Metropolitan St. Ry. Co.*, 166 NY 433, 60 NE 32 (1901). The pattern charge is only illustrative. Other instances of admission by conduct include: (1) silence with respect to statements made in a party's presence which were heard and understood by the party and which he or she was free to deny and which would have been natural to deny if false, *Keefner v Albany*, 77 AD2d 747, 430 NYS2d 877 (3d Dept 1980) (tort action); see *Schwab v Campbell*, 266 AD2d 840, 697 NYS2d 424 (4th Dept 1999) (silence of party cannot be considered admission by silence if there is no evidence that party was given opportunity to speak); *Cohen v Toole*, 184 App Div 70, 171 NYS 577 (1st Dept 1918) (fraud action); *Surace v Ide*, 131 Misc 69, 225 NYS 744 (Sup 1927) (tort action decision sets forth charge); but see *Jordan v Smyk*, 288 NY 525, 41 NE2d 930 (1942) (statements concerning how an accident could have been avoided required no answer); (2) flight or concealment, *People v Reddy*, 261 NY 479, 185 NE 705 (1933), *Harrington v Sharff*, 305 F2d 333 (2d Cir 1962), even though there may be more than one motive to escape, *People v Yazum*, 13 NY2d 302, 246 NYS2d 626, 196 NE2d 263 (1963); (3) receipt of fraternal insurance benefits, as an admission of past sickness, *Seidenspinner v Metropolitan Life Ins. Co.*, 175 NY 95,

67 NE 123 (1903); (4) destruction of evidence, see PJI 1:77; (5) paying an obligation, but the making of a payment in settlement of an obligation that might be found to be contractual or based on negligence or both is an admission of one or the other, but not necessarily an admission of either, and the jury should be so charged, *Nantasket, Inc. v E. F. Raboy & Co.*, 31 AD2d 804, 297 NYS2d 684 (1st Dept 1969); (6) seeking to procure the absence of an eyewitness, *Millington v New York City Transit Authority*, 54 AD2d 649, 387 NYS2d 865 (1st Dept 1976); and (7) refusal to submit to a breathalyzer, *Bazza v Banscher*, 143 AD2d 715, 533 NYS2d 285 (2d Dept 1988).

In *People v Yazum*, 13 NY2d 302, 246 NYS2d 626, 196 NE2d 263 (1963), dealing with evidence of flight, the Court noted that the jury must be closely instructed as to the weakness of such evidence. In *Derमतossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986), the Court held that evidence that first party benefits were paid to claimant pursuant to the no-fault insurance statute may not be considered as an admission in a subsequent personal injury action.

Generally, on admission by conduct, see *Prince, Richardson on Evidence* (11th ed. Farrell) §§ 8-220 et seq.; *Fisch, New York Law of Evidence*, §§ 792, 794, 795 (2nd Ed.); 57 NYJur2d 564-570, *Evidence* §§ 296-301; Annot: 70 ALR2d 1099.

The comments made and cases cited under PJI 1:55 are also applicable to this charge.

3. BURDEN OF PROOF

PJI 1:60. General Instruction—Burden of Proof—When Burden Differs on Different Issues

To say that a party has the burden of proof on a particular issue means that, considering all the evidence in the case, the party's claim on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance means the greater part of the evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase preponderance of the evidence refers to the quality of the evidence, its weight, and the effect that it has on your minds. In order for a party to prevail on an issue on which he or she has the burden of proof, the evidence that supports his or her claim on that issue must appeal to you as more nearly representing what happened than the evidence opposed to it. If it does not or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must decide the question against the party who has the burden of proof and in favor of the opposing party.

[In this case the plaintiff claims that the defendant caused the (accident or other appropriate characterization of the event).] The defendant claims that (he, she) did not cause the (accident or occurrence) but that the plaintiff did, and the defendant says that even if (he, she) did, the plaintiff also caused the (accident or occurrence). The plaintiff has the burden of proving that the defendant was negligent and that defendant's negligence was a substantial factor in causing the (accident or occurrence). The defendant has the burden of proving that the plaintiff was negligent and that the plaintiff's negligence was a substantial factor in causing the (accident or occurrence).

Comment

Caveat 1: In a case where the liability of a party has previously

been determined, the charge must be modified, see *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018).

Caveat 2: In a trial where the amount of the plaintiff's damages was the sole issue, the court improperly shifted the burden of proof to the defendant by charging PJI 1:60, committing reversible error, *Gorokhova v Consolidated Edison of New York, Inc.*, 186 AD3d 1201, 127 NYS3d 908 (2d Dept 2020). Where only the plaintiff has the burden of proof, the proper charge is PJI 1:23.

To be substituted for PJI 1:23, in appropriate cases. In a negligence action, while plaintiff has the burden of proving defendant's negligence, defendant has the burden of establishing plaintiff's comparative fault, see *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012) (citing PJI), *affd* 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014). Care must be taken in charging the jury with respect to burden of proof in a negligence case in which the comparative fault of plaintiff is in issue. The jury must not be instructed that as to each party it is "all or nothing" since plaintiff may recover even if plaintiff was more negligent than defendant, see *Grisoff v Nicoletta*, 107 AD2d 1047, 486 NYS2d 579 (4th Dept 1985). The penultimate sentence of the first paragraph of the pattern charge has been cited with approval, see *Jarrett v Madifari*, 67 AD2d 396, 415 NYS2d 644 (1st Dept 1979).

Affirmative Defenses

An affirmative defense is (1) any matter which if not pleaded would be likely to take the adverse party by surprise, or (2) any matter which raises fact issues not appearing on the face of a prior pleading, CPLR 3018(b). CPLR 3018(b) provides the following non-exhaustive list of affirmative defenses: arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, *res judicata*, statute of frauds, or statute of limitations. As to affirmative defenses generally, see Siegel, *New York Practice* § 223 (5th ed.). As to pleading issues regarding affirmative defenses generally, see *Bello v Transit Authority of New York City*, 12 AD3d 58, 783 NYS2d 648 (2d Dept 2004) (emergency doctrine); 156 Siegel's Practice Review 1 (December 2004).

The pattern charge deals with the affirmative defense of comparative negligence, and should be used in connection with PJI 2:36. Special verdicts (PJI 1:97) or written interrogatories are appropriate to record the jury's determination. Suggested special verdict formats in comparative negligence cases are included in the Comment to PJI 2:36. With the exception of the issue of comparative negligence, most affirmative defenses generally pose questions of law for the court (e.g. discharge in bankruptcy, *res judicata*, collateral estoppel, statute of frauds, statute of limitations).

Counterclaims

A counterclaim is a cause of action a defendant interposes against a

plaintiff, Siegel, New York Practice § 224 (5th ed.); see CPLR 3019(a). As to counterclaims generally, see Siegel, New York Practice §§ 224–226 (5th ed.); Siegel, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, C3019:1–C3019:10. Where there is a counterclaim, a charge pursuant to PJI 1:23 should be given with respect to the plaintiff's burden on his or her claim, and a charge similar to PJI 1:23 should be given with respect to the burden of proof on the party asserting the counterclaim, *Pagnotta v Diamond*, 51 AD3d 1099, 857 NYS2d 773 (3d Dept 2008) (citing PJI). The failure to do so may prevent the jury from evaluating the evidence under the proper legal standard and, in a case with sharply conflicting evidence, may result in reversal even in the absence of a request to charge, *id.*

Cross-Claims

A cross-claim is a claim by one defendant against another, CPLR 3019(b). As to cross-claims generally, see Siegel, New York Practice §§ 227–228 (5th ed.); Siegel, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, C3019:11–C3019:15. Typically, a cross-claim is used by one defendant to assert a claim for indemnification or contribution against another defendant. As to claims for indemnification and contribution generally, see Comment to PJI 2:275.

There is no pattern charge addressing indemnification, as the issue is not a matter for the trier of fact. Where a cross-claim for contribution has been asserted, the charge to be given will depend on whether the plaintiff's fault is in issue. If there is no issue regarding the plaintiff's fault, the proper charge to the jury is PJI 2:275, modified to account for the number of defendants in the action. However, if the plaintiff's fault is in issue, then the court must give the jury a charge pursuant to PJI 2:36, modified to account for the number of defendants in the action.

Third-Party Actions

A defendant is permitted to implead a person or entity not a party to the underlying action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant, CPLR 1007. Accordingly, claims for indemnification and contribution dominate third-party practice, see Siegel, New York Practice § 157 (5th ed.). As to third-party practice generally, see Siegel, New York Practice §§ 155–167 (5th ed.). As to claims for indemnification and contribution generally, see Comment to PJI 2:275.

There is no pattern charge addressing indemnification, as the issue is not a matter for the trier of fact. Where a third-party claim for contribution has been asserted, the charge to be given will depend on whether the plaintiff's fault is in issue. If there is no issue regarding the plaintiff's fault, the proper charge to the jury is PJI 2:275, modified to account for the number of defendants and third-party defendants in the action. However, if the plaintiff's fault is in issue, then the court must give the jury a charge pursuant to PJI 2:36, modified to account for the number of defendants and third-party defendants in the action.

PJI 1:61. General Instruction—Burden of Proof—In Death Cases

The burden of proving that the defendant was negligent and that (his, her) negligence was a substantial factor in causing the injury and death is upon the plaintiff who is (executor, administrator) of the estate of AB. The burden of proving that AB was negligent and that (his, her) negligence was a substantial factor in causing the injury and death of AB is upon the defendant.

The party having the burden of proof on a particular issue must establish his or her contention on that issue by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase fair preponderance of the credible evidence refers to the quality of the evidence, the weight and effect that it has on your minds. The law requires that in order for a party to prevail on an issue on which he or she has the burden of proof, the evidence that supports the claim on that issue must appeal to you as more nearly representing what happened than that opposed to his or her claim on that issue. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

In a death action such as this, however, the plaintiff (executor, administrator) of AB's estate is not held to as high a degree of proof as is required of an injured plaintiff who can describe what happened. Thus, you are permitted greater latitude in evaluating such factual issues as the decedent might have testified to had (he, she) lived. If, from all the credible evidence in this case, you conclude that it is more probable than not that defendant

was negligent and that (his, her) negligence was a substantial factor causing the injury or death, you will find for the plaintiff on this issue. However, if that is not your decision, or if you find that the evidence is so evenly balanced that you cannot say that the greater weight of the evidence is on either side of these issues, you will find defendant was not at fault.

On the issue of AB's fault, the burden is on the defendant to prove that AB was negligent and that (his, her) negligence was a substantial factor causing the (collision or other description of the occurrence). If, on considering all the evidence, you decide that it is more probable than not that AB was negligent and that (his, her) negligence was a substantial factor causing the injury and death, you will find for the defendant on this issue. If, however, you do not so decide or if you find that the evidence is so evenly balanced that you cannot say that the greater weight of the evidence is on either side of this issue of AB's negligence, you will find that AB was not at fault.

Comment

When this charge is used, PJI 1:23 should be omitted.

Based on *Wank v Ambrosino*, 307 NY 321, 121 NE2d 246 (1954); *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948); *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986); *Franco v Zingarelli*, 72 AD2d 211, 424 NYS2d 185 (1st Dept 1980) (citing PJI) (whatever form the charge takes, jury must be instructed that the *Noseworthy* rule permits greater latitude in inferring negligence); *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969); see *Lyons v De Vore*, 39 NY2d 971, 387 NYS2d 108, 354 NE2d 848 (1976); *Andersen v Bee Line, Inc.*, 1 NY2d 169, 151 NYS2d 633, 134 NE2d 457 (1956); *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955); *Brown v State*, 56 AD2d 672, 391 NYS2d 204 (3d Dept 1977), *aff'd*, 44 NY2d 1006, 408 NYS2d 502, 380 NE2d 328 (1978); *Natale v Niagara Mohawk Power Corp.*, 135 AD2d 955, 522 NYS2d 364 (3d Dept 1987); *Tyrell v Pollak*, 163 AD3d 1232, 80 NYS3d 706 (3d Dept 2018) (citing PJI); *Carpino v Baker*, 66 AD2d 201, 412 NYS2d 617 (1st Dept 1979); *Archie v Todd Shipyards Corp.*, 65 AD2d 699, 410 NYS2d 69 (1st Dept 1978); *Cox v Don's Welding Service, Inc.*, 58 AD2d 1013, 397 NYS2d 272 (4th Dept 1977); *Hirsch v Graeber*, 55 AD2d 808, 390 NYS2d 274 (4th Dept 1976). It is error to refuse to charge the *Noseworthy* rule in a death action, *Dobro v Sloan*, 48 AD2d 243, 368 NYS2d 621 (4th Dept 1975) (citing PJI); *Moses v Litman*, 24 AD2d 867, 264 NYS2d 360 (2d Dept 1965).

A plaintiff in a wrongful death action is not held to as high a degree of proof as a plaintiff in a personal injury action and is entitled to benefit from every favorable inference which can reasonably be drawn from the evidence in determining whether a prima facie case has been made out, *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948); see *Rivenburgh v Viking Boat Co.*, 55 NY2d 850, 447 NYS2d 707, 432 NE2d 600 (1982); *Nieves v New York City Housing Authority*, 200 AD2d 427, 606 NYS2d 224 (1st Dept 1994). The rationale of the *Noseworthy* rule is that the decedent is not available to describe the occurrence and that it is unfair to permit the defendant, who has knowledge of the facts, to benefit by standing mute, *Noseworthy v New York*, *supra*. Consistent with this rationale, the rule is inapplicable where the parties were on equal footing with respect to knowledge of the occurrence, *Tyrell v Pollak*, 163 AD3d 1232, 80 NYS3d 706 (3d Dept 2018); *Morris v Solow Management Corp. Townhouse Co., L.L.C.*, 46 AD3d 330, 848 NYS2d 613 (1st Dept 2007). In determining whether the parties are on equal footing, factors to be considered include whether the decedent's comparative fault is at issue and whether the plaintiffs witnesses can describe accident from the decedent's perspective, *Vatalaro v Suffolk*, 163 AD3d 891, 81 NYS3d 444 (2d Dept 2018). In an action where *Noseworthy* is applicable, proof in opposition to a summary judgment motion that is "admittedly slight and clearly circumstantial" may nevertheless be sufficient to raise a triable issue, *Budik v CSX Transp., Inc.*, 88 AD3d 1097, 931 NYS2d 176 (3d Dept 2011).

Although the rationale for the *Noseworthy* rule would seem to sustain application of the rule to a plaintiff's decedent who died of other causes after the accident out of which the action arises, the rule as stated applies only to death actions, and in the analogous loss of memory situation, it is required that the amnesia have resulted from defendant's acts, *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971); *Holliday v Hudson Armored Car & Courier Service, Inc.*, 301 AD2d 392, 753 NYS2d 470 (1st Dept 2003); see PJI 1:62; but see *Farrell v State*, 46 AD2d 697, 359 NYS2d 922 (3d Dept 1974) (applying the rule to a case where the injured party had died from an unrelated cause). However, the rule may not be appropriate where the decedent did not die until 8 years after the accident and 5 years after the action was commenced, since plaintiffs had ample opportunity to memorialize the decedent's testimony, *Holliday v Hudson Armored Car & Courier Service, Inc.*, *supra*. Moreover, eyewitness testimony does not make the rule inapplicable, *Schechter v Klanfer*, *supra*; *Schafer v Mayor of City of N.Y.*, 154 NY 466, 48 NE 749 (1897); *Vatalaro v Suffolk*, 163 AD3d 891, 81 NYS3d 444 (2d Dept 2018); *Learch v Bartell*, 122 AD2d 596, 504 NYS2d 918 (4th Dept 1986); *Soulier v Hughes*, 119 AD2d 951, 501 NYS2d 480 (3d Dept 1986); see *Swensson v New York, Albany Despatch Co.*, 309 NY 497, 131 NE2d 902 (1956); *Carpino v Baker*, 66 AD2d 201, 412 NYS2d 617 (1st Dept 1979), and it is not material that defendant's decedent died in the same occurrence, *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955).

The *Noseworthy* rule need not always be applied in an "all or noth-

ing manner.” It has been held that the Noseworthy standard applies only to such factual testimony as the decedent might have testified to, had he or she lived, *Stewart v Olean Medical Group, P.C.*, 17 AD3d 1094, 795 NYS2d 420 (4th Dept 2005); *Holiday v Huntington Hosp.*, 164 AD2d 424, 563 NYS2d 444 (2d Dept 1990); see *Bin Xin Tan v St. Vincent’s Hosp.*, 294 AD2d 122, 742 NYS2d 10 (1st Dept 2002) (citing PJI). In fact, in the context of a medical malpractice action, it was held reversible error to charge PJI 1:61 in unmodified, “all or nothing” form when the decedent’s testimony would necessarily have been limited to his communications with the treating physicians and there were issues in the case, including whether there was a deviation from the standard of care, about which the decedent could have offered no relevant testimony, *Imbierowicz v A.O. Fox Memorial Hosp.*, 43 AD3d 503, 841 NYS2d 168 (3d Dept 2007).

Where the identity of an assailant and the manner in which the assailant gained access to defendant’s building and confronted the deceased is as unknown to the defendant building owner as it is to the plaintiff and plaintiff and defendant are similarly situated insofar as accessibility to the facts of the decedent’s death, the Noseworthy rule has no application, *Wright v New York City Housing Authority*, 208 AD2d 327, 624 NYS2d 144 (1st Dept 1995); see *Rockhill v Pickering*, 276 AD2d 1002, 714 NYS2d 598 (3d Dept 2000); *Staples v Sisson*, 274 AD2d 779, 711 NYS2d 550 (3d Dept 2000); *Ether v State*, 235 AD2d 685, 651 NYS2d 752 (3d Dept 1997).

The Noseworthy rule does not shift the burden of proof on control, negligence, and causation, *Peterson v P. Ballantine & Sons*, 205 NY 29, 98 NE 202 (1912); *Williams v New York*, 81 AD2d 559, 438 NYS2d 333 (1st Dept 1981). The rule simply describes “a method of, or approach to, weighing evidence,” *Wank v Ambrosino*, 307 NY 321, 121 NE2d 246 (1954), and permits greater latitude in drawing an inference of negligence, *Peterson v P. Ballantine & Sons*, *supra*; *Horne v Metropolitan Transit Authority*, 82 AD2d 909, 440 NYS2d 695 (2d Dept 1981); but if control of defendant’s vehicle is in issue, a *prima facie* case depends on evidence that defendant was in the vehicle, *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955), as well as facts and conditions from which the negligence of the defendant and causation of the accident by that negligence may be reasonably inferred, *Wragge v Lizza Asphalt Const. Co.*, 17 NY2d 313, 270 NYS2d 616, 217 NE2d 666 (1966); *Cole v Swagler*, *supra*; *Christian v New York City Transit Authority*, 74 AD2d 751, 425 NYS2d 586 (1st Dept 1980), *aff’d*, 52 NY2d 920, 437 NYS2d 663, 419 NE2d 341 (1981); *Cole v New York Racing Ass’n*, 24 AD2d 993, 266 NYS2d 267 (2d Dept 1965), *aff’d*, 17 NY2d 761, 270 NYS2d 421, 217 NE2d 144 (1966); *Spano v Onondaga*, 135 AD2d 1091, 523 NYS2d 310 (4th Dept 1987) (citing PJI); *Mildner v Wagner*, 89 AD2d 638, 453 NYS2d 100 (3d Dept 1982); *Bender v State*, 54 AD2d 809, 388 NYS2d 47 (3d Dept 1976); *Snell v Motor Vehicle Acc. Indemnification Corp.*, 34 AD2d 872, 310 NYS2d 828 (3d Dept 1970); see *Oates v New York City Transit Authority*, 138 AD3d 470, 30 NYS3d 606 (1st Dept 2016), *aff’d*, 28 NY3d 1046, 43 NYS3d 245, 65 NE3d 1280 (2016). Nevertheless, even

if the rule applies, plaintiff must still make out a prima facie case, *Detres v New York City Housing Authority*, 271 AD2d 309, 706 NYS2d 105 (1st Dept 2000) (plaintiff submitted evidentiary and other materials that together supported plaintiff's assertion that dangerous condition existed at site where decedent was allegedly injured).

Dismissal of the complaint will nonetheless be proper when, even applying the *Noseworthy* rule, a prima facie case has not been made out, *Lenti v Cohon*, 16 NY2d 796, 262 NYS2d 961, 210 NE2d 245 (1965); *Rucker v Fifth Ave. Coach Lines, Inc.*, 15 NY2d 516, 254 NYS2d 97, 202 NE2d 548 (1964); *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955); *Wank v Ambrosino*, 307 NY 321, 121 NE2d 246 (1954); *Green ex rel. Green v Mower*, 302 AD2d 1005, 755 NYS2d 162 (4th Dept 2003), *aff'd*, 100 NY2d 529, 761 NYS2d 137, 791 NE2d 394 (2003) (decedent's failure to yield right of way was sole proximate cause of accident); *Iannelli v Powers*, 114 AD2d 157, 498 NYS2d 377 (2d Dept 1986); *Agius v State*, 50 AD2d 1049, 377 NYS2d 735 (3d Dept 1975), *see Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971), and plaintiff's burden has not been met when the conflicting inferences are equally balanced, *Johnson v Tschiember*, 7 AD2d 1029, 184 NYS2d 787 (2d Dept 1959).

It is error to charge that there is a presumption that decedent exercised reasonable care, *Wiwirowski v Lake Shore & M.S. Ry. Co.*, 124 NY 420, 26 NE 1023 (1891); *Wisniewski v New York Cent. R. Co.*, 228 App Div 27, 238 NYS 429 (4th Dept 1930). The absence of an eyewitness does not make admissible evidence of the decedent's habits of care and caution to show freedom from fault, *Zucker v Whitridge*, 205 NY 50, 98 NE 209 (1912); *Parsons v Syracuse, B. & N.Y.R. Co.*, 205 NY 226, 98 NE 331 (1912); *Gibson v Casein Mfg. Co.*, 157 App Div 46, 141 NYS 887 (3d Dept 1913); but *see Halloran v Virginia Chemicals Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991 (1977); PJI 1:71.

As to the use of prior testimony of one who has since died, *see Fleury v Edwards*, 14 NY2d 334, 251 NYS2d 647, 200 NE2d 550 (1964).

PJI 1:62. General Instruction—Burden of Proof—When Plaintiff Suffers Loss of Memory

The plaintiff has the burden of proving the negligence of the defendant and that the defendant's negligence was a substantial factor in causing the (accident or occurrence). This means that, considering all the evidence in the case, the plaintiff's claims on these issues must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance of the evidence means the greater part of such

evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The words fair preponderance of the credible evidence refer to the quality of the evidence, the weight and effect it has on your minds. The law requires that in order for the plaintiff to prove (his, her) claim on an issue, the evidence that supports (his, her) claim on that issue must appeal to you as more nearly representing what happened than that opposed to (his, her) claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the issue in favor of the defendant.

Plaintiff claims, however, that as a result of the injuries (he, she) sustained in the (accident or occurrence) (he, she) is suffering from a loss of memory which makes it impossible for (him, her) to recall events at or about the time of the (accident or occurrence). The plaintiff has the burden of proving by clear and convincing evidence that (he, she) is suffering from a loss of memory caused by the (accident or occurrence). This claim must be supported by the nature and extent of the injuries to the plaintiff, and you must be satisfied from the evidence that the plaintiff's loss of memory was caused by the (accident or occurrence). If you are satisfied that plaintiff's memory loss was caused by the (accident or occurrence), then I instruct you that in proving (his, her) case against defendant, plaintiff is not held to as high a degree of proof as a plaintiff who could (himself, herself) describe what happened. Thus, you are permitted greater latitude in inferring negligence on the part of defendant from all the evidence in the case.

If, from all the evidence, including any evidence introduced by defendant, you decide that it is more probable than not that defendant was negligent and that (his, her) negligence was a substantial factor in causing the (accident or occurrence), you will find that defendant was at fault. However, if that is not your decision, or if

you find that the evidence is so evenly balanced that you cannot say that the greater weight of the evidence is on either side of these issues, you will find defendant was not at fault.

Comment

When this charge is used, PJI 1:23 should be omitted.

Based on *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986) (citing PJI); *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971) (citing PJI) (amnesia); *Nahvi v Urban*, 259 AD2d 740, 687 NYS2d 398 (2d Dept 1999) (amnesia charge improperly given) (citing PJI); *Fasano v State*, 113 AD2d 885, 493 NYS2d 805 (2d Dept 1985) (citing PJI) (amnesia); see *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986) (citing PJI); *Lyons v De Vore*, 39 NY2d 971, 387 NYS2d 108, 354 NE2d 848 (1976); *Wartels v County Asphalt, Inc.*, 29 NY2d 372, 328 NYS2d 410, 278 NE2d 627 (1972); *Williams v Hooper*, 82 AD3d 448, 919 NYS2d 121 (1st Dept 2011); *Sala v Spallone*, 38 AD2d 860, 330 NYS2d 131 (2d Dept 1972); *Cameron v Dooley*, 18 AD2d 130, 238 NYS2d 338 (3d Dept 1963). The charge applies the rule of *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948), discussed in the comment to PJI 1:61, to the plaintiff whose ability to testify about an incident has been destroyed by amnesia, see *Williams v Hooper*, *supra*; *Miceli v GEICO Properties, Inc.*, 215 AD2d 461, 626 NYS2d 266 (2d Dept 1995); *Jarrett v Madifari*, 67 AD2d 396, 415 NYS2d 644 (1st Dept 1979) (rule was not applicable where despite the claim of amnesia plaintiff's version of the events could be pieced together from pre-trial deposition read into evidence and from trial testimony). Where the parties are similarly situated insofar as accessibility to the facts of the accident, the *Noseworthy* rule has no application, *Gayle v New York*, 256 AD2d 541, 682 NYS2d 426 (2d Dept 1998); *Ether v State*, 235 AD2d 685, 651 NYS2d 752 (3d Dept 1997). Similarly, the charge is not applicable where there is no evidence that plaintiff's amnesia with respect to the events in question was caused by defendant's conduct, *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 840 NYS2d 508 (4th Dept 2007) (citing PJI).

The plaintiff must establish, by clear and convincing evidence, that plaintiff suffers from amnesia caused by the accident, *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971); *Nahvi v Urban*, 259 AD2d 740, 687 NYS2d 398 (2d Dept 1999) (citing PJI); *Stanford v Resler*, 206 AD2d 468, 615 NYS2d 46 (2d Dept 1994). In light of that limitation, plaintiff must be permitted to present medical testimony concerning the relationship between the retrograde amnesia condition and the incident and concerning its effect, see *Mahon v Giordano*, 30 AD2d 792, 291 NYS2d 854 (1st Dept 1968); Annot: 11 ALR3d 1360; 20 ALR3d 684. Since amnesia is easily feigned, the *Schechter* case, although approving application of the *Noseworthy* principle to amnesiacs, imposed the requirement of clear and convincing evidence set forth in the second paragraph of the pattern charge, see

Nahvi v Urban, *supra*. For a charge on clear and convincing evidence, see PJI 1:64. Absent any medical evidence of amnesia and causation, plaintiff will not be entitled to the more lenient standard of proof, *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 (1st Dept 2010); *McGuire v Laier*, 281 AD2d 401, 721 NYS2d 552 (2d Dept 2001) (citing PJI); *Nahvi v Urban*, *supra*; *Costa v Hicks*, 98 AD2d 137, 470 NYS2d 627 (2d Dept 1983). Imbecility is, however, a mental deficiency to which the requirements of causation and clear and convincing evidence should not logically be applied, but since the *Schechter* opinion discussed imbecility without drawing the distinction here suggested, the law on the point is not clear.

Eyewitness testimony does not make the rule inapplicable; only the amnesiac plaintiff could testify that he or she saw the danger and sought to avoid it, *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971); see *Swensson v New York, Albany Despatch Co.*, 309 NY 497, 131 NE2d 902 (1956); *Schafer v Mayor of City of N.Y.*, 154 NY 466, 48 NE 749 (1897).

The burden of proof remains on the amnesiac plaintiff, however, to present *prima facie* evidence of defendant's negligence before the *Noseworthy* rule can be applied, *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986) (citing PJI); *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986) (citing PJI); *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971); *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955); *Wank v Ambrosino*, 307 NY 321, 121 NE2d 246 (1954), because the *Noseworthy* rule describes "a method of, or approach to, weighing evidence," *Wank v Ambrosino*, *supra*. This permits greater latitude in drawing an inference of negligence, but does not shift the burden of proof, *Peterson v P. Ballantine & Sons*, 205 NY 29, 98 NE 202 (1912); *Lynn v Lynn*, 216 AD2d 194, 628 NYS2d 667 (1st Dept 1995); *Townley v Bagby Transfer Co.*, 19 AD2d 757, 241 NYS2d 492 (3d Dept 1963). Plaintiff may prevail on a "lighter burden of persuasion," *Wartels v County Asphalt, Inc.*, 29 NY2d 372, 328 NYS2d 410, 278 NE2d 627 (1972); see *Williams v Hooper*, 82 AD3d 448, 919 NYS2d 121 (1st Dept 2011). Nevertheless, a plaintiff must make some showing of defendant's negligence to invoke the rule, *Jarrett v Madifari*, 67 AD2d 396, 415 NYS2d 644 (1st Dept 1979). Unless there is some evidence, even if weak, upon which a jury could find defendant negligent, the complaint must be dismissed, *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986) (citing PJI); *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986) (citing PJI); see *Gayle v New York*, 92 NY2d 936, 680 NYS2d 900, 703 NE2d 758 (1998).

The presumption of due care by plaintiff, recognized in some other states in loss of memory cases, see *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971); *Rossmann v La Grega*, 28 NY2d 300, 321 NYS2d 588, 270 NE2d 313 (1971); *Breker v Rosema*, 301 Mich 685, 4 NW2d 57 (1942), does not apply in New York, *Wiwirowski v Lake Shore & M.S. Ry. Co.*, 124 NY 420, 26 NE 1023 (1891); *Cary v Short*, 16

AD2d 309, 228 NYS2d 348 (4th Dept 1962); *Wisniewski v New York Cent. R. Co.*, 228 App Div 27, 238 NYS 429 (4th Dept 1930); see *LeRoy v Sabena Belgian World Airlines*, 344 F2d 266 (2d Cir 1965). Based on death case jurisprudence, it would appear that the absence of an eyewitness would not make admissible evidence of an amnesiac plaintiff's general habits of care and caution as tending to show freedom from fault; compare *Zucker v Whitridge*, 205 NY 50, 98 NE 209 (1912), and *Parsons v Syracuse, B. & N.Y.R. Co.*, 205 NY 226, 98 NE 331 (1912) with *Gibson v Casein Mfg. Co.*, 157 App Div 46, 141 NYS 887 (3d Dept 1913), and see Annot: 28 ALR3d 1293; 29 ALR3d 791. As to evidence of habit generally, see PJI 1:71.

Plaintiff, in order to prove amnesia by clear and convincing evidence, must produce expert testimony establishing a loss of memory and its causal relationship to defendant's conduct, *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986); *Ether v State*, 235 AD2d 685, 651 NYS2d 752 (3d Dept 1997); *Menekou v Crean*, 222 AD2d 418, 634 NYS2d 532 (2d Dept 1995); *Fleming by Fleming v Kings Ridge Recreation Park, Inc.*, 138 AD2d 451, 525 NYS2d 866 (2d Dept 1988). Absent expert testimony, a jury "is not capable of evaluating the effects of a trauma or the symptoms which may verify the loss of memory and indicate that it is real and not feigned," *Sawyer v Dreis & Krump Mfg. Co.*, supra.

PJI 1:63. General Instruction—Burden of Proof—Effect of Presumption

Defendant CD admits that (he, she) owned the automobile involved in the collision but claims that (defendant) AB was driving it without (his, her) permission. Defendant CD cannot be held responsible for AB's negligence, if any, unless AB was driving the automobile with CD's permission. The plaintiff has the burden of proving that AB was driving the automobile with CD's permission. Permission can be given by words or by conduct. Since CD admits that (he, she) owned the automobile, the law presumes that AB was driving with CD's permission. That presumption is strong but it can be overcome by evidence to the contrary. In order to decide this question, you must consider all the evidence including the presumption of permission. For the plaintiff to succeed in proving that permission was given, you must find that the plaintiff has proved by the greater weight of the evidence that AB was driving the automobile with CD's permission.

Comment

Based on *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); *St. Andrassy v Mooney*, 262 NY 368, 186 NE 867 (1933); *Chaika v Vandenberg*, 252 NY 101, 169 NE 103 (1929); *Orlando v Pioneer Barber Towel Supply Co.*, 239 NY 342, 146 NE 621 (1925); *Potts v Pardee*, 220 NY 431, 116 NE 78 (1917); see 8B NYJur2d Automobiles § 1089; Annot: 27 ALR2d 167. The charge is intended to be used together with PJI 2:245–PJI 2:249 dealing with Vehicle and Traffic Law § 388 and the legal consequences of a finding of permission. For a discussion of the application of the statutory presumption in VTL § 388, see *Murdza v Zimmerman*, *supra*. Generally, as to presumptions, see *People v Rivera*, 39 NY2d 519, 384 NYS2d 726, 349 NE2d 825 (1976); *Prosser and Keeton, Torts* (5th Ed) 208; *Prince, Richardson on Evidence* (11th Ed Farrell) §§ 3-101–3-106; *Fisch, New York Evidence* § 1140; 4 *Bender's New York Evidence* §§ 230.04; 230.05; 21 NYJur2d, *Evidence* §§ 97 et seq.; Annot: 5 ALR3d 19; *McCormick, What Shall the Judge Tell the Jury About Presumption*, 13 Wash L Rev 185; *McCormick, Charges on Presumption and Burden of Proof*, 5 NCLR 291; *Morgan, Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv L Rev 59; UCC § 1-201(31). With respect to the confusion in judicial decisions between an inference and a presumption, see *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455 (1941). As to definition of “express” and “implied” permission, see PJI 2:245. As to the presumption of ownership arising from proof of registration, see Comment to PJI 2:245; the presumption of notice in an injurious falsehood case, see Comment to PJI 3:55; the presumption against suicide, see this Comment *infra* and Comment to PJI 4:57; the presumption of negligence when a bailee returns goods in damaged condition, see Comment to PJI 4:93; the presumption of sanity, see as to actions on insurance policies, *infra* this Comment and Comment to PJI 4:57; and as to will contests, the Comment to PJI 7:48.

Many cases use the terms “inference” and “presumption” interchangeably. An inference, however, merely allows the trier of fact to draw a conclusion from a proven fact, *Martin v Albany*, 42 NY2d 13, 396 NYS2d 612, 364 NE2d 1304 (1977). A presumption places the burden upon the adversary to come forward with evidence to rebut the presumption, *Kilburn v Bush*, 223 AD2d 110, 646 NYS2d 429 (4th Dept 1996).

A certificate of ownership is *prima facie* evidence of ownership, but it is not conclusive and may be rebutted, *Vergari v Kraisky*, 120 AD2d 739, 502 NYS2d 788 (2d Dept 1986). The presumption of permission arising from proof of ownership is a form of the presumption of regularity, *Fiocco v Carver*, 234 NY 219, 137 NE 309 (1922); *Aetna Cas. and Sur. Co. v Brice*, 72 AD2d 927, 422 NYS2d 203 (4th Dept 1979), *aff'd*, 50 NY2d 958, 431 NYS2d 528, 409 NE2d 1000 (1980).

Proof of consent under VTL § 388 can often depend on the testimony

of a hostile party, i.e., the owner, *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003). Recognizing this, the Court of Appeals has held that proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied, *id.* Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator until an explanation to the contrary is given, *id.*; *St. Andrassy v Mooney*, 262 NY 368, 186 NE 867 (1933). The presumption is rebuttable by substantial evidence, *Murdza v Zimmerman*, *supra*; *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); *Fili v Matson Motors, Inc.*, 183 AD2d 324, 590 NYS2d 961 (4th Dept 1992), but is controlling until rebutted, *Lovetere v Stackhouse*, 25 AD2d 628, 267 NYS2d 758 (1st Dept 1966); see *St. Andrassy v Mooney*, *supra*; *Chaika v Vandenberg*, 252 NY 101, 169 NE 103 (1929); *Aetna Cas. and Sur. Co. v Brice*, 72 AD2d 927, 422 NYS2d 203 (4th Dept 1979), *aff'd*, 50 NY2d 958, 431 NYS2d 528, 409 NE2d 1000 (1980). The rebutting explanation may be either that permission was never given, or that permission was conditioned upon the driver taking no riders, see PJI 2:247, or permitting no one else to drive, *Murdza v Zimmerman*, *supra* (employee handbook explicitly restricted those who could operate its vehicles); *Rooney v Myers*, 132 AD2d 839, 517 NYS2d 627 (3d Dept 1987); *Smyth v Pellegrino*, 28 AD2d 537, 279 NYS2d 694 (2d Dept 1967), or using the car only in a given area or for a particular purpose, *Fiocco v Carver*, 234 NY 219, 137 NE 309 (1922), or that permission was limited to operation during daylight hours only, *Rachon v Cheuvant*, 37 AD2d 911, 325 NYS2d 452 (4th Dept 1971); see PJI 2:246; cf. *Smyth v Pellegrino*, *supra*. Note, however, that a restriction on manner of operation does not relieve the owner from responsibility, *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); see PJI 2:248, and, therefore, is not a sufficient explanation to rebut the presumption. For a discussion of the presumption created by VTL § 388 in cases involving car rental agencies and company owned cars, see *Murdza v Zimmerman*, *supra*; PJI 2:245.

Whether rebuttal evidence, taken at face value, is sufficient to exonerate the owner as a matter of law is a question of law for the court, *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); see *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003); *Chaika v Vandenberg*, 252 NY 101, 169 NE 103 (1929). If it is legally sufficient, whether the presumption is in fact rebutted may be either a question for the court or a question for the jury. Whether the question is for the court or the jury depends on whether there is an issue of credibility. It is for the court if the evidence adduced has no merit whatsoever, *Leotta v Plessinger*, *supra*; see *Burgin v New York*, 91 AD2d 926, 457 NYS2d 814 (1st Dept 1983), or if, on the other hand, the evidence may not reasonably be disregarded. In the former instance, the court should instruct the jury that there was permission as a matter of law. The presumption is destroyed as a matter of law when on "any fair interpretation of the evidence" the jury could not conclude that permission had been granted, *Blunt v Zinni*, 32 AD2d

882, 302 NYS2d 504 (4th Dept 1969), *aff'd*, 32 AD2d 882, 302 NYS2d 504 (4th Dept 1969); *Ryder v Cue Car Rental, Inc.*, 32 AD2d 143, 302 NYS2d 17 (4th Dept 1969) (citing PJI).

In *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 811 NYS2d 302, 844 NE2d 756 (2006), the Court of Appeals discussed when substantial evidence rebutting the presumption of permissive use would justify granting summary judgment for defendant owner. The Court stated that uncontradicted disavowals of permission by both the owner and driver may lead to summary judgment, depending upon the strength and plausibility of the disavowals and whether they leave room for doubts that are best left for the jury, see *Murphy v Carnesi*, 30 AD3d 570, 817 NYS2d 136 (2d Dept 2006); see also *Britt v Pharmacologic Pet Services, Inc.*, 36 AD3d 1039, 828 NYS2d 630 (3d Dept 2007) (uncontradicted disavowals of permission by both driver and owner constitute substantial evidence rebutting presumption of permissive use and “in most circumstances” entitle owner to summary judgment). Where such uncontradicted disavowals are bolstered by additional evidence such as accident reports, summary judgment is usually (although not always) warranted, *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, *supra*; *Wilson v Harrington*, 269 App Div 891, 56 NYS2d 157 (3d Dept 1945), *aff'd*, 295 NY 667, 65 NE2d 101 (1946); see *Fluegel v Coudert*, 244 NY 393, 155 NE 683 (1927); *Rooney v Myers*, 132 AD2d 839, 517 NYS2d 627 (3d Dept 1987); *Capalario v Murray*, 52 AD2d 1037, 384 NYS2d 579 (4th Dept 1976); see also *St. Andrassy v Mooney*, 262 NY 368, 186 NE 867 (1933) (claim against owner should not have been submitted to jury where there were uncontradicted disavowals of permission by owner, owner’s wife and driver). In contrast, where competent evidence is introduced suggesting implausibility, collusion or implied permission, the issue of consent should go to the jury even where both the owner and the driver have denied that permission was given, *Murphy v Carnesi*, *supra*. However, inconsistencies and factual issues pertaining to matters collateral to the question of permission do not suffice to raise a triable question of fact, *Britt v Pharmacologic Pet Services, Inc.*, *supra*.

In other situations, whether the presumption is rebutted will ordinarily be for the jury, *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); *Comstock v Beeman*, 24 AD2d 931, 264 NYS2d 767 (3d Dept 1965), *aff'd*, 18 NY2d 772, 274 NYS2d 905, 221 NE2d 564 (1966); *Brindley v Krizsan*, 18 AD2d 971, 238 NYS2d 260 (1st Dept 1963), *aff'd*, 13 NY2d 976, 244 NYS2d 779, 194 NE2d 688 (1963); *Harrison v Malcolm*, 186 AD2d 502, 589 NYS2d 865 (1st Dept 1992); *Morris v Palmier Oil Co., Inc.*, 94 AD2d 911, 463 NYS2d 631 (3d Dept 1983); *Carey v AAA Con Transp., Inc.*, 61 AD2d 113, 401 NYS2d 1015 (3d Dept 1978); *Berger v Charles Schatz, Inc.*, 26 AD2d 551, 271 NYS2d 108 (2d Dept 1966), since there will ordinarily be some credibility issue and the presumption is “very strong,” *Aetna Cas. and Sur. Co. v Brice*, 72 AD2d 927, 422 NYS2d 203 (4th Dept 1979), *aff'd*, 50 NY2d 958, 431 NYS2d 528, 409 NE2d 1000 (1980); *Tabares v Colin Service Systems, Inc.*, 197 AD2d 571, 602 NYS2d 634 (2d Dept 1993);

see *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 786 NE2d 440 (2003). Even where there is substantial evidence to the contrary, there is generally an issue for the jury, *Aetna Cas. and Sur. Co. v Brice*, supra; *Blunt v Zinni*, 32 AD2d 882, 302 NYS2d 504 (4th Dept 1969); *Ryder v Cue Car Rental, Inc.*, 32 AD2d 143, 302 NYS2d 17 (4th Dept 1969) (citing PJI); see *Phoenix v Bolton*, 59 AD2d 464, 399 NYS2d 914 (3d Dept 1977) (bench trial). Thus, it is for the jury to say whether the presumption has in fact been overcome when the only rebuttal evidence is the owner's denial and the circumstances are as consistent with consent as with lack of consent, *Chaika v Vandenberg*, 252 NY 101, 169 NE 103 (1929); *Orlando v Pioneer Barber Towel Supply Co.*, 239 NY 342, 146 NE 621 (1925); *Ryder v Cue Car Rental, Inc.*, supra; *Blunt v Zinni*, supra, or the rebuttal evidence is contradicted, or, though not contradicted, may reasonably be disregarded by the jury because of improbability, the interest of the witnesses or other weakness, *Piwowski v Cornwell*, 273 NY 226, 7 NE2d 111 (1937); *St. Andrassy v Mooney*, 262 NY 368, 186 NE 867 (1933); *Hukey v Massachusetts Bonding & Ins. Co.*, 277 App Div 411, 100 NYS2d 643 (3d Dept 1950).

The presumption of consent disappears from the case when there is substantial evidence to the contrary, *St. Andrassy v Mooney*, 262 NY 368, 186 NE 867 (1933); *Chaika v Vandenberg*, 252 NY 101, 169 NE 103 (1929); *Rose v Balfe*, 223 NY 481, 119 NE 842 (1918); *Glens Falls Ins. Co. v U. S. Fire Ins. Co.*, 41 AD2d 869, 342 NYS2d 624 (3d Dept 1973), *aff'd*, 34 NY2d 778, 358 NYS2d 773, 315 NE2d 813 (1974); *Rachon v Cheuvant*, 37 AD2d 911, 325 NYS2d 452 (4th Dept 1971) (evidence sufficient); *Casiano v Weinstein & Son Floor Covering Corp.*, 37 AD2d 564, 322 NYS2d 497 (2d Dept 1971) (evidence insufficient); see *People ex rel. Wallington Apartments v Miller*, 288 NY 31, 41 NE2d 445 (1942). In other words, when the court holds as a matter of law or the jury finds as a question of fact that there is substantial evidence of lack of consent, the presumption is overcome. Clearly, if the jury discards the rebuttal evidence offered by defendant, the presumption remains and determines the issue of permission, *St. Andrassy v Mooney*, supra; *Chaika v Vandenberg*, supra. Substantial evidence means evidence which reasonably sustains the proposition that permission was not given or was subject to a restriction (of the type referred to above) with which the operator did not comply, *Orlando v Pioneer Barber Towel Supply Co.*, 239 NY 342, 146 NE 621 (1925). Thus, the uncontradicted testimony of both the defendant-owner and the defendant-driver that on the occasion of the accident the owner's permission was limited to operation during daylight hours led to reversal of a judgment against the owner in *Rachon v Cheuvant*, supra. When the presumption is overcome "the case ceases to be one for presumptions, and becomes a case for proof," *Matter of Magna*, 258 NY 82, 179 NE 266 (1932), and unless such proof is adduced, the complaint must be dismissed, see *Capalario v Murray*, 52 AD2d 1037, 384 NYS2d 579 (4th Dept 1976).

What the jury should be told about the presumption will depend upon the nature of the explanation offered and how the court rules on the question whether the presumption has been overcome. It is error to

charge that plaintiff has the burden of proving permission without advising the jury of the presumption and the error is compounded by a charge that defendant does not have the burden of proving anything since the presumption casts on defendant the burden of coming forward with substantial evidence to the contrary, *Rivera v W. & R. Service Station, Inc.*, 34 AD2d 115, 309 NYS2d 274 (1st Dept 1970). If the court rules as a matter of law that the presumption has been rebutted, and plaintiff then comes forward with proof, there is no need to say anything to the jury about the presumption; permission will be submitted to them as an issue of fact on all the evidence in the case. When the question whether the presumption has been rebutted is for the jury, and the only explanation offered is a denial, the jury should be instructed, as in the pattern charge, that they must find in accordance with the presumption unless on the evidence presented they find the presumption overcome, see the records on appeal in *Piowarski v Cornwell*, 273 NY 226, 7 NE2d 111 (1937); *Shuba v Greendonner*, 271 NY 189, 2 NE2d 536 (1936); *Orlando v Pioneer Barber Towel Supply Co.*, 239 NY 342, 146 NE 621 (1925); see *Berger v Charles Schatz, Inc.*, 26 AD2d 551, 271 NYS2d 108 (2d Dept 1966); UCC § 1-201(31) and Comment, 53 Calif L Rev 1439, 1444. If the explanation given is that the driver had conditional permission but the condition was not complied with, and the court rules that there are questions of fact on both of those claims, the last two sentences of the pattern charge will be deleted and the following inserted:

PJI 1:63.1

You must find in accordance with that presumption that permission was given, unless you believe that ([state the alleged condition, such as:—] at the time CD turned the car over to AB (he, she) instructed (him, her) not to allow riders in the car with (him, her). If you find that ([state condition, as:—] CD told AB not to allow riders in the car), then you will determine whether AB violated that instruction ([specify how it is claimed condition was violated, as:—] by allowing riders in the car at the time of the collision). If you find that CD gave such instruction to AB and that AB violated it, you will find that defendant CD is not liable for the negligence of AB. If you find either that no such instruction was given or that ([negative the claimed violation, as:—] there was no rider in the car at the time of the collision), your finding will be that the car was driven by AB with CD's permission and CD is liable for AB's negligence.

If there is a question of fact on only one of those claims, the foregoing must be modified accordingly.

Care must be taken to analyze the particular presumption under consideration. Sometimes the presumption aids the person who has the burden of proof by shifting to the opposing party the burden of going forward with evidence. This may be because social policy is served by the presumption or because the evidence is more readily available to the opponent. Examples are the situation dealt with in the pattern charge, and the presumption arising in bailment cases that damage was occasioned through the fault or neglect of the bailee when there is evidence that property was in good condition when delivered and damaged when returned in a way that could not result from wear and tear, *Aronette Mfg. Co. v Capitol Piece Dye Works, Inc.*, 6 NY2d 465, 190 NYS2d 361, 160 NE2d 842 (1959); *Castorina v Rosen*, 290 NY 445, 49 NE2d 521 (1943); *Goldstein v Pullman Co.*, 220 NY 549, 116 NE 376 (1917); *Wintringham v Hayes*, 144 NY 1, 38 NE 999 (1894); *Stewart v Stone*, 127 NY 500, 28 NE 595 (1891); *Claflin v Meyer*, 75 NY 260 (1878); *Herrman v New England Nav. Co.*, 143 App Div 551, 128 NYS 380 (2d Dept 1911); *Prince, Richardson on Evidence* (11th Ed Farrell) § 3-104; *UCC* § 7-403.

Sometimes the "presumption" is simply another way of stating who has the burden of proof, *People ex rel. Wallington Apartments v Miller*, 288 NY 31, 41 NE2d 445 (1942) (presumption that assessors' valuations are not excessive); see *People v Rivera*, 39 NY2d 519, 384 NYS2d 726, 349 NE2d 825 (1976); *People v Langan*, 303 NY 474, 104 NE2d 861 (1952); *People v Richetti*, 302 NY 290, 97 NE2d 908 (1951) (presumption of regularity of official acts); *Mobil Oil Corp. v Tax Commission of City of New York*, 60 AD2d 910, 401 NYS2d 565 (2d Dept 1978); *Broadway-Saranac Lake Corp. v Board of Assessors of Saranac Lake*, 43 AD2d 649, 349 NYS2d 830 (3d Dept 1973). The presumption may also be a way of stating who has the burden of going forward with evidence, *Fleming v Ponziani*, 24 NY2d 105, 299 NYS2d 134, 247 NE2d 114 (1969) (presumption of validity of a release arising from proof of signature imposes on plaintiff the burden of going forward, but disappears from the case once some evidence of fraud or duress is introduced). In such a case there is no need to refer to the presumption in instructing the jury; the burden of proof charge is sufficient.

Sometimes the presumption arises because the presumed fact accords more closely with probability, as is true of the presumption against suicide and the presumption in favor of sanity, see *Schelberger v Eastern Sav. Bank*, 93 AD2d 188, 461 NYS2d 785 (1st Dept 1983), *aff'd*, 60 NY2d 506, 470 NYS2d 548, 458 NE2d 1225 (1983). In such a case the presumption may do more than shift the burden of going forward; in some, and perhaps all, cases it shifts the burden of proof to the party asserting suicide or insanity. Thus, in an action on a straight life insurance policy which excludes suicide from coverage as an excepted risk, the burden of proof of suicide is upon the defendant insurer, *Wellisch v John Hancock Mut. Life Ins. Co.*, 293 NY 178, 56 NE2d 540 (1944); *Martorella v Prudential Ins. Co. of America*, 268 NY 586, 198 NE 417 (1935); *Prince, Richardson on Evidence* (11th ed. Farrell) § 3-109.

The party asserting suicide as a defense must clearly establish such facts as will exclude any reasonable hypothesis of accidental death, *Schelberger v Eastern Sav. Bank*, 60 NY2d 506, 470 NYS2d 548, 458 NE2d 1225 (1983). A finding of suicide is warranted only if “no conclusion other than suicide may reasonably be drawn,” *id.* However, the presumption is “really a rule or guide for the jury in coming to a conclusion on the evidence,” *Wellisch v John Hancock Mut. Life Ins. Co.*, 293 NY 178, 56 NE2d 540 (1944); see *Green v William Penn Life Ins. Co. of New York*, 12 NY3d 342, 879 NYS2d 822, 907 NE2d 700 (2009). Thus, the presumption against suicide does not alone justify rejection of a claim of suicide as a matter of law, *Green v William Penn Life Ins. Co. of New York*, *supra*. As long as there is some support in the evidence for the claim of suicide, the question must be submitted to the jury, *id.* The presumption against suicide is an evidentiary rule that is relevant to resolving disputes over life insurance proceeds, *Infante v Dignan*, 12 NY3d 336, 879 NYS2d 824, 907 NE2d 702 (2009); see *Green v William Penn Life Ins. Co. of New York*, *supra*. The Court of Appeals has not considered its applicability in other civil litigation contexts, *Infante v Dignan*, *supra*.

Because the presumption involves probabilities predicated on general human conduct and is a factor for the jury to consider in weighing the evidence, a separate instruction is required, *Wellisch v John Hancock Mut. Life Ins. Co.*, 293 NY 178, 56 NE2d 540 (1944); see *Begley v Prudential Ins. Co. of America*, 1 NY2d 530, 154 NYS2d 866, 136 NE2d 839 (1956); *Weil v Globe Indemnity Co.*, 179 App Div 166, 166 NYS 225 (1st Dept 1917). In an action on a straight life insurance policy, the following would be a proper charge:

PJI 1:63.2

There is a presumption against suicide since self-destruction is contrary to general human conduct. In deciding whether the defendant has sustained its burden of proving that decedent committed suicide, you should consider that presumption and the evidence in the case. [*Here state contentions of the parties.*] If the evidence supporting a finding of accidental death and the evidence supporting a finding of suicide weigh so evenly that you are unable to say that there is a preponderance on either side, your finding must be that death was accidental. You may make a finding of suicide only if you are satisfied from the evidence, and taking into consideration the presumption against suicide, that no conclusion other than suicide may reasonably be drawn.

This is essentially the charge approved by the Court of Appeals,

Schelberger v Eastern Sav. Bank, 60 NY2d 506, 470 NYS2d 548, 458 NE2d 1225 (1983), and discussed in Green v William Penn Life Ins. Co. of New York, 12 NY3d 342, 879 NYS2d 822, 907 NE2d 700 (2009) (citing PJI). The purpose of the instruction is to impress on the jurors' minds that the presumption against suicide is a strong one and that they should not find suicide unless the evidence shows suicide to be highly probable, Green v William Penn Life Ins. Co. of New York, supra (citing PJI). In light of the Begley case, 1 NY2d 530, 154 NYS2d 866, 136 NE2d 839, and the analysis of the impact of that decision in Schelberger v Eastern Sav. Bank, 93 AD2d 188, 461 NYS2d 785 (1st Dept 1983), aff'd, 60 NY2d 506, 470 NYS2d 548, 458 NE2d 1225 (1983), the foregoing charge may properly be adapted in a double indemnity case where the defense is suicide, see also Prince, Richardson on Evidence (11th ed. Farrell) § 3-109. The presumption against suicide is not applicable where the injured party survives the event, sues for personal injuries while denying a suicide attempt and is available to testify in rebuttal to proof of attempted suicide, Rinaldo v New York City Transit Authority, 39 NY2d 285, 383 NYS2d 571, 347 NE2d 897 (1976) (no presumption against attempted suicide). The presumption against suicide is also not applicable to a medical examiner's determination of the cause or manner of a decedent's death or to judicial review of that determination, which is to be sustained unless it is arbitrary, Infante v Dignan, 12 NY3d 336, 879 NYS2d 824, 907 NE2d 702 (2009); see Mitchell v Halpern, 17 AD2d 922, 233 NYS2d 297 (1st Dept 1962), aff'd, 14 NY2d 817, 251 NYS2d 470, 200 NE2d 454 (1964).

In a civil action in which sanity is in issue, it apparently would be proper to adapt the above suicide charge, see People v Davis, 299 NY 745, 87 NE2d 668 (1949); People v Tobin, 176 NY 278, 68 NE 359 (1903); Brotherton v People, 75 NY 159 (1878); see PJI 4:57.

The presumption of death after three years' absence, EPTL 2-1.7(a), requires that the party relying on the presumption bear the burden of proving that the person was absent for a continuous period of three years, that there had been a diligent but fruitless search for the person, and that the person's absence cannot be explained satisfactorily, see Kutner v New England Mut. Life Ins. Co. of Boston, 57 AD2d 697, 395 NYS2d 540 (4th Dept 1977); Prince, Richardson on Evidence (11th ed. Farrell) § 3-114. Unless the facts are undisputed and not susceptible of conflicting inferences, the jury is to determine whether the presumption arises, Butler v Mutual Life Ins. Co. of New York, 225 NY 197, 121 NE 758 (1919); Kutner v New England Mut. Life Ins. Co., supra.

No New York case concerned with the presumption of receipt of a letter or telegram arising from proof of mailing or delivery for transmission has considered what the effect of that presumption is, but in light of the statement in Oregon S.S. Co. v Otis, 100 NY 446, 3 NE 485 (1885), that the presumption "consists merely in the natural inference which may be drawn from experienced certainty of transmission. The great bulk of letters sent by mail reach their destination, and equally so the great bulk of telegrams," it would not appear improper to charge the

jury in similar fashion as in the suicide case. Other presumption of receipt cases are *Nassau Ins. Co. v Murray*, 46 NY2d 828, 414 NYS2d 117, 386 NE2d 1085 (1978); *Dulberg v Equitable Life Assur. Soc. of U.S.*, 277 NY 17, 12 NE2d 554 (1938); *Trusts & Guarantee Co. v Barnhardt*, 270 NY 350, 1 NE2d 459 (1936); *News Syndicate Co. v Gatti Paper Stock Corporation*, 256 NY 211, 176 NE 169 (1931). Such a presumption may also be created by statute; e.g.—VTL § 253(2), presumption of receipt of summons served by registered mail upon a nonresident; CPLR 2103(b)(2), presumption of receipt by mailing. Whether the denial of receipt standing alone will be sufficient to raise a jury question will depend upon the policy behind the creation of the particular presumption, *Engel by Engel v Lichterman*, 62 NY2d 943, 479 NYS2d 188, 468 NE2d 26 (1984) (order of preclusion); *Trusts & Guarantee Co. v Barnhardt*, supra (with respect to negotiable instrument, such denial insufficient); *Caprino v Nationwide Mut. Ins. Co.*, 34 AD2d 522, 308 NYS2d 624 (1st Dept 1970) (insurer's proof of mailing procedures insufficient to invoke presumption receipt and overcome insured's denial of receipt of notice of cancellation).

A presumption that plaintiff or defendant acted with due care, predicated on the human instinct of self-preservation, is sometimes argued. *Wiwrowski v Lake Shore & M.S. Ry. Co.*, 124 NY 420, 26 NE 1023 (1891) and *Wisniewski v New York Cent. R. Co.*, 228 App Div 27, 238 NYS 429 (4th Dept 1930), held that there is no such presumption. *Cary v Short*, 16 AD2d 309, 228 NYS2d 348 (4th Dept 1962), considered the question but left it open. *LeRoy v Sabena Belgian World Airlines*, 344 F2d 266 (2d Cir 1965), held that refusal so to charge was not error.

The presumption of continuance, see *Prince, Richardson on Evidence* (11th ed. Farrell) § 3-112, may be invoked by a plaintiff to resist a claim that her decedent was already dead when struck by defendant's vehicle, but it is rebuttable and it is for the jury to say what inference should be drawn from the circumstances disclosed by the evidence, *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969).

Death or disability of a firefighter or police officer resulting from injury to or impairment of the heart, occurring in the line of duty is presumed to be the natural and proximate result of an accident, absent "substantial evidence to the contrary," Retirement and Social Security Law § 363-a. Substantial evidence apparently means evidence which reasonably sustains a finding that the injury or impairment was not the result of an accident, see *Bunnell v New York State Policemen's and Firemen's Retirement System*, 50 AD2d 244, 377 NYS2d 935 (3d Dept 1975).

Federal Annotation: In civil actions, the effect of a presumption as to a fact which is an element of a claim or defense as to which state law supplies the rule is determined in accordance with state law, FRE 302. The pattern charge, therefore, applies when a presumption operates on such an element. In other cases, presumptions in federal actions are governed by FRE 301.

PJI 1:64. General Instruction—Burden of Proof—Clear and Convincing Evidence

The burden is on the plaintiff to prove [*here state the ultimate issue to be decided*] (e.g., fraud, malice, mistake, a gift, the contract between the plaintiff and the deceased, incompetency, addiction) by clear and convincing evidence. This means evidence that satisfies you that there is a high degree of probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction), as I (have defined, will define) it for you.

To decide for the plaintiff it is not enough to find that the preponderance of the evidence is in the plaintiff's favor. A party who must prove (his, her) case by a preponderance of the evidence only need satisfy you that the evidence supporting (his, her) case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish (his, her) case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what (he, she) claims is what actually happened.

If, upon all the evidence, you are satisfied that there is a high probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction) as I (have defined, will define) it for you, you must decide for the plaintiff. If you are not satisfied that there is such a high probability, you must decide for the defendant.

Comment

Based on *Young v Knickerbocker Arena*, 281 AD2d 761, 722 NYS2d 596 (3d Dept 2001); *Faas v State*, 249 AD2d 731, 672 NYS2d 145 (3d Dept 1998); *Caruso v Russell P. LeFrois Builders, Inc.*, 217 AD2d 256, 635 NYS2d 367 (4th Dept 1995); *Ausch v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 43, 511 NYS2d 919 (2d Dept 1987).

The pattern charge is for use in those cases where the issue is fraud, *Simcusi v Saeli*, 44 NY2d 442, 406 NYS2d 259, 377 NE2d 713 (1978); see *Hutt v Lumbermens Mut. Cas. Co.*, 95 AD2d 255, 466 NYS2d

28 (2d Dept 1983) (citing PJI); 2 NY PJI 3:20; malice in cases governed by *New York Times Co. v Sullivan*, 376 US 254, 84 SCt 710 (1964); see PJI 3:33; recovery on a contract to render services to a person now deceased, *Matter of Zimmer's Will*, 77 NYS2d 872 (Sur 1948), *aff'd*, 274 App Div 1024, 86 NYS2d 479 (4th Dept 1948); see PJI 4:32; mistake in a contract action, see *Southard v Curley*, 134 NY 148, 31 NE 330 (1892); see also PJI 4:11; in a discovery proceeding, a gift by the deceased, *Matter of Love*, 46 NY2d 784, 413 NYS2d 919, 386 NE2d 830 (1978); see PJI 7:65; and the grounds for confinement in a proceeding under the Mental Hygiene Law, see *Addington v Texas*, 441 US 418, 99 SCt 1804 (1979); PJI 8:1 (incompetency); see *Application of Estes*, 75 AD2d 451, 429 NYS2d 514 (4th Dept 1980) (citing PJI) (re: release from custody under CPL 330.20).

The requirement of proof by “clear and convincing” evidence has also been applied to cases seeking to terminate the life support systems of a terminally ill patient, *Matter of Westchester County Medical Center on Behalf of O'Connor*, 72 NY2d 517, 534 NYS2d 886, 531 NE2d 607 (1988); *Matter of Storar*, 52 NY2d 363, 438 NYS2d 266, 420 NE2d 64 (1981); to establish an implied easement, *Abbott v Herring*, 62 NY2d 1028, 479 NYS2d 498, 468 NE2d 680 (1984); *Huggins v Castle Estates, Inc.*, 36 NY2d 427, 369 NYS2d 80, 330 NE2d 48 (1975); *Buck v Allied Chemical Corp.*, 77 AD2d 782, 431 NYS2d 222 (4th Dept 1980); *Zentner v Fiorentino*, 52 AD2d 1036, 384 NYS2d 297 (4th Dept 1976); to establish the elements of title by adverse possession, *Snyder v Fabrizio*, 2 AD3d 1464, 770 NYS2d 533 (4th Dept 2003); to reform a contract, *George Backer Management Corp. v Acme Quilting Co., Inc.*, 46 NY2d 211, 413 NYS2d 135, 385 NE2d 1062 (1978); *Nash v Kornblum*, 12 NY2d 42, 234 NYS2d 697, 186 NE2d 551 (1962); *Amend v Hurley*, 293 NY 587, 59 NE2d 416 (1944); *Porter v Commercial Casualty Ins. Co.*, 292 NY 176, 54 NE2d 353 (1944); *Christopher & T. St. R. Co. v Twenty-Third St. Ry. Co.*, 149 NY 51, 43 NE 538 (1896); to support the appointment of a temporary receiver, *Schachner v Sikowitz*, 94 AD2d 709, 462 NYS2d 49 (2d Dept 1983); to establish paternity, *Hawthorne v De Both*, 42 AD2d 827, 345 NYS2d 806 (4th Dept 1973); *Matter of Hawthorne*, 31 AD2d 426, 298 NYS2d 522 (4th Dept 1969); to establish amnesia in a case in which the plaintiff seeks a charge on the lessened burden of proof, *Schechter v Klanfer*, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971); *Nahvi v Urban*, 259 AD2d 740, 687 NYS2d 398 (2d Dept 1999) (citing PJI); see PJI 1:62; and to terminate parental rights and establish the grounds for appointment of a guardian under Social Serv. L. § 384-b, *Matter of Dochingozi B.*, 57 NY2d 641, 454 NYS2d 63, 439 NE2d 872 (1982); see *Santosky v Kramer*, 455 US 745, 102 SCt 1388 (1982) (termination of parental rights on ground that child is permanently neglected must be based on “clear and convincing” evidence, therefore former Family Court Act § 622 is unconstitutional because it sets “fair preponderance” as the standard of proof); *Matter of Michael B.*, 58 NY2d 71, 459 NYS2d 254, 445 NE2d 637 (1983) (“clear and convincing” evidence required under FCA § 614); see also *Matter of Candie Lee W.*, 91 AD2d 1106, 458 NYS2d 347 (3d Dept 1983); *Matter of Rose Marie M.*, 90 AD2d 810, 455 NYS2d 664 (2d Dept 1982).

The clear and convincing evidence standard applies to defenses of arson and false swearing asserted in an action to recover on a fire insurance policy but does not apply to the defense of refusal to comply with the policy requirements, *Ausch v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 43, 511 NYS2d 919 (2d Dept 1987) (citing PJI).

In general, the clear and convincing evidence standard is utilized only where the interests at stake are deemed more significant than ordinary, *Matter of Storar*, 52 NY2d 363, 438 NYS2d 266, 420 NE2d 64 (1981).

For a charge on preponderance of the evidence, see PJI 1:23. For a charge to be used when the burden of proof differs on different issues, see PJI 1:60 and 1:61.

4. EVIDENCE

a. ADMITTED FOR LIMITED PURPOSE

PJI 1:65. General Instruction—Evidence Admitted for Limited Purpose—Insurance

Defendant AB admits that the automobile involved in the accident was registered in his name but says the registration was not correct and that the automobile was actually owned by defendant CD. On the question of who owned the automobile, evidence was admitted that policies of fire insurance and liability insurance covering the automobile were issued in the name of AB. That evidence was admitted and may be considered by you solely on the question of whether AB owned the automobile. The fact that insured AB carried insurance should have no bearing on your verdict except as it relates to the question of ownership.

Comment

The burden of requesting a limiting instruction is upon the party against whom the evidence is offered, see *C. K. S. Inc. v Helen Borgenicht Sportswear, Inc.*, 25 AD2d 218, 268 NYS2d 409 (1st Dept 1966).

In addition to evidence of insurance, other examples of evidence admitted for a limited purpose are: that subsequent design changes were made, to show feasibility in a products liability case, except where the manufacturer concedes feasibility of an alternative design, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Demirovski v Skil Corp.*, 203 AD2d 319, 610 NYS2d 551 (2d Dept 1994); see PJI 2:126; Federal Rules of Evidence 407; that defendant made repairs subsequent to plaintiff's injury, to show control, *Antonsen v Bay Ridge Sav. Bank*, 292 NY 143, 54 NE2d 338 (1944); *Posman v State*, 117 AD2d 915, 498 NYS2d 917 (3d Dept 1986); *Mason v New York*, 29 AD2d 922, 288 NYS2d 990 (1st Dept 1968); that defendant had been advised of an allegedly defective condition, to show notice, *Frederick v Theresa*, 99 AD2d 656, 472 NYS2d 56 (4th Dept 1984); that defendant had actual notice of a dangerous condition and a duty to abate it, *Maiorani v Adesa Corp.*, 83 AD3d 669, 921 NYS2d 255 (2d Dept 2011); that there were prior similar accidents, to prove notice, *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986); see *White v Timberjack, Inc.*, 209 AD2d 968, 630 NYS2d 1005 (4th Dept 1994); *Posman v State*, *supra*; that an admission by one party may not under the

circumstances of the case be considered against another, *Van Campen v Cram*, 30 AD2d 541, 291 NYS2d 22 (2d Dept 1968); in a split trial, evidence of injuries, to show the speed of the vehicles, see Comment, PJI 1:2A; *Patino v Nassau*, 124 AD3d 738, 3 NYS3d 43 (2d Dept 2015) (citing PJI); in insurance litigation, a withdrawn settlement offer, to show the insurer's refusal to pay, *Cass v Finger Lakes Co-op. Ins. Co.*, 107 AD2d 904, 483 NYS2d 849 (3d Dept 1985). The pattern charge illustrates and the balance of this Comment discusses the limited admissibility of the existence of insurance.

Generally insurance or the lack of it is not relevant in negligence cases, *Boehm v Rosario*, 154 AD3d 1298, 63 NYS3d 164 (4th Dept 2017); *Oltarsh v Aetna Ins. Co.*, 15 NY2d 111, 256 NYS2d 577, 204 NE2d 622 (1965); *Krieger v Insurance Co. of North America*, 66 AD2d 1025, 411 NYS2d 730 (4th Dept 1978); Federal Rules of Evidence, 411; see *Kelly v Yannotti*, 4 NY2d 603, 176 NYS2d 637, 152 NE2d 69 (1958); *Prince, Richardson on Evidence* (11th ed. Farrell) § 4-614; Annot: 40 ALR Fed 541; 4 ALR2d 761. When relevant, however, a cautionary instruction such as the above should be given. It appears advisable to give the instruction when the evidence is first introduced, see *People v Marshall*, 306 NY 223, 117 NE2d 265 (1954). The fact that the existence and contents of an insurance agreement are subject to disclosure does not make the agreement or its contents admissible on trial, CPLR 3101(f); to the same effect is FRCP 26(b)(2).

Evidence of insurance is admissible when ownership is disputed, see *Ferris v Sterling*, 214 NY 249, 108 NE 406 (1915); *Flieg v Levy*, 148 App Div 781, 133 NYS 249 (2d Dept 1912), *aff'd*, 208 NY 564, 101 NE 1102 (1913); *Martyn v Braun*, 270 App Div 768, 59 NYS2d 588 (2d Dept 1946). This exception to the general rule precluding evidence of insurance, however, is not without limit and evidence relevant for the purpose of showing ownership may nevertheless be excluded if "the risk of confusion or prejudice is so great as to outweigh the advantage in receiving it," *Constable v Matie*, 199 AD2d 1004, 608 NYS2d 10 (4th Dept 1993). A denial of ownership in the pleadings is not enough to make the evidence admissible if the proof of ownership is not controverted at the trial, *Akin v Lee*, 206 NY 20, 99 NE 85 (1912). Evidence of insurance may also be relevant when an action is brought against the insurer under another state's direct action statute, *Oltarsh v Aetna Ins. Co.*, 15 NY2d 111, 256 NYS2d 577, 204 NE2d 622 (1965); when the issue is whether a vehicle was being operated within the scope of the permission granted by its owner, *Leotta v Plessinger*, 8 NY2d 449, 209 NYS2d 304, 171 NE2d 454 (1960); whether a mortgagee was in possession and control of premises, *Levatino v Rochester Sav. Bank*, 38 NYS2d 182 (Sup 1942); whether an owner retained control of that portion of the premises where an injury occurred, *Martyn v Braun*, *supra*; see *Jackson v Martin*, 271 App Div 796, 65 NYS2d 192 (2d Dept 1946), *aff'd*, 297 NY 487, 74 NE2d 189 (1947); and whether a master-servant relationship existed, *Lisanti v William F. Kenny Co.*, 225 App Div 129, 232 NYS 103 (2d Dept 1928), *aff'd*, 250 NY 621, 166 NE 347 (1929); *Rashall v Morra*, 250 App Div 474, 294 NYS 630 (2d Dept 1937). Where a contract exists between the

parties and conclusively delineates possession of the premises, evidence of insurance is not admissible to contradict the language of the contract, *Butler ex rel. Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567, 792 NE2d 1055 (2003).

In addition, to show bias, an investigator or physician called by defendant may be cross examined concerning whether he is employed by a named insurer and whether that company had a policy covering the accident in the lawsuit, see *Wood v New York State Elec. & Gas Corp.*, 257 App Div 172, 12 NYS2d 947 (3d Dept 1939), *aff'd*, 281 NY 797, 24 NE2d 480 (1939); *Di Tommaso v Syracuse University*, 172 App Div 34, 158 NYS 175 (4th Dept 1916), *aff'd*, 218 NY 640, 112 NE 1057 (1916); but see *Cerasuoli v Brevetti*, 166 AD2d 403, 560 NYS2d 468 (2d Dept 1990) (not an abuse of discretion to preclude cross-examination of defendant's expert as to employment as consultant to defendant's insurer where trial court did allow plaintiff to show the expert's prior medical review services for law firms). In *Young v Knickerbocker Arena*, 281 AD2d 761, 722 NYS2d 596 (3d Dept 2001), the court held that isolated and indirect references to insurance coverage did not warrant a mistrial where defendant's expert, who examined plaintiff, derived some percentage of income from performing such evaluations for insurance companies and/or law firms that performed insurance defense work. The *Wood* and *Di Tommaso* cases were cited with apparent approval by the Court of Appeals in *Oltarsh v Aetna Ins. Co.*, 15 NY2d 111, 256 NYS2d 577, 204 NE2d 622 (1965). Note, however, that in *Hopper v Comfort Coal-Lumber Co.*, 276 App Div 1014, 95 NYS2d 318 (2d Dept 1950), the Second Department majority distinguished the *Wood* case and made no reference to the *Young* or *Di Tommaso* cases. Note further that where the inquiry concerns not only the witness but someone else employed by the carrier and elicits a number of references to the carrier by name, the prejudicial effect may be such as to require reversal, even though the case arose after the advent of compulsory insurance, *Doyle v Dapolito*, 20 AD2d 318, 247 NYS2d 340 (4th Dept 1964). Ordinarily, the existence of the compulsory insurance law makes non-prejudicial an inadvertent reference to the existence of automobile liability insurance, *Zeglen v Adamson*, 12 AD2d 15, 208 NYS2d 282 (3d Dept 1960); see *Kowalski v Loblaw's, Inc.*, 61 AD2d 340, 402 NYS2d 681 (4th Dept 1978). In other cases, where evidence of liability is clear, an inadvertent mention of insurance does not require a mistrial, *Allen v Harrington*, 156 AD2d 854, 550 NYS2d 79 (3d Dept 1989); *Rush v Sears, Roebuck and Co.*, 92 AD2d 1072, 461 NYS2d 559 (3d Dept 1983). Comment by plaintiff's attorney on the existence or adequacy of defendant's insurance coverage requires reversal in a close case, see *Johnson v Lazarowitz*, 4 AD3d 334, 771 NYS2d 534 (2d Dept 2004); *Depelteau v Ford Motor Co.*, 28 AD2d 1178, 284 NYS2d 490 (3d Dept 1967).

Improper cross-examination of plaintiff by defense counsel as to plaintiff's awareness of benefits obtainable through no-fault automobile insurance policy may also lead to reversal, particularly where curative instruction was not immediately given, *Vassura v Taylor*, 117 AD2d 798, 499 NYS2d 120 (2d Dept 1986); see *Sobie v Katz Const. Corp.*, 189 AD2d 49, 595 NYS2d 750 (1st Dept 1993).

A letter written by defendant's insurer reflecting defendant's version of the accident may be used in cross-examination to show possibly inconsistent statements, *Galuska v Arbaiza*, 106 AD2d 543, 482 NYS2d 846 (2d Dept 1984). Similarly, documents filed with the Workers' Compensation Board may be used to show a prior inconsistent statement by revealing that plaintiff has received or made claim for Workers' Compensation benefits, see *Nappi v Falcon Truck Renting Corp.*, 1 NY2d 750, 152 NYS2d 297, 135 NE2d 51 (1956); *Gropper v St. Luke's Hosp. Center*, 234 AD2d 171, 651 NYS2d 469 (1st Dept 1996); *Bradley v John W. Donovan Const. Corp.*, 26 AD2d 734, 271 NYS2d 901 (3d Dept 1966). In such a case, the court should charge:

PJI 1:65.1

The fact that the plaintiff has (received, applied for) workers' compensation benefits has no bearing on any other issue in the case than the weight you will give to (the plaintiff's, the witness') testimony. Compensation benefits (are payable, were paid) (to, for) the plaintiff because (he, she) was an employee of CD at the time of the accident. These payments are made without determining fault with respect to the happening of the accident. If, but only if, the plaintiff is successful in this action, the payments made by CD will have to be refunded by the plaintiff to CD.

As to the effect of compensation benefits and other insurance in a medical malpractice action, see PJI 2:151B.

Federal Annotation: Rules 105 and 411 of the Federal Rules of Evidence accord with the pattern charge.

PJI 1:66. General Instruction—Evidence Admitted for Limited Purpose—Credibility of Non-Party Witness

You will remember that during the testimony of the witness AB, a written statement made by (him, her) before this trial was introduced in evidence. That written statement is not proof of the facts stated in it. If, however, you find that the written statement is not consistent with the testimony given by AB at this trial, you may consider that inconsistency in deciding whether you will believe all, or a part, or none of the testimony AB gave during this trial and how much weight you

will give to AB's testimony. In other words, you may only consider the written statement in connection with AB's believability and not for any other purpose.

[It is suggested that this charge be adapted to the appropriate statement, written or oral, and be given in appropriate form initially when the statement is received in evidence. See, e.g., PJI 1:90.2.]

Comment

Based on *People v McClean*, 69 NY2d 426, 515 NYS2d 428, 508 NE2d 140 (1987); *Roge v Valentine*, 280 NY 268, 20 NE2d 751 (1939); *Millington v New York City Transit Authority*, 44 AD2d 542, 353 NYS2d 469 (1st Dept 1974); *Stanley v Surface Transit, Inc.*, 20 AD2d 854, 248 NYS2d 157 (1st Dept 1964); *Allen v Mendelson*, 266 App Div 969, 44 NYS2d 277 (2d Dept 1943); *Schwartz v Lawrence*, 214 App Div 559, 212 NYS 494 (1st Dept 1925); CPLR 4514; see *Mantuano v Mehale*, 258 AD2d 566, 685 NYS2d 467 (2d Dept 1999); see *Seaberg v North Shore Lincoln-Mercury, Inc.*, 85 AD3d 1148, 925 NYS2d 669 (2d Dept 2011) (911 tape).

The above charge does not apply to a witness who is a party. A party's prior inconsistent statement concerning a fact in issue or relevant to any issue constitutes an admission and is primary evidence against the party, *Gangi v Fradus*, 227 NY 452, 125 NE 677 (1920); *Dlugosz v Exchange Mut. Ins. Co.*, 176 AD2d 1011, 574 NYS2d 864 (3d Dept 1991); *Burns v Dixon*, 46 AD2d 943, 362 NYS2d 245 (3d Dept 1974); *Mindlin v Dorfman*, 197 App Div 770, 189 NYS 265 (1st Dept 1921). A plea of guilty to a traffic offense is such an admission, *Ando v Woodberry*, 8 NY2d 165, 203 NYS2d 74, 168 NE2d 520 (1960); see *Vogel v Gilbo*, 276 AD2d 977, 715 NYS2d 455 (3d Dept 2000); see also *Guarino v Woodworth*, 204 AD2d 391, 611 NYS2d 638 (2d Dept 1994), even though conviction of a traffic offense would not be admissible to impeach a witness or party as a matter of credibility. A confession voluntarily made is such an admission and is admissible in a civil action although previously suppressed in a criminal proceeding, *Terpstra v Niagara Fire Ins. Co.*, 26 NY2d 70, 308 NYS2d 378, 256 NE2d 536 (1970). As to admissions against interest by statement, see PJI 1:55.

If a non-party witness uses the statement or report of a third person to refresh his or her recollection, the statement or report may be admissible on the application of an adverse party on the issue of the witness' credibility, *Caupain v Johnson*, 20 AD2d 712, 247 NYS2d 345 (2d Dept 1964). A witness' own statement which does not refresh his or her recollection is admissible for the same limited purpose, *Dugan v Dieber*, 32 AD2d 815, 302 NYS2d 423 (2d Dept 1969). However, the contents of a

document used for impeachment only should not be read to the jury over objection until the material and competent parts have been determined, *Hanlon v Ehrich*, 178 NY 474, 71 NE 12 (1904); *Canty v New York City Health and Hospitals Corp.*, 158 AD2d 271, 550 NYS2d 673 (1st Dept 1990); *Caplan v New York*, 34 AD2d 549, 309 NYS2d 859 (2d Dept 1970); *Brown v W. U. Tel. Co.*, 26 AD2d 316, 274 NYS2d 52 (4th Dept 1966), and the unredacted document should not be given to the jury, *Lee v Mount Ivy Indus. Developers, Inc.*, 31 AD2d 958, 298 NYS2d 813 (2d Dept 1969). The judge's comment when receiving such a statement that, "I am taking it for the purposes of credibility," is insufficient. The jury must be instructed that the statement is received only for the purpose of impeaching the credibility of the witness and that it has no probative value as to the happening of the accident or other events stated, *Dugan v Dieber*, *supra*; *People v Carroll*, 37 AD2d 1015, 325 NYS2d 714 (3d Dept 1971). Of course, it is within the sound discretion of the trial judge to restrict the scope of impeachment, *People v Walker*, 83 NY2d 455, 611 NYS2d 118, 633 NE2d 472 (1994).

Prior consistent statements generally are not admissible. However, when the testimony of a witness is assailed as a recent fabrication, it may be confirmed by evidence of consistent statements made before the motive to falsify existed, *Moore v Leventhal*, 303 NY 534, 104 NE2d 892 (1952); see *Fishman v Scheuer*, 39 NY2d 502, 384 NYS2d 716, 349 NE2d 815 (1976); *Crawford v Nilan*, 289 NY 444, 46 NE2d 512 (1943); *Harvin v New York City Transit Authority*, 198 AD2d 401, 603 NYS2d 893 (2d Dept 1993). Recent fabrication means that the witness is being accused of making up a false story well after the event "to meet the exigencies of the case," *People v Davis*, 44 NY2d 269, 405 NYS2d 428, 376 NE2d 901 (1978); *People v Singer*, 300 NY 120, 89 NE2d 710 (1949), *Pomer v Chen*, 187 AD2d 497, 589 NYS2d 192 (2d Dept 1992). A statement by a party made to the police about two hours after an accident is, as a matter of law, made after there is a motive to falsify, *Giordano v Eastern Utilities, Inc.*, 9 AD2d 947, 195 NYS2d 753 (2d Dept 1959). Where the cross-examiner challenges the reliability of the witness' account, but does not attempt to show recent fabrication, the witness may not be rehabilitated by use of a prior consistent statement, *Harvin v New York City Transit Authority*, *supra*; *Smith v Emkay Fifth Ave., Inc.*, 172 AD2d 656, 568 NYS2d 457 (2d Dept 1991). Where a prior consistent statement is introduced, the pattern charge must be modified accordingly.

There are, of course, other methods of impeachment, see *Prince, Richardson on Evidence* (11th ed. Farrell) §§ 6-401-6-418; *Fisch*, *New York Evidence*, Chap 15, such as (1) showing the witness' general bad reputation for truth and veracity, *People v Pavao*, 59 NY2d 282, 464 NYS2d 458, 451 NE2d 216 (1983); *Stanton v Velis*, 172 AD2d 415, 568 NYS2d 789 (1st Dept 1991); (2) cross-examining the witness concerning immoral, vicious or criminal acts, *People v Greer*, 42 NY2d 170, 397 NYS2d 613, 366 NE2d 273 (1977); *Simon v Indursky*, 211 AD2d 404, 630 NYS2d 2 (1st Dept 1995); (3) showing bias, hostility or interest, see generally *Coleman v New York City Transit Authority*, 37 NY2d 137,

371 NYS2d 663, 332 NE2d 850 (1975); *Hill v Arnold*, 226 AD2d 232, 640 NYS2d 892 (1st Dept 1996); *Luce v St. Peter's Hospital*, 85 AD2d 194, 448 NYS2d 855 (3d Dept 1982); (4) showing either by the record or by cross-examination that the witness has been convicted of a crime, CPLR 4513; *People v Walker*, 83 NY2d 455, 611 NYS2d 118, 633 NE2d 472 (1994); *Murphy v Estate of Vece*, 173 AD2d 445, 570 NYS2d 71 (2d Dept 1991); see *Dance v Southampton*, 95 AD2d 442, 467 NYS2d 203 (2d Dept 1983), but not an offense in the sense of a violation of law short of a felony or misdemeanor, see *Ando v Woodberry*, 8 NY2d 165, 203 NYS2d 74, 168 NE2d 520 (1960); *Augustine v Interlaken*, 68 AD2d 705, 418 NYS2d 683 (4th Dept 1979); Penal Law § 10.00(1); see VTL § 155(5). As to testimony of a witness who was at the time of the occurrence, or at the time of his or her testimony, under the influence of drugs or alcohol, see Annot: 65 ALR3d 705.

Generally, where a witness, on cross-examination, denies having committed prior illegal or immoral acts, the cross-examiner may not refute those denials with extrinsic evidence if the acts relate solely to the credibility of the witness, *Badr v Hogan*, 75 NY2d 629, 555 NYS2d 249, 554 NE2d 890 (1990); see *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Huff v Rodriguez*, 88 AD3d 1274, 930 NYS2d 717 (4th Dept 2011). In addition, such questions must be asked in good faith, *People v Mayrant*, 43 NY2d 236, 401 NYS2d 165, 372 NE2d 1 (1977). An exception to the general rule relative to extrinsic evidence exists where the witness has been convicted of a crime, see CPLR 4513.

With respect to proof of reputation, once a party seeking admission of reputation evidence has laid the proper foundation, the presentation of reputation evidence in a criminal trial is a matter of right not discretion and it is for the jury to evaluate the credibility of the character witnesses who testify, and to decide how much weight to give the views reported in their testimony, *People v Fernandez*, 17 NY3d 70, 926 NYS2d 390, 950 NE2d 126 (2011). When reputation evidence is admitted, the jurors should be informed that they are to consider the reputation evidence only on the issue of the witness' credibility and to give whatever weight to the witness' testimony that they deem it entitled to under the circumstances. Evidence of the good character of a party or witness is inadmissible to bolster credibility except where the person has been attacked as a generally untruthful person, see *Kravitz v Long Island Jewish-Hillside Medical Center*, 113 AD2d 577, 497 NYS2d 51 (2d Dept 1985).

With respect to cross-examination concerning criminal acts, it was held in *Phass v MacClenathen*, 274 App Div 535, 85 NYS2d 643 (3d Dept 1948), that since operation of a vehicle more than 30 days after the operator's license has expired is a misdemeanor rather than an offense, the fact of operation is admissible on the issue of credibility, see *Huff v Rodriguez*, 88 AD3d 1274, 930 NYS2d 717 (4th Dept 2011); *Kenneth v Gardner*, 36 AD2d 575, 317 NYS2d 798 (4th Dept 1971); see also *Anderson v William Cohen Iron Works*, 45 AD2d 664, 360 NYS2d 482 (3d Dept 1974), *aff'd*, 38 NY2d 511, 381 NYS2d 457, 344 NE2d 389

(1976). The same rule applies to improper registration of a vehicle, which under VTL §§ 401 is a misdemeanor, *Morales v Olivero*, 23 AD2d 554, 256 NYS2d 628 (1st Dept 1965). A conviction for leaving the scene of the accident involved in the lawsuit being tried is likewise admissible on credibility although not on liability, *Kenneth v Gardner*, 36 AD2d 575, 317 NYS2d 798 (4th Dept 1971).

With respect to showing bias, hostility or interest, the credibility of a witness who testifies that plaintiff was not negligent may be attacked by showing that the witness has sued plaintiff for negligence in the same occurrence, *Service Fire Ins. Co. of N.Y. v Lederman*, 279 App Div 319, 109 NYS2d 812 (3d Dept 1952), *aff'd*, 304 NY 658, 107 NE2d 588 (1952), and the credibility of a defendant's witness may be attacked by showing that the witness has sued the plaintiff, *Thompson v Korn*, 48 AD2d 1007, 368 NYS2d 923 (4th Dept 1975).

With respect to proof of conviction of a crime, the jury should be informed that they are to consider the evidence only on the issue of the witness' credibility in determining the weight to be given to the witness' testimony. A judgment of conviction is conclusive proof in a civil action of the facts upon which that judgment rests, *People v Walker*, 83 NY2d 455, 611 NYS2d 118, 633 NE2d 472 (1994); *S. T. Grand, Inc. v New York*, 32 NY2d 300, 344 NYS2d 938, 298 NE2d 105 (1973); but see *Gilberg v Barbieri*, 53 NY2d 285, 441 NYS2d 49, 423 NE2d 807 (1981) (conviction of petty offense of harassment, a violation, not conclusive). Thus, if the conviction involves the precise event that is the subject of the current trial, further exploration of the circumstances of the conviction may not be permitted, *People v Johnson*, 78 AD2d 298, 434 NYS2d 389 (1st Dept 1981). Where the conviction is used for impeachment purposes, there is support for the proposition that the circumstances may be explored, see *People v Tait*, 234 App Div 433, 255 NYS 455 (1st Dept 1932), *aff'd*, 259 NY 599, 182 NE 197 (1932). The rule barring use of convictions for unlicensed operation and leaving the scene as evidence of liability has nothing to do with the grade of the offense, since neither misdemeanor is relevant to the issue of fault, see *Reitano v Dobbs*, 31 AD2d 104, 295 NYS2d 573 (1st Dept 1968), *aff'd*, 25 NY2d 612, 306 NYS2d 3, 254 NE2d 222 (1969).

In *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016), the Court held that the trial court committed reversible error in admitting into evidence a consent agreement and order between a defendant-physician and the New York State Office of Professional Medical Conduct in which defendant-physician agreed not to contest administrative charges of similar acts of medical negligence relating to 12 anonymous patients, none of whom was plaintiff's decedent. The Court found that the order could have induced the jury to punish defendant-physician for his unrelated misdeeds and was therefore unduly prejudicial.

The Letendre Rule

There is continuing support for the proposition that an inconsistent

statement by a non-party witness may be received for all purposes, not merely to impeach the witness.

Out-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable, *Nucci ex rel. Nucci v Proper*, 95 NY2d 597, 721 NYS2d 593, 744 NE2d 128 (2001); see *Kaufman v Quickway, Inc.*, 14 NY3d 907, 905 NYS2d 532, 931 NE2d 516 (2010). In determining reliability, a court must decide whether the declaration was spoken under circumstances which render it highly probable that it is truthful, *Nucci ex rel. Nucci v Proper*, *supra*; see *Kaufman v Quickway, Inc.*, *supra*. In holding that the “departure from the general rule excluding hearsay evidence [was] proper” under the circumstances, the *Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518, 289 NYS2d 183, 236 NE2d 467 (1968), declared:

Declarant himself was present in court, subject to the oath and the safeguard of cross-examination. . . . The jury had ample opportunity to assess his credibility. Also the declaration was in writing and was taken by the appellant’s agent. Thus there was no risk that [the witness’] words would be incorrectly reported.

In *Vincent v Thompson*, 50 AD2d 211, 377 NYS2d 118 (2d Dept 1975), the Second Department enlarged the *Letendre* rationale to allow use of an inconsistent oral statement made by one defendant as evidence against a co-defendant. Further case law support for the *Letendre* rule includes: *Kaufman v Quickway, Inc.*, 14 NY3d 907, 905 NYS2d 532, 931 NE2d 516 (2010); *Campbell v Elmira*, 198 AD2d 736, 604 NYS2d 609 (3d Dept 1993), *aff’d*, 84 NY2d 505, 620 NYS2d 302, 644 NE2d 993 (1994); *Whitman Delicatessen, Inc. v State Liquor Authority*, 83 AD2d 963, 443 NYS2d 14 (2d Dept 1981); *Rosario v New York City Transit Authority*, 73 AD2d 912, 423 NYS2d 254 (2d Dept 1980) (bus driver’s deposition, statements in MV-104 form and information he gave bus dispatcher were inconsistent with his trial testimony and should have been received as evidence in chief).

The Court of Appeals has rejected the argument that *Letendre* created an exception to the hearsay rule premised solely on witness availability, *Nucci ex rel. Nucci v Proper*, 95 NY2d 597, 721 NYS2d 593, 744 NE2d 128 (2001). The availability of the declarant for cross-examination is only one component of the *Letendre* reliability equation, *id.* Other relevant factors in determining reliability include spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, unlikelihood of faulty recollection and the degree to which the statement was against the declarant’s interest, *id.* Courts have also considered the status or relationship to the declarant of the person to whom the statement was made, whether there was a coercive atmosphere, whether it was made in response to questioning and whether the statements reflect an attempt to shift blame or curry favor, *id.* In

Nucci, the proffered statements were offered in support of plaintiff's malpractice claim and were not made in writing or under oath, *id.* They were made several days after the incident occurred at a gathering of plaintiff's relatives and their friends and they were reported by a relative of plaintiff, who may have had a strong motive to shade her testimony, *id.* The Court concluded that these infirmities, in addition to others, were not cured simply by the declarant's presence at trial and her availability for cross-examination because the declarant denied making those statements plaintiff's deemed crucial to their case, *id.* Thus, the Court of Appeals rejected the so-called "modern" view adopted by several states that permits the admission of prior, unsworn oral statements where the declarant is available and subject to cross-examination, Nucci *ex rel.* Nucci v Proper, *supra*.

Federal Annotation: A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, Federal Rule of Evidence § 801(d)(1)(A).

b. CIRCUMSTANTIAL**PJI 1:70. General Instruction—Direct and Circumstantial Evidence**

Facts must be proved by evidence. Evidence includes the testimony of a witness concerning what the witness saw, heard or did. Evidence also includes writings, photographs, or other physical objects which may be considered as proof of a fact. Evidence can either be direct or circumstantial.

Direct evidence is evidence of what a witness saw, heard, or did which, if believed by you, proves a fact. For example, suppose a fact in dispute is whether I knocked over this water glass near the witness chair. If someone testifies that she saw me knock over the glass, that is direct evidence that I knocked over the glass.

Circumstantial evidence is evidence of a fact that does not directly prove a fact in dispute but which permits a reasonable inference or conclusion that the fact exists. For example, a witness testifies that he saw this water glass on the bench. The witness states that, while he was looking the other way, he heard the breaking of glass, looked up, and saw me wiping water from my clothes and from the papers on the bench. This testimony is not direct evidence that I knocked over the glass; it is circumstantial evidence from which you could reasonably infer that I knocked over the glass.

Those facts that form the basis of an inference must be proved and the inference to be drawn must be one that reasonably may be drawn. In the example, even though the witness did not see me knock over the glass, if you believe her testimony, you could conclude that I did. Therefore, the circumstantial evidence, if accepted by you, allows you to conclude that the fact in dispute has been proved.

In reaching your conclusion you may not guess or speculate. Suppose, for example, the witness

testifies that the water glass was located equally distant from the court clerk and me. The witness states she heard the breaking of glass and looked up to see both the court clerk and me brushing water from our clothes. If you believe that testimony, you still could not decide on that evidence alone who knocked over the water glass. Where these are the only proved facts, it only would be a guess as to who did it. However, if the witness also testifies that she heard the court clerk say “I am sorry,” then this additional evidence would allow you to decide who knocked over the water glass.

Facts may be proved either by direct or circumstantial evidence or by a combination of both. You may give circumstantial evidence less weight, more weight, or the same weight as direct evidence.

Comment

Caveat 1: It is reversible error for a court to refuse to give a requested circumstantial evidence charge where the evidence is wholly circumstantial, *Washington v New York City Transit Authority*, 174 AD3d 667, 101 NYS3d 910 (2d Dept 2019); *Venditto v Doody*, 181 AD2d 729, 581 NYS2d 82 (2d Dept 1992); *Matter of Fodera*, 96 AD2d 559, 465 NYS2d 65 (2d Dept 1983). But where parties do not rely solely upon circumstantial evidence, a circumstantial evidence charge is not required, *Washington v New York City Transit Authority*, *supra*; *C.B. v Valley Stream Central High School District*, 174 AD3d 565, 101 NYS3d 890 (2d Dept 2019); *Cavallaro v Somaskanda*, 280 AD2d 1002, 720 NYS2d 431 (4th Dept 2001); *Venditto v Doody*, *supra*.

Caveat 2: There are alternative illustrations in addition to the water glass example that may be used to explain the distinction between direct and circumstantial evidence, see e.g. CJI2d [NY] Circumstantial Evidence. Based upon *Bernstein v New York*, 69 NY2d 1020, 517 NYS2d 908, 511 NE2d 52 (1987); *Schneider v Kings Highway Hosp. Center, Inc.*, 67 NY2d 743, 500 NYS2d 95, 490 NE2d 1221 (1986); *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff'd*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959); *Boyce Motor Lines, Inc. v State*, 280 App Div 693, 117 NYS2d 289 (3d Dept 1952), *aff'd*, 306 NY 801, 118 NE2d 819 (1954); *Pollicina v Misericordia Hosp. Medical Center*, 158 AD2d 194, 557 NYS2d 902 (1st Dept 1990); *Johnson v New York City Transit Authority*, 129 AD2d 424, 513 NYS2d 687 (1st Dept 1987); *Ridings v Vaccarello*, 55 AD2d 650, 390 NYS2d 152 (2d Dept 1976); *Nieskes & Craig, Inc. v Schoonerman*, 40 AD2d 931, 337 NYS2d 750 (4th Dept 1972); see *People v Ford*, 66 NY2d 428, 497 NYS2d 637,

488 NE2d 458 (1985); *People v Way*, 59 NY2d 361, 465 NYS2d 853, 452 NE2d 1181 (1983); *People v Pena*, 50 NY2d 400, 429 NYS2d 410, 406 NE2d 1347 (1980); *People v Kennedy*, 47 NY2d 196, 417 NYS2d 452, 391 NE2d 288 (1979); *People v Cleague*, 22 NY2d 363, 292 NYS2d 861, 239 NE2d 617 (1968).

For an inference to be drawn from circumstantial facts, the inference must logically be compelling, *People v Cleague*, 22 NY2d 363, 292 NYS2d 861, 239 NE2d 617 (1968); see *Gayle v New York*, 92 NY2d 936, 680 NYS2d 900, 703 NE2d 758 (1998); *Schneider v Kings Highway Hosp. Center, Inc.*, 67 NY2d 743, 500 NYS2d 95, 490 NE2d 1221 (1986); *Fleming by Fleming v Kings Ridge Recreation Park, Inc.*, 138 AD2d 451, 525 NYS2d 866 (2d Dept 1988). While the trier of fact may choose between competing inferences, *People v Pena*, 50 NY2d 400, 429 NYS2d 410, 406 NE2d 1347 (1980); *People v Castillo*, 47 NY2d 270, 417 NYS2d 915, 391 NE2d 997 (1979), in the final analysis, the question is “whether common human experience would lead a reasonable man, putting his mind to it, to reject or accept the inferences asserted for the established facts,” *People v Kennedy*, 47 NY2d 196, 417 NYS2d 452, 391 NE2d 288 (1979); *People v Benzinger*, 36 NY2d 29, 364 NYS2d 855, 324 NE2d 334 (1974); *People v Wachowicz*, 22 NY2d 369, 292 NYS2d 867, 239 NE2d 620 (1968). The jury may not draw unreasonable inferences, *People v Pena*, *supra*; *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff’d*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959). In circumstantial evidence cases, the possibility that an accident may have been caused by factors other than defendant’s negligence does not mandate a conclusion that plaintiff has failed to establish a *prima facie* case of negligence; rather, the plaintiff may establish a *prima facie* case by showing facts and conditions from which negligence and proximate cause may be reasonably inferred, *Brito v Manhattan and Bronx Surface Transit Operating Authority*, 188 AD2d 253, 590 NYS2d 450 (1st Dept 1992). However, the record must render other possible causes sufficiently remote or technical to enable the trier of fact to reach a verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence, *Gayle v New York*, 92 NY2d 936, 680 NYS2d 900, 703 NE2d 758 (1998); *Simion v Franklin Center for Rehabilitation & Nursing, Inc.*, 157 AD3d 738, 69 NYS3d 64 (2d Dept 2018); *Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 (2d Dept 1995). The evidence must support plaintiff’s view of the cause of the injury over the opposing view and, while plaintiff need not refute remote possibilities, plaintiff must show facts and circumstances from which defendant’s negligence may be reasonably inferred, *Bernstein v New York*, 69 NY2d 1020, 517 NYS2d 908, 511 NE2d 52 (1987); *Simion v Franklin Center for Rehabilitation & Nursing, Inc.*, *supra*; *Bradish v Tank Tech Corp.*, *supra*; *Coluzzi v Korn*, 209 AD2d 951, 624 NYS2d 688 (4th Dept 1994); *LaPaglia v Sears Roebuck and Co., Inc.*, 143 AD2d 173, 531 NYS2d 623 (2d Dept 1988); see *Tyrell v Pollak*, 163 AD3d 1232, 80 NYS3d 706 (3d Dept 2018); *Brandon v Schmits*, 278 AD2d 843, 718 NYS2d 749 (4th Dept 2000); *Thomas v New York City Transit Authority*, 194 AD2d 663, 599 NYS2d 127 (2d Dept 1993); *Pollicina v Misericordia Hosp. Medical Center*, 158 AD2d 194, 557 NYS2d 902 (1st Dept 1990); *Johnson v New*

York City Transit Authority, 129 AD2d 424, 513 NYS2d 687 (1st Dept 1987). Therefore, a plaintiff need only prove that it was “more likely” or “more reasonable” that the alleged injury was caused by the defendant’s negligence rather than by some other agency, *Gayle v New York*, 92 NY2d 936, 680 NYS2d 900, 703 NE2d 758 (1998); *New York Telephone Co. v Harrison & Burrowes Bridge Contractors, Inc.*, 3 AD3d 606, 771 NYS2d 187 (3d Dept 2004); see *Tyrell v Pollak*, *supra*.

PJI 1:71. General Instruction—Circumstantial Evidence—Habit

The (plaintiff, defendant) has introduced evidence to show that it was AB’s habit [*here describe conduct.*] Habit means a person’s regular practice to act or behave in the same way in the same or similar circumstances. Experience teaches, however, that for one reason or another, a person may not always follow his or her habit. If you find that it was AB’s habit to (act or behave in a particular way), then you may, but are not required to, conclude that AB (acted or behaved) in accordance with that habit at the time in question.

Comment

Based on *Rivera v Anilesh*, 8 NY3d 627, 838 NYS2d 478, 869 NE2d 654 (2007); *Halloran v Virginia Chemicals Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991 (1977); *William Gardam & Son v Batterson*, 198 NY 175, 91 NE 371 (1910); *Matter of Kellum*, 52 NY 517 (1873); *Martin v Timmins*, 178 AD3d 107, 110 NYS3d 707 (2d Dept 2019); *Peninsula Nat. Bank of Cedarhurst v Hill*, 52 Misc2d 903, 277 NYS2d 162 (AppT 1966), *aff’d*, 30 AD2d 643, 292 NYS2d 820 (2d Dept 1968); see *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982); *Soltis v State*, 188 AD2d 201, 594 NYS2d 433 (3d Dept 1993); *Rigie v Goldman*, 148 AD2d 23, 543 NYS2d 983 (2d Dept 1989); see also *People v Bean*, 284 App Div 922, 134 NYS2d 483 (3d Dept 1954) (routine practice of judge to advise accused of the right to counsel); 1 *Wigmore, Evidence* (3d Ed), §§ 92–98; 2 *id.*, § 376; *McCormick, Evidence* (2d Ed), § 195; *Prince, Richardson on Evidence* (11th ed. Farrell) §§ 4-601, 4-602; *FRE* 406; see also PJI 2:16 (re: customary business practice).

The general rule is that evidence of conduct on other occasions is usually irrelevant to prove that a person performed a particular act on a different unrelated occasion, *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Matter of Brandon’s Estate*, 55 NY2d 206, 448 NYS2d 436, 433 NE2d 501 (1982); *People v Molineux*, 168 NY 264, 61 NE 286 (1901); *Guido v Fielding*, 190 AD3d 49, 134 NYS3d 34 (1st Dept 2020); see *Coopersmith v Gold*, 89 NY2d 957, 655 NYS2d 857, 678 NE2d 469 (1997); *Feaster v New York City Transit Authority*, 172 AD2d 284,

568 NYS2d 380 (1st Dept 1991). Thus, in a medical malpractice action, it was improper to allow the jury to view a videotape of defendant performing a surgical procedure similar to the one at issue upon a different patient, *Glusaskas v John E. Hutchinson, III, M.D., P.C.*, 148 AD2d 203, 544 NYS2d 323 (1st Dept 1989); see *Fanelli v di Lorenzo*, 187 AD2d 1004, 591 NYS2d 658 (4th Dept 1992) (error to allow defendant to offer testimony that he was typically non-violent and mellow when intoxicated). In *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016), the Court held that the trial court committed reversible error in admitting into evidence a consent agreement and order between a defendant-physician and the New York State Office of Professional Medical Conduct in which defendant-physician agreed not to contest administrative charges of similar acts of medical negligence relating to 12 anonymous patients, none of whom was plaintiff's decedent. The Court concluded that the order should not have admitted because it is improper to prove that a person did an act on a particular occasion by showing that he or she did similar acts on different, unrelated occasions.

The general rule excluding evidence of conduct on other occasions is subject to two major exceptions.

Under certain circumstances, proof of habit may be offered to create an inference that a person acted in conformity with the habit on the occasion in question. This is the situation depicted in the pattern charge. At present, New York law permits evidence of habit on the issue of due care only when offered to prove "deliberate repetitive practice by one in complete control of the circumstances," *Halloran v Virginia Chemicals Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991 (1977); see *Rivera v Anilesh*, 8 NY3d 627, 838 NYS2d 478, 869 NE2d 654 (2007); *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020); *Guido v Fielding*, 190 AD3d 49, 134 NYS3d 34 (1st Dept 2020); *Martin v Timmins*, 178 AD3d 107, 110 NYS3d 707 (2d Dept 2019); *Heubish v Baez*, 178 AD3d 779, 113 NYS3d 755 (2d Dept 2019) (court properly admitted defendant physician's habit testimony about how he performs knee replacement surgeries); *Goldson v Mann*, 173 AD3d 410, 102 NYS3d 184 (1st Dept 2019) (defendant's expert affirmation insufficient because it relied on defendant's testimony regarding his deliberative and repetitive custom and practice, which defendant admitted varied depending on examinee). Under *Halloran*, before testimony of habit is allowed the party tendering the evidence must "show on voir dire . . . that he expects to prove a sufficient number of instances of the conduct in question," *id*; see *Martin v Timmins*, *supra*; *Greenberg v New York City Transit Authority*, 290 AD2d 412, 736 NYS2d 73 (2d Dept 2002). Evidence of habit may be considered where it involves a repetitive pattern of conduct that is predictable and predictive, *Michalko v DeLuccia*, *supra*. It should be noted that *Halloran* did not affect the pre-existing evidentiary rules regarding the use of evidence of business, professional or other institutional custom or practice insofar as it is relevant to issues other than the exercise of due care, *Soltis v State*, 188 AD2d 201, 594 NYS2d 433 (3d Dept 1993).

Whether evidence of other similar acts may be received is a ques-

tion to be decided by the trial judge. If admitted, evidence of habit merely provides a basis for the jury to draw an inference and cannot be the basis for judgment as a matter of law, *Guido v Fielding*, 190 AD3d 49, 134 NYS3d 34 (1st Dept 2020); *Martin v Timmins*, 178 AD3d 107, 110 NYS3d 707 (2d Dept 2019); *Lindeman v Slavin*, 184 AD2d 910, 585 NYS2d 568 (3d Dept 1992). The habit charge is appropriate only when an inference is necessary to fill evidentiary gaps, *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020). Rebuttal of evidence of habit may take two forms. First, evidence may be offered to establish that a contrary habit existed, in which case the jury may consider the evidence of contrary habit as circumstantial evidence of conduct at the time in question. Second, evidence may be offered that on specific occasions the alleged habit was not followed, in which case the jury may consider the evidence only on whether the asserted habit existed. As to this second form of rebuttal evidence, see PJI 1:66 (evidence admitted for a limited purpose); and see generally, *Halloran v Virginia Chemicals Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991 (1977).

Evidence of habit has been admitted to prove regular business practice in mailing correspondence, *William Gardam & Son v Battersson*, 198 NY 175, 91 NE 371 (1910); *Hastings v Brooklyn Life Ins. Co.*, 138 NY 473, 34 NE 289 (1893); an attorney's practice in supervising the execution of wills, *Matter of Kellum*, 52 NY 517 (1873); a process server's practice in effecting substituted service, *Peninsula Nat. Bank of Cedarhurst v Hill*, 52 Misc2d 903, 277 NYS2d 162 (AppT 1966), *aff'd*, 30 AD2d 643, 292 NYS2d 820 (2d Dept 1968); and a transit authority's practice of cleaning a particular train in a specific station in the early morning hours, *Greenberg v New York City Transit Authority*, 290 AD2d 412, 736 NYS2d 73 (2d Dept 2002). An employee may testify to custom or practice of his or her organization as probative evidence of the conduct of other employees of the organization on a given occasion, *Soltis v State*, 188 AD2d 201, 594 NYS2d 433 (3d Dept 1993).

The *Halloran* decision, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991, carefully preserved the authority of those cases barring use of "habit" to prove care in boarding a conveyance, *Eppendorf v Brooklyn City & N.R. Co.*, 69 NY 195 (1877), or at a railroad crossing, *Parsons v Syracuse, B. & N.Y.R. Co.*, 205 NY 226, 98 NE 331 (1912); *Zucker v Whitridge*, 205 NY 50, 98 NE 209 (1912); or intemperance, *Warner v New York Cent. R. Co.*, 44 NY 465 (1871); see *People v Holliday*, 38 NY2d 763, 381 NYS2d 53, 343 NE2d 770 (1975); see also Annot: 29 ALR3d 791; 28 ALR3d 1293. Evidence to show only that a person was generally careless has been held inadmissible, *Cabezudo v New York's Eldorado, Inc.*, 50 AD2d 794, 378 NYS2d 75 (1st Dept 1975); *Grenadier v Surface Transport Corporation of New York*, 271 App Div 460, 66 NYS2d 130 (1st Dept 1946); *Horton v Brooklyn City Savings & Loan Ass'n*, 246 App Div 757, 283 NYS 938 (2d Dept 1935); *Fithian v Degnon Contracting Co.*, 175 App Div 386, 161 NYS 888 (1st Dept 1916); see *Davis v Blum*, 70 AD2d 583, 416 NYS2d 57 (2d Dept 1979) (in a medical malpractice action, error to allow expert testimony that the plaintiff exhibited so-called "denial syndrome" tending to make him disregard

competent medical advice. “[S]uch evidence is akin to evidence of character and habit which is generally inadmissible in civil cases to raise the inference that a party acted in a particular way on the occasion in issue . . .”). Evidence of the instructions given to a child by a parent in regard to the proper method of crossing streets is inadmissible, *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982).

With regard to actions involving medical and dental procedures, the courts have held that admissible habit evidence can include an institution’s or a practitioner’s normal documentation and notification protocols, *Gier v CGF Health System, Inc.*, 307 AD2d 729, 762 NYS2d 472 (4th Dept 2003) (notification of on-call attending physician at time of patient’s hospital admission); *Orloski v McCarthy*, 274 AD2d 633, 710 NYS2d 691 (3d Dept 2000) (documentation of patient complaints and maintenance of medical records), routine warnings given to patients, *Soltis v State*, 188 AD2d 201, 594 NYS2d 433 (3d Dept 1993) (correctional institution’s custom to warn inmates that treating physicians are not state employees); *Rigie v Goldman*, 148 AD2d 23, 543 NYS2d 983 (2d Dept 1989) (dental surgeon’s practice of informing patients of risks of surgical procedure), and the processes associated with certain noninvasive medical procedures, *Biesiada v Suresh*, 309 AD2d 1245, 764 NYS2d 739 (4th Dept 2003) (practice in transferring stroke patients from supine to seated position); *Nigro v Benjamin*, 155 AD2d 872, 547 NYS2d 710 (4th Dept 1989) (breast examination protocol). The habit charge may be given in a medical malpractice action if the practice or procedure does not vary from patient to patient depending on the particular medical circumstances or physical condition of the patient, *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020); see *Martin v Timmins*, 178 AD3d 107, 110 NYS3d 707 (2d Dept 2019) (custom and practice/habit). In contrast, evidence concerning a physician’s surgical practices has been held inadmissible on the theory that every surgery is unique and the physician’s actions must therefore vary in light of the patient’s medical condition, *Gushlaw v Roll*, 290 AD2d 667, 735 NYS2d 667 (3d Dept 2002); *Glusaskas v John E. Hutchinson, III, M.D., P.C.*, 148 AD2d 203, 544 NYS2d 323 (1st Dept 1989). While refraining from commenting upon the propriety of these cases, the Court of Appeals held in *Rivera v Anilesh*, 8 NY3d 627, 838 NYS2d 478, 869 NE2d 654 (2007), that evidence of a dentist’s routine procedure for administering local anesthesia injections was admissible under the standards set forth in *Halloran v Virginia Chemicals Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991 (1977), in light of the nature of the procedure, the fact that the dentist, who had been practicing for 18 years, performed the procedure three to five times a day and the absence of evidence that the dentist’s pre-extraction injection procedure varied from patient to patient, see *Guido v Fielding*, 190 AD3d 49, 134 NYS3d 34 (1st Dept 2020) (practice of palpitating bowel for perforations during open bariatric sutures could be demonstrated by habit evidence, provided proper foundation laid). By contrast, where a plaintiff alleged that a surgeon deviated from the standard of care by failing to properly suture a mesh patch during abdominal surgery, the defendant surgeon

failed to lay a proper foundation for the introduction of habit testimony, since the placement of sutures varied based upon the contours of each patient's abdominal wall, and he had only used that particular type of mesh patch "at least 'a couple of times,'" *Martin v Timmins*, 178 AD3d 107, 110 NYS3d 707 (2d Dept 2019). Habit testimony was also held improper to establish a course of treatment regarding a patient two doctors held in common, since neither doctor had complete control over the patient, and both doctors testified that their decisions regarding the patient's medication protocol varied depending on the circumstances, *Michalko v DeLuccia*, *supra*.

A related rule permits the admission of "evidence of other similar acts if it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; or (5) identity, *People v Molineux*, 168 NY 264, 61 NE 286 (1901); accord, *New York Proposed Code of Evidence*, § 404(b)," *Matter of Brandon's Estate*, 55 NY2d 206, 448 NYS2d 436, 433 NE2d 501 (1982); see *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Dlugosz v New York Cent. Mut. Fire Ins. Co.*, 132 AD2d 903, 518 NYS2d 237 (3d Dept 1987) (admissibility of prior insurance claims for theft and vandalism in action to recover on theft policy); *Davis v Solondz*, 122 AD2d 401, 504 NYS2d 804 (3d Dept 1986) (as to admissibility of prior, similar acts of unauthorized dental surgery performed on anesthetized patients); see also *People v Ingram*, 71 NY2d 474, 527 NYS2d 363, 522 NE2d 439 (1988) (evidence of subsequent, similar acts held admissible on the issue of intent). However, the list drawn from the *Molineux* case is not exclusive, see *People v Alvino*, 71 NY2d 233, 525 NYS2d 7, 519 NE2d 808 (1987); *Prince, Richardson on Evidence* (11th ed. Farrell) § 4-501, 4-602. For instance, both the N.Y. Proposed Code of Evidence, § 404(b), and the Federal Rules of Evidence, § 404(b), expand the list to include: opportunity, preparation, and knowledge.

Federal Annotation: Federal Rules of Evidence § 406 provides: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

c. FAILURE TO PRODUCE

(1) WITNESS

PJI 1:75. General Instruction—Evidence—Failure to Produce Non-Party Witness—In General

A party is not required to call any particular person as a witness. However, the failure to call a certain person as a witness may be the basis for an inference against the party not calling the witness. Here, (plaintiff AB, defendant CD) did not call [identify witness, e.g. treating physician, examining physician] to testify on the question(s) of [identify issue(s), e.g., permanent extent of injury, causation].

[If explanation is offered: (AB, CD) has offered the following explanation for not calling the witness [summarize explanation]. If you find that this explanation is reasonable, then you should not consider the failure to call that witness in evaluating the evidence. If, however, you find the explanation is not reasonable, you may, although you are not required to, conclude that the testimony of that witness would not support (AB's, CD's) position on the question(s) of [identify issue(s)] [add if opposing party has offered evidence on the issue(s): and would not contradict the evidence offered by (AB, CD) on (that, these) question(s)]. Additionally, you may, although you are not required to, draw the strongest inference(s) against (AB, CD) on (that, those) question(s), to the extent you deem appropriate.]

[If no explanation is offered: (AB, CD) has offered no explanation for not calling the witness. You may, although you are not required to, conclude that the testimony of that witness would not support (AB's, CD's) position on the question(s) of [identify issue(s)] [add if opposing party has offered evidence on the issue(s): and would not contradict the evidence offered by (AB, CD) on (that, these) question(s)]. Additionally, you may, although you are not required to, draw the strongest inference(s) against (AB, CD) on (that, those) question(s), to the extent you deem appropriate.]

Comment

Caveat 1: This missing witness charge should be used where the missing witness is a non-party. Where the missing witness is a party, the supplemental charge, PJI 1:75.1, should be used.

Caveat 2: The party seeking the charge has the burden to notify the court as soon as practicable of its request for the charge, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Rivera v Port Authority of New York and New Jersey*, 127 AD3d 415, 5 NYS3d 96 (1st Dept 2015) (missing witness instruction request made at charge conference not timely even though conference conducted before plaintiff formally rested). For a further discussion of the requirement that a missing witness charge be sought as soon as practicable, see this Comment, *infra*.

Caveat 3: It is error to charge that the jury is required to draw the adverse inference, *Kronenberg v Morris*, 174 AD2d 610, 571 NYS2d 316 (2d Dept 1991).

Caveat 4: Notwithstanding whether a missing witness charge is given, counsel may properly comment in summation upon the failure of the opposing party to call a witness, *People v Thomas*, 21 NY3d 226, 969 NYS2d 426, 991 NE2d 200 (2013); *DeVaul v Carvigo Inc.*, 138 AD2d 669, 526 NYS2d 483 (2d Dept 1988); *Seligson, Morris & Neuburger v Fairbanks Whitney Corp.*, 22 AD2d 625, 257 NYS2d 706 (1st Dept 1965). For a further discussion of the right of counsel to comment upon the failure of the opposing party to call a witness, see this Comment, *infra*.

Caveat 5: Where the witness is an infant of “tender years,” the missing witness charge should contain an addendum instructing the jury to consider the child’s age and the circumstances surrounding the occurrence in deciding the effect, if any, of the child’s failure to testify, *Wyman by Wyman v J. Giarnella & Son, Inc.*, 170 AD2d 229, 565 NYS2d 112 (1st Dept 1991); *Crosby v Beaird*, 93 AD2d 852, 461 NYS2d 350 (2d Dept 1983); see *Mahoney v NAMCO Cybertainment Inc.*, 282 AD2d 949, 724 NYS2d 93 (3d Dept 2001). For a further discussion of the tender-years addendum, see this Comment, *infra*.

Based on *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019); *DeVito v Feliciano*, 22 NY3d 159, 978 NYS2d 717, 1 NE3d 791 (2013) (citing PJI); *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003); *Nassau County Dept. of Social Services on Behalf of Dante M. v Denise J.*, 87 NY2d 73, 637 NYS2d 666, 661 NE2d 138 (1995); *People v Macana*, 84 NY2d 173, 615 NYS2d 656, 639 NE2d 13 (1994); *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *People v Valerius*, 31 NY2d 51, 334 NYS2d 871, 286 NE2d 254 (1972); *Noce v Kaufman*, 2 NY2d 347, 161 NYS2d 1, 141 NE2d 529 (1957); *Trainor v Oasis Roller World, Inc.*, 151 AD2d 323, 543 NYS2d 61 (1st Dept 1989) (citing PJI); *Grey v United Leasing Inc.*, 91 AD2d 932, 457 NYS2d 823 (1st Dept 1983) (citing PJI); *Jarrett v Madifari*, 67

AD2d 396, 415 NYS2d 644 (1st Dept 1979); *Jacobowitz v Mutual Ben. Health & Acc. Ass'n*, 10 AD2d 159, 198 NYS2d 7 (1st Dept 1960); *Robinson v New York*, 5 AD2d 197, 170 NYS2d 734 (1st Dept 1958); *Laffin v Ryan*, 4 AD2d 21, 162 NYS2d 730 (3d Dept 1957); see *Turner Press, Inc. v Gould*, 76 AD2d 906, 429 NYS2d 239 (2d Dept 1980) (inference may support findings in bench trial); *Prince, Richardson on Evidence* § 3-140 (11th ed. Farrell).

I. Missing Witness Charge; Generally

The missing witness charge allows the jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events, *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019); *DeVito v Feliciano*, 22 NY3d 159, 978 NYS2d 717, 1 NE3d 791 (2013) (citing PJI); *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003); see *Matter of Estate of Lewis*, 158 AD3d 1247, 71 NYS3d 786 (4th Dept 2018). The charge rests on "the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause," *People v Smith*, *supra*; *People v Savinon*, *supra*; *Matter of Adam K.*, 110 AD3d 168, 970 NYS2d 297 (2d Dept 2013).

In the context of a civil matter, a trier of fact may draw the strongest inference that the opposing evidence permits against a party who fails to testify or who fails to call the missing witness, *Nassau County Dept. of Social Services on Behalf of Dante M. v Denise J.*, 87 NY2d 73, 637 NYS2d 666, 661 NE2d 138 (1995); *Matter of Adam K.*, 110 AD3d 168, 970 NYS2d 297 (2d Dept 2013); *Crowder v Wells & Wells Equipment, Inc.*, 11 AD3d 360, 783 NYS2d 552 (1st Dept 2004).

II. Procedural Considerations

A. Burdens on Respective Parties

Under *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019), which endorsed anew the burden-shifting analysis of *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986), the proponent of the missing witness charge has the initial, *prima facie* burden of demonstrating only three things: (1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case; (2) that the witness can be expected to testify favorably to the opposing party; and (3) that the party has failed to call the witness to testify. The party opposing the charge can defeat the initial, *prima facie* showing by accounting for the witness's absence or demonstrating that the charge would not be appropriate, *People v Smith*, *supra*; *People v Gonzalez*, *supra*. This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is

not “available,” or that the witness is not under the opposing party’s “control” such that he or she would not be expected to testify in the opposing party’s favor, *People v Gonzalez*, supra. If the party opposing the charge meets its burden by rebutting the initial, prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate, *People v Smith*, supra; see *People v Gonzalez*, supra; *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003). Because the proponent of the charge generally lacks the information necessary to know what an uncalled witness would testify to and, thus, whether the witness’s testimony would be cumulative, the proponent does not have the burden to negate cumulativeness to meet its initial, prima facie showing, *People v Smith*, supra.

B. Timing

The party seeking the charge has the burden to notify the court as soon as practicable of its request for the charge, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Matter of Estate of Lewis*, 158 AD3d 1247, 71 NYS3d 786 (4th Dept 2018).

Whether a request for a missing witness charge is timely is a discretionary determination; in making that determination, the trial court must take into account when the requesting party knew or should have known that a basis for the charge existed and any prejudice that may have been sustained by the party against whom the charge is sought, *People v Carr*, 14 NY3d 808, 899 NYS2d 746, 926 NE2d 253 (2010); *Matter of Estate of Lewis*, 158 AD3d 1247, 71 NYS3d 786 (4th Dept 2018). The reason for early notification is, in part, to allow the court to exercise discretion appropriately and the parties to adjust their respective trial strategies, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Matter of Estate of Lewis*, supra; *Spoto v S.D.R. Const., Inc.*, 226 AD2d 202, 641 NYS2d 20 (1st Dept 1996). Early notification provides the party against whom the charge is sought an opportunity to account for the witness’s absence, argue that the party does not have the requisite control over the witness, or attempt to procure the witness’s appearance, *Mereau v Prentice*, 139 AD3d 1209, 33 NYS3d 476 (3d Dept 2016); *Herman v Moore*, 134 AD3d 543, 21 NYS3d 254 (1st Dept 2015).

A trial court should not sua sponte give a missing witness charge, *Bloom v Mancuso*, 175 AD3d 924, 108 NYS3d 575 (4th Dept 2019); *Matter of Liam M.J.*, 170 AD3d 1623, 96 NYS3d 798 (4th Dept 2019); *Spoto v S.D.R. Const., Inc.*, 226 AD2d 202, 641 NYS2d 20 (1st Dept 1996); see *Spooner-Boyke v Charles*, 126 AD3d 907, 4 NYS3d 137 (2d Dept 2015).

In order to permit effective judicial review, all discussions regarding the charge must be clearly put into the record so that each party’s position can easily be discerned, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Mahoney v NAMCO Cybertainment Inc.*, 282 AD2d 949, 724 NYS2d 93 (3d Dept 2001); see *People v Smith*,

33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019); Additionally, the record should clearly reflect when the court was notified of the request for the charge, see *Herman v Moore*, 134 AD3d 543, 21 NYS3d 254 (1st Dept 2015).

C. Expert Witnesses

The missing witness charge may be given with respect to expert, as well as fact, witnesses. Thus, a defendant's failure to call a doctor who examined plaintiff on defendant's behalf and a plaintiff's failure to call a doctor who examined plaintiff at plaintiff's request were deemed bases for giving a missing witness charge, *Brooks v Judlau Contracting, Inc.*, 39 AD3d 447, 833 NYS2d 223 (2d Dept 2007), rev'd on other grounds, 11 NY3d 204, 869 NYS2d 366, 898 NE2d 549 (2008); *Griffin v Nissen*, 89 AD2d 808, 453 NYS2d 277 (4th Dept 1982); *Laffin v Ryan*, 4 AD2d 21, 162 NYS2d 730 (3d Dept 1957); see *Rice v Ninacs*, 34 AD2d 388, 312 NYS2d 246 (4th Dept 1970). Similarly, in a treatment-over-objection proceeding, petitioner's failure to call the patient's treating physician was a proper predicate for the charge, *Matter of Adam K.*, 110 AD3d 168, 970 NYS2d 297 (2d Dept 2013).

D. Nonjury Trials

The court in a nonjury trial may draw a negative inference against a party based on the party's failure to call a witness, *Matter of Adam K.*, 110 AD3d 168, 970 NYS2d 297 (2d Dept 2013); *Turner Press, Inc. v Gould*, 76 AD2d 906, 429 NYS2d 239 (2d Dept 1980). However, the court must give notice of its intent to draw a negative inference in order to give the party an opportunity to explain the failure to call the witness, *Bloom v Mancuso*, 175 AD3d 924, 108 NYS3d 575 (4th Dept 2019); *Matter of Liam M.J.*, 170 AD3d 1623, 96 NYS3d 798 (4th Dept 2019); *Spooner-Boyke v Charles*, 126 AD3d 907, 4 NYS3d 137 (2d Dept 2015).

III. Preconditions to Charge

In *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019), the Court of Appeals stated that "[a] missing witness charge is appropriate when three conditions are met." Those three conditions, set forth previously by the Court in *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986), are as follows: (1) that the witness's knowledge is material to the trial; (2) that the witness is expected to give noncumulative testimony favorable to the party against whom the charge is sought; and (3) that the witness is available to that party, *People v Smith*, *supra*; *People v Gonzalez*, *supra*. Some decisions refer to four preconditions for the charge, dividing the second element into two, *DeVito v Feliciano*, 22 NY3d 159, 978 NYS2d 717, 1 NE3d 791 (2013) ("(1) the witness's knowledge is material to the trial; (2) the witness is expected to give noncumulative testimony; (3) the witness is under the 'control' of the party against whom the charge is sought, so that the witness would be expected to testify in that party's favor; and (4) the witness is available to that party").

A. Materiality

The party who seeks the benefit of the inference must establish that there is a witness who can give material testimony, *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019); *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Matter of Estate of Lewis*, 158 AD3d 1247, 71 NYS3d 786 (4th Dept 2018); see *Feneck v First Union Real Estate Equity and Mortg. Investments*, 266 AD2d 916, 697 NYS2d 442 (4th Dept 1999); *Phillips v Roux Laboratories*, 286 App Div 549, 145 NYS2d 449 (1st Dept 1955). It is error to give the charge if the party seeking it does not identify a particular witness who would be knowledgeable about the issue, *Hess v Murnane Bldg. Contractors, Inc.*, 306 AD2d 824, 762 NYS2d 212 (4th Dept 2003); *Feldberg v Howard Fulton St., Inc.*, 20 AD2d 555, 245 NYS2d 168 (2d Dept 1963); *Robinson v New York*, 5 AD2d 197, 170 NYS2d 734 (1st Dept 1958).

B. “Control” Element (i.e., Favorability Factor)

The party seeking the benefit of the inference provided by the charge must establish that the witness would be expected to give testimony favorable to the party against whom the charge is sought, *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019); see *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003); *Group v Szenher*, 260 App Div 308, 20 NYS2d 803 (1st Dept 1940), *aff’d*, 284 NY 741, 31 NE2d 508 (1940); *Matter of Estate of Lewis*, 158 AD3d 1247, 71 NYS3d 786 (4th Dept 2018). This is commonly referred to as the “control” element, which requires an evaluation of the relationship between the witness and the party in whose favor the witness is expected to testify, *People v Savinon*, *supra*; *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986).

“Control” is used in a very broad sense and includes a witness under the influence of a party as well as one under the party’s employment or management, see *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003) (closeness of friendship and business relationship, even if it had not remained current, was enough to establish control); *People v Keen*, 94 NY2d 533, 707 NYS2d 380, 728 NE2d 979 (2000) (under circumstances, defendant had control over former girlfriend and mother of his child); *People v Wilson*, 64 NY2d 634, 485 NYS2d 40, 474 NE2d 248 (1984) (control established by existence of spousal relationship); *Hershkowitz v Michel*, 143 AD2d 809, 533 NYS2d 344 (2d Dept 1988) (citing PJI); *Saffdie v New York*, 138 AD2d 361, 525 NYS2d 650 (2d Dept 1988) (employee); *People v Douglas*, 54 AD2d 515, 386 NYS2d 477 (3d Dept 1976) (informant); see also *Leear v John W. McGrath Corp.*, 52 AD2d 804, 383 NYS2d 342 (1st Dept 1976) (one-time employee not in party’s control).

When an uncalled witness is equally available to both parties—that is, when it is within the ability of both parties to produce the witness—but the witness is a stranger to both parties and cannot be expected to testify favorably to either party, generally no unfavorable inference may

be drawn from the failure of either party to call the witness, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Hayden v New York Rys. Co.*, 233 NY 34, 134 NE 826 (1922). On the other hand, if a witness, although theoretically “available” to both sides, is favorable to or under the influence of one party and hostile to the other, the witness is said to be in the “control” of the party to whom he or she is favorably disposed, and an unfavorable inference may be drawn from the failure to call the witness, *People v Gonzalez*, *supra*; see *People v Keen*, 94 NY2d 533, 707 NYS2d 380, 728 NE2d 979 (2000); *Rosa v Blander*, 47 AD2d 865, 366 NYS2d 36 (2d Dept 1975). Where a witness is under the control of one party, that witness is unavailable to the opposing party, *People v Keen*, *supra*; *People v Gonzalez*, *supra*.

1. Relationship Between Witness and Party

It is reasonable to expect that a party will call one of its corporate officers, *Spitzer v Born, Inc.*, 194 App Div 739, 185 NYS 875 (1st Dept 1921); an employee, *Trainor v Oasis Roller World, Inc.*, 151 AD2d 323, 543 NYS2d 61 (1st Dept 1989); *O'Donnell v K-Mart Corp.*, 100 AD2d 488, 474 NYS2d 344 (4th Dept 1984); *Standard Fabrics Corporation v Hob Mfg. Co.*, 199 App Div 508, 191 NYS 821 (1st Dept 1922); a fellow employee, see *Clow v New York Cent. R. Co.*, 32 AD2d 1008, 302 NYS2d 90 (3d Dept 1969); a relative, *People v Macana*, 84 NY2d 173, 615 NYS2d 656, 639 NE2d 13 (1994); *People v Rodriguez*, 38 NY2d 95, 378 NYS2d 665, 341 NE2d 231 (1975); a friend, *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003); an expert witness who has been identified as having knowledge of the cause of the accident, *Sanders v Otis Elevator Co.*, 232 AD2d 327, 649 NYS2d 19 (1st Dept 1996); or a treating or examining physician, *Mashley v Kerr*, 47 NY2d 892, 419 NYS2d 476, 393 NE2d 471 (1979) (citing PJI); *Ghize v Kinney Drugs, Inc.*, 177 AD2d 784, 576 NYS2d 395 (3d Dept 1991); *Wilson v Bodian*, 130 AD2d 221, 519 NYS2d 126 (2d Dept 1987); *Siegfried v Siegfried*, 123 AD2d 621, 507 NYS2d 20 (2d Dept 1986); *Chandler v Flynn*, 111 AD2d 300, 489 NYS2d 289 (2d Dept 1985).

A party cannot reasonably be expected to call a witness who is hostile or has an adverse interest, *Vollmer v Automobile Fire Ins. Co. of Hartford, Conn.*, 207 App Div 67, 202 NYS 374 (3d Dept 1923); see *Metallurgical Securities Co. v Mechanics & Metals Nat. Bank of City of New York*, 171 App Div 321, 157 NYS 321 (1st Dept 1916); or a witness who is a governmental employee who had no friendship with or loyalty to a private party, *Div-Com, Inc. v F.J. Zeronda, Inc.*, 136 AD2d 844, 523 NYS2d 687 (3d Dept 1988); or one who is a stranger, as the driver of a taxicab in which plaintiff was riding, *Hayden v New York Rys. Co.*, 233 NY 34, 134 NE 826 (1922). A former employee who cannot be located is not considered to be under the control of the former employer, *Zeeck v Melina Taxi Co.*, 177 AD2d 692, 576 NYS2d 878 (2d Dept 1991) (former lessee of taxicab treated as former employee) (citing PJI); *Hershkowitz v Michel*, 143 AD2d 809, 533 NYS2d 344 (2d Dept 1988) (citing PJI); *Crosby v Stone*, 137 AD2d 785, 525 NYS2d 332 (2d Dept 1988); *Valentino v State*, 62 AD2d 1086, 403 NYS2d 596 (3d Dept 1978); *Blauner v Reeveland*, 203 App Div 101, 196 NYS 457 (1st Dept 1922).

2. *Cumulative Testimony*

If the testimony would be cumulative, it is improper to charge that an inference may be drawn, *Feneck v First Union Real Estate Equity and Mortg. Investments*, 266 AD2d 916, 697 NYS2d 442 (4th Dept 1999); *Lipp v Saks*, 129 AD2d 681, 514 NYS2d 443 (2d Dept 1987); *Chandler v Flynn*, 111 AD2d 300, 489 NYS2d 289 (2d Dept 1985); *Oswald v Heaney*, 70 AD2d 653, 416 NYS2d 826 (2d Dept 1979); *Perlman v Shanck*, 192 App Div 179, 182 NYS 767 (1st Dept 1920); see *Klombers v Lefkowitz*, 131 AD2d 815, 517 NYS2d 179 (2d Dept 1987); *Trotta v Koch*, 110 AD2d 631, 487 NYS2d 371 (2d Dept 1985) (error to give missing witness charge where plaintiffs conceded that defendant's testimony about conversation with one plaintiff was true); *Rudnik v Norwich Pharmacal Co.*, 34 AD2d 912, 311 NYS2d 363 (1st Dept 1970) (failure to call treating doctor, who administered drug, did not give rise to inference where doctors who treated for consequences of administration did testify); *Prince, Richardson on Evidence* (11th ed. Farrell) § 3-140.

When a doctor who examines a plaintiff on a defendant's behalf does not testify at trial, an inference generally arises that the testimony of the doctor would be unfavorable to the defendant, *Lauro v New York*, 67 AD3d 744, 889 NYS2d 215 (2d Dept 2009); *Hanlon v Campisi*, 49 AD3d 603, 856 NYS2d 136 (2d Dept 2008); *Brooks v Judlau Contracting, Inc.*, 39 AD3d 447, 831 NYS2d 734 (2d Dept 2007). In such a circumstance, the defendant may defeat the inference by demonstrating that the doctor's testimony would be merely cumulative, that the doctor was unavailable or not under the defendant's control, or that the doctor would address matters not in dispute, *Lauro v New York*, *supra*; *Hanlon v Campisi*, *supra*; *Brooks v Judlau Contracting, Inc.*, *supra*. Likewise, in *Matter of Adam K.*, 110 AD3d 168, 970 NYS2d 297 (2d Dept 2013), the court held in a treatment-over-objection proceeding that the existence of a procedure for multi-layered review of the need for the proposed treatment does not render the testimony of the patient's treating physician cumulative. In *Warner v Kain*, 186 AD3d 1844, 131 NYS3d 726 (3d Dept 2020), the plaintiffs' belated request for a missing witness charge with respect to the defendant's examining physician was denied where the plaintiff subpoenaed the physician prior to trial, failed to enforce the subpoena, and portions of the testimony would have been cumulative.

An uncalled witness's testimony may be deemed cumulative only when it would be cumulative of testimony or other evidence favoring the party that controls the uncalled witness, *DeVito v Feliciano*, 22 NY3d 159, 978 NYS2d 717, 1 NE3d 791 (2013) (abrogating *Getlin v St. Vincent's Hosp. & Medical Center of New York*, 117 AD2d 707, 498 NYS2d 849 (2d Dept 1986)); *Leahy v Allen*, 221 AD2d 88, 644 NYS2d 388 (3d Dept 1996). A witness's testimony is not cumulative merely because it would be cumulative of the opposing witness's testimony, *DeVito v Feliciano*, *supra*.

If the proponent of the missing witness charge makes the initial,

prima facie showing, the party opposing the charge can defeat that showing by demonstrating that the testimony of the uncalled witness would be cumulative, *People v Smith*, 33 NY3d 454, 104 NYS3d 572, 128 NE3d 649 (2019). If the party opposing the charge makes a showing that the testimony of the uncalled witness would be cumulative, the proponent of the charge has the ultimate burden to show that the charge would be appropriate, *id*; see *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003). Because the proponent of the charge generally lacks the information necessary to know what an uncalled witness would testify to and, thus, whether the witness's testimony would be cumulative, the proponent does not have the burden to negate cumulativeness to meet its initial, prima facie showing, *People v Smith*, *supra*.

C. Availability

One of the preconditions for a missing witness charge is that the witness be available to the party against whom the charge is sought. The burden is upon the party opposing the charge to show that the witness is not available, *People v Gonzalez*, 68 NY2d 424, 509 NYS2d 796, 502 NE2d 583 (1986); *Grun v Sportsman, Inc.*, 58 AD2d 802, 396 NYS2d 250 (2d Dept 1977) (citing PJI). Lack of availability may be shown by hearsay evidence, such as a letter from the witness, see *Healy v Rennert*, 9 NY2d 202, 213 NYS2d 44, 173 NE2d 777 (1961); *Minick v Liquid Air Corp.*, 240 AD2d 477, 658 NYS2d 420 (2d Dept 1997) (citing PJI). When the facts are not in dispute as to the reasons for the witness's unavailability, the question is for the court, see *Byczek v City of New York Dept. of Parks*, 81 AD2d 823, 438 NYS2d 596 (2d Dept 1981); *Metallurgical Securities Co. v Mechanics & Metals Nat. Bank of City of New York*, 171 App Div 321, 157 NYS 321 (1st Dept 1916).

A witness is unavailable if, among other things, the witness is dead, missing or incapacitated, *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003). Though a genuine inability to locate a witness will foreclose a missing witness charge, a witness may be readily accessible and even in the courtroom, but still be unavailable within the meaning of the rule, *id*. Thus, a non-party witness who on Fifth Amendment grounds refuses to testify will be considered "unavailable," although the witness's presence is known and apparent, *id*; see *People v Webster*, 248 AD2d 738, 670 NYS2d 871 (2d Dept 1998). The fact that a witness has met with defendant and counsel during trial supports a finding that the witness could have been produced if defendant earnestly wanted him or her, *People v Savinon*, *supra*. A missing witness charge is appropriate where a party had the physical ability to locate and produce a witness and there was a legal or factual relationship between the witness and the party that would make it "natural to expect the party to have called the witness to testify in his [or her] favor," *id*; see *People v Webster*, *supra*. For a discussion of a missing witness charge with regard to a claim of privilege, see PJI 1:76.

Ordinarily, proof that a witness is beyond the jurisdiction of the

court is sufficient to bar the inference as a matter of law, *Zeeck v Melina Taxi Co.*, 177 AD2d 692, 576 NYS2d 878 (2d Dept 1991) (citing PJI); *Fremont v Metropolitan St. Ry. Co.*, 83 App Div 414, 82 NYS 307 (1st Dept 1903), especially where the testimony is cumulative, *Perlman v Shanck*, 192 App Div 179, 182 NYS 767 (1st Dept 1920). The *Perlman* case indicates, however, that the question may be one for the jury to consider taking into account the expense and delay involved in taking a deposition in a foreign jurisdiction. In *Brewster v Prince Apartments, Inc.*, 264 AD2d 611, 695 NYS2d 315 (1st Dept 1999), where defendant apparently waited until the eve of trial to subpoena his psychiatrist, vague assertions that the psychiatrist was traveling in Russia were insufficient to show that “the witness’ whereabouts are unknown and that diligent efforts to locate him have been unsuccessful.”

Whether a reasonable explanation has been offered for the failure to call the witness is usually for the trier of fact, see *Wyman by Wyman v J. Giarnella & Son, Inc.*, 170 AD2d 229, 565 NYS2d 112 (1st Dept 1991). Counsel’s failure to subpoena defendant’s friend, after having just met with him, justified the trial court’s determination that the defendant did not rebut a prima facie showing of the witness’s availability, *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003). It is error for a court to preclude a party from offering an explanation for a witness’s absence to the jury where the party has produced a doctor’s note indicating that the witness is unable to leave another jurisdiction because of medical treatment at the time of the trial, *Minick v Liquid Air Corp.*, 240 AD2d 477, 658 NYS2d 420 (2d Dept 1997) (citing PJI).

IV. Witness of “Tender Years”

Where the witness is an infant of “tender years,” the missing witness charge should contain an addendum instructing the jury to consider the child’s age and the circumstances surrounding the occurrence in deciding the effect, if any, of the child’s failure to testify, *Wyman by Wyman v J. Giarnella & Son, Inc.*, 170 AD2d 229, 565 NYS2d 112 (1st Dept 1991); *Crosby v Beaird*, 93 AD2d 852, 461 NYS2d 350 (2d Dept 1983); see *Mahoney v NAMCO Cybertainment Inc.*, 282 AD2d 949, 724 NYS2d 93 (3d Dept 2001).

The court should limit the missing witness charge to those issues the infant could have reasonably been expected to testify about, *Wyman by Wyman v J. Giarnella & Son, Inc.*, 170 AD2d 229, 565 NYS2d 112 (1st Dept 1991) (where child was four years old at time of injury and seven years old at time of trial, missing witness charge would be limited to issues concerning child’s damages).

V. Right of Counsel to Comment in Summation

A party not entitled to a missing witness charge may nonetheless properly comment in summation on the failure of the opposing party to call the witness, *People v Thomas*, 21 NY3d 226, 969 NYS2d 426, 991

NE2d 200 (2013); *People v Williams*, 5 NY3d 732, 800 NYS2d 360, 833 NE2d 695 (2005); *People v Tankleff*, 84 NY2d 992, 622 NYS2d 503, 646 NE2d 805 (1994); *DeVaul v Carvigo Inc.*, 138 AD2d 669, 526 NYS2d 483 (2d Dept 1988); *Seligson, Morris & Neuburger v Fairbanks Whitney Corp.*, 22 AD2d 625, 257 NYS2d 706 (1st Dept 1965). The right of counsel to comment upon another party's failure to call a witness is different from the court's charge as to the inference that the jury may draw from the failure of a party to call a witness under its control who has knowledge of material facts, *Seligson, Morris & Neuburger v Fairbanks Whitney Corp.*, *supra*. Where a trial court errs in denying a request for a missing witness charge, that error is not rendered harmless by the court having permitted counsel to comment on the failure to call the witness in summation, *Nuccio v Chou*, 183 AD2d 511, 585 NYS2d 170 (1st Dept 1992); *Safdie v New York*, 138 AD2d 361, 525 NYS2d 650 (2d Dept 1988).

VI. Failure of Party to Testify

In the context of a civil matter, a trier of fact may draw the strongest inference that the opposing evidence permits against a party who fails to testify, *Nassau County Dept. of Social Services on Behalf of Dante M. v Denise J.*, 87 NY2d 73, 637 NYS2d 666, 661 NE2d 138 (1995); *Matter of Adam K.*, 110 AD3d 168, 970 NYS2d 297 (2d Dept 2013); *Crowder v Wells & Wells Equipment, Inc.*, 11 AD3d 360, 783 NYS2d 552 (1st Dept 2004). In cases where a party fails to testify, the negative inference ordinarily applies without regard to the required preconditions, "since those factors would be either irrelevant (the party's control over himself or herself) or deemed satisfied (the party's availability and personal knowledge of noncumulative, material facts)," *Matter of Adam K.*, *supra*; see *Crowder v Wells & Wells Equipment, Inc.*, *supra* (discussing application of principle in multiple defendant cases); *Lipp v Saks*, 129 AD2d 681, 514 NYS2d 443 (2d Dept 1987) (not error in declining to give missing witness charge when testimony of certain plaintiffs would have been cumulative). The principle that allows the drawing of the strongest inference against a non-testifying party has been applied in cases against a municipal defendant that failed to call its employee as a witness, *Matter of Richard E.*, 12 AD3d 1019, 785 NYS2d 580 (3d Dept 2004) (patient's therapist, a government employee, not called in civil involuntary commitment proceeding); *Piquette v New York*, 4 AD3d 402, 771 NYS2d 365 (2d Dept 2004) (police officers); see *Matter of Adam K.*, *supra* (psychiatrist).

In an appropriate case where a party fails to testify, the following charge should be given.

PJI 1:75.1

Generally, a party is not required to call any particular person as a witness. However, where a party does not testify, an inference may be drawn against that party.

In this case, (AB, CD) did not testify. Therefore, you may, although you are not required to, conclude that the testimony of (AB, CD) would not support (AB's, CD's) position on the question(s) of [identify issue(s)] [add if opposing party has offered evidence on the issue(s)] and would not contradict the evidence offered by (AB, CD) on (that, those) question(s)]. Additionally, you may, although you are not required to, draw the strongest inference(s) against (AB, CD) on (that, those) question(s) to the extent you deem appropriate.

Comment

Caveat 1: The Fifth Amendment accords an individual the privilege not to answer questions in a civil proceeding if the answers might incriminate the person in future criminal proceedings, *Andrew Carothers, M.D., P.C. v Progressive Insurance Company*, 33 NY3d 389, 104 NYS3d 26, 128 NE3d 153 (2019). However, a party who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial, *id*; see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 19 NYS3d 475, 41 NE3d 340 (2015). Thus, a party's failure to answer questions may be considered by a jury in assessing the strength of the opposing evidence on the issue or issues that the party was in a position to controvert, and an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination, *Andrew Carothers, M.D., P.C. v. Progressive Insurance Company*, *supra*; see *El-Dehdan v El-Dehdan*, *supra*; *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980). Where a party invokes the Fifth Amendment to avoid answering questions posed to him or her, the supplemental charge should be tailored to reflect that the witness refused to answer certain questions on the basis of the privilege, that the privilege could have been waived by the party and the party could have answered the questions, and that from the assertion of the privilege the jury may conclude that had the answers been given they would not have contradicted the opposing evidence on the relevant issues or would not have supported the party's position on those issues, see PJI 1:76.

A party's use of a missing party's deposition testimony does not constitute a waiver of the right to request a missing witness charge, *Alli v Full Service Auto Repair, LLC*, 127 AD3d 1003, 7 NYS3d 456 (2d Dept 2015); *Webber v K-Mart Corp.*, 266 AD2d 534, 698 NYS2d 894 (2d Dept 1999); *Farrell v Labarbera*, 181 AD2d 715, 581 NYS2d 226 (2d Dept 1992).

In *Bzezi v Eldib*, 112 AD3d 772, 977 NYS2d 354 (2d Dept 2013), the Second Department concluded that the trial court properly denied the

request of two defendants for a missing witness charge against another defendant who was precluded from testifying by a pre-trial order, see *Bonomo v New York*, 78 AD3d 1094, 912 NYS2d 601 (2d Dept 2010).

PJI 1:76. General Instruction—Evidence—Claim of Privilege

No witness can be compelled to give testimony concerning communications of a confidential nature between [here specify the relationship, such as: physician and patient.] A witness's right to refuse to answer questions because of such a confidential relationship is called a privilege. You will recall that during the testimony of (the defendant, plaintiff, the witness AB) I sustained the (defendant's, plaintiff's) objection to certain questions on the ground of that privilege. The privilege could have been waived by (the defendant, plaintiff) and (he, she) could have (answered, permitted AB to answer) the questions. From the assertion of the privilege you may, but are not required to, conclude that had the answers been given they would not have contradicted the opposing evidence on the issue of [identify issue] or would not have supported (the defendant's, plaintiff's) position on that issue. Additionally, you may, but are not required to, draw the strongest inference against the (plaintiff, defendant) on that issue that the opposing evidence permits.

Comment

Based on *Commissioner of Social Services v Philip De G.*, 59 NY2d 137, 463 NYS2d 761, 450 NE2d 681 (1983) (citing PJI) (in paternity proceeding respondent availed himself of Family Court Act § 531 "privilege" not to testify); *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980) (privilege against self-incrimination); *People v Hovey*, 92 NY 554 (1883) (husband and wife); *Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452, 922 NYS2d 343 (1st Dept 2011) (attorney-client); *Sabowska v Coney Island & B.R. Co.*, 174 App Div 913, 160 NYS 386 (2d Dept 1916); *Deutschmann v Third Ave. R. Co.*, 87 App Div 503, 84 NYS 887 (1st Dept 1903) (physician and patient); see *People v Savinon*, 100 NY2d 192, 761 NYS2d 144, 791 NE2d 401 (2003); Prince, *Richardson on Evidence* (11th ed. Farrell) § 5-102; McCormick, *Evidence* (4th Ed Strong) 163 § 80; Annot: 34 ALR3d 775. Concerning the propriety of comment by opposing counsel upon the exercise of privilege to exclude testimony, see Annot: 32 ALR3d 906.

The statutory provisions dealing with privilege are CPLR 4501 (self-incrimination); 4502 (spouses); 4503 (attorney-client); 4504 (physician, dentist, nurse-patient); 4505 (clergy-confidant); 4507 (psychologist-client); 4508 (social worker-client); Civil Rights Law § 79(h) (professional journalist or newscaster-source). The primary obligation to observe the physician-patient privilege created in CPLR 4504 lies with the physician or hospital rather than the patient, *People v Greene*, 9 NY3d 277, 849 NYS2d 461, 879 NE2d 1280 (2007). Inasmuch as the physician-patient privilege has no relation to a constitutionally protected right, evidence obtained as a result of a violation of the privilege need not be suppressed in a criminal proceeding, *id.*

For a detailed discussion of the history and policy objectives of the physician-patient privilege, see *Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 29 NYS3d 879, 49 NE3d 1171 (2016); *Matter of Grand Jury Investigation in New York County*, 98 NY2d 525, 749 NYS2d 462, 779 NE2d 173 (2002).

In holding that an unfavorable inference may be drawn, *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980) and *Commissioner of Social Services v Philip De G.*, 59 NY2d 137, 463 NYS2d 761, 450 NE2d 681 (1983), dispose of any doubt on this question. *Hovey* and *Sabowska* deal with failure to call a witness; *Deutschmann* involves a claim of privilege by a plaintiff who had waived the privilege by putting her health in issue. These decisions all proceeded on the basic theory that an unfavorable inference may be drawn from the act of a party in suppressing, concealing, or destroying testimony, and view the matter as covered by the rule permitting an unfavorable inference where a party has control of a witness who could give material testimony and refuses to call the witness, see *Califano v New York*, 212 AD2d 146, 627 NYS2d 1008 (1st Dept 1995); *Deutschmann v Third Ave. R. Co.*, 87 App Div 503, 84 NYS 887 (1st Dept 1903); see also PJI 1:75.

The Second Circuit also permits an unfavorable inference to be drawn from the assertion of the Fifth Amendment privilege, see *LiButti v U.S.*, 178 F3d 114 (2d Cir 1999); *Brink's Inc. v New York*, 717 F2d 700 (2d Cir 1983). Under the Model Code of Evidence, Rule 233, an inference is permissible, while under the Uniform Rules of Evidence, Rule 512, it is not. *Fisch*, *New York Evidence* (2nd) § 1126 states that New York allows the inference. *Wigmore on Evidence* (McNaughton Rev ed) summarizes the authorities which, though sharply split, hold that no inference arises from the exercise of the husband-wife (§ 2243), attorney-client (§ 2322) or doctor-patient (§ 2386) privilege. No case has been found with respect to the inference to be drawn from the exercise of the clergy-confident privilege.

In *Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452, 922 NYS2d 343 (1st Dept 2011), the court, citing *Commissioner of Social Services v Philip De G.*, 59 NY2d 137, 463 NYS2d 761, 450 NE2d 681 (1983), held that the trial court properly charged PJI 1:76, that an

adverse inference could be drawn from the plaintiff's refusal to waive the attorney-client privilege to allow his worker's compensation attorney's paralegal to testify.

The privilege against self-incrimination raises a constitutional question. Exercise of the privilege has been held to justify an inference in *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980); *Califano v New York*, 212 AD2d 146, 627 NYS2d 1008 (1st Dept 1995). There, the court refused to extend the rule of *Spevack v Klein*, 385 US 511, 87 SCt 625 (1967) (attorney's assertion of the privilege against self-incrimination cannot be the basis of disbarment), to a purely civil case, see *Matter of Randel*, 158 NY 216, 52 NE 1106 (1899) (disbarment); *Gonzalez v Dumpson*, 46 AD2d 861, 361 NYS2d 666 (1st Dept 1974) (welfare department hearing); *Matter of O'Neill*, 184 App Div 75, 171 NYS 514 (1st Dept 1918) (disbarment); *Fritz v Fritz*, 88 AD2d 778, 451 NYS2d 519 (4th Dept 1982) (divorce, failure of defendant to testify in denial of adultery).

However, *Spevack v Klein*, 385 US 511, 87 SCt 625 (1967), may be interpreted as constitutionally barring an inference based on exercise of the privilege. The privilege is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v Hogan*, 378 US 1, 84 SCt 1489 (1964). "Penalty" is not restricted to fine or imprisonment but means the imposition of any sanction which makes assertion of the privilege costly, *Griffin v California*, 380 US 609, 85 SCt 1229, 5 Ohio Misc 127 (1965); *Gardner v Broderick*, 392 US 273, 88 SCt 1913 (1968) (a provision of the New York City charter that allowed the discharge of a policeman who refused to waive immunity violated a constitutional privilege). *Steinbrecher v Wapnick*, 24 NY2d 354, 300 NYS2d 555, 248 NE2d 419 (1969), held that striking defendant's answer was impermissible as a penalty for exercising the privilege at an examination before trial because it was "nothing more than the imposition of a civil forfeiture for the good faith exercise of a constitutional right." *Steinbrecher* stated that there was one important exception; the privilege may not be unfairly used as a weapon to prejudice an adversary. Such proposition was based on *Levine v Bornstein*, 6 NY2d 892, 190 NYS2d 702, 160 NE2d 921 (1959), where plaintiff's complaint was dismissed after he invoked the privilege at an examination before trial in a civil action, and thus deprived defendant of information necessary to its defense. *Kuriansky v Bed-Stuy Health Care Corp.*, 135 AD2d 160, 525 NYS2d 225 (2d Dept 1988), *aff'd*, 73 NY2d 875, 538 NYS2d 233, 535 NE2d 286 (1988), held that there was no constitutional violation in denying the return of attached assets of criminal defendants because of their refusal to provide financial information.

As to the privilege accorded a professional journalist or newscaster by Civil Rights Law § 79(h), it would appear that there is no constitutional barrier to drawing an inference from its exercise, *Branzburg v Hayes*, 408 US 665, 92 SCt 2646 (1972).

The pattern charge states the nature and effect of the inference in

the same terms used in the general charge, PJI 1:75. The fact that the privilege is affirmatively asserted does not seem to warrant stronger consequences than are imposed when a party with knowledge fails to testify.

A party who affirmatively puts his or her physical condition in issue waives the physician-patient privilege, *People v Abdul Karim Al-Kanani*, 33 NY2d 260, 351 NYS2d 969, 307 NE2d 43 (1973); *McDonnell v Nassau*, 59 AD2d 550, 397 NYS2d 140 (2d Dept 1977); see *Koump v Smith*, 25 NY2d 287, 303 NYS2d 858, 250 NE2d 857 (1969). Under that principle, a plaintiff who commences a personal injury action waives the physician-patient privilege to the extent that the plaintiff's physical or mental condition is affirmatively placed in controversy, *Cynthia B. v New Rochelle Hosp. Medical Center*, 60 NY2d 452, 470 NYS2d 122, 458 NE2d 363 (1983); *Carter v Fantauzzo*, 256 AD2d 1189, 684 NYS2d 384 (4th Dept 1998). The waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments, *Carter v Fantauzzo*, *supra*.

Although plaintiff waives the physician-patient privilege by tendering to the jury the issue of his or her physical condition, defendant does not waive the privilege by denying the allegations of the complaint or by asserting the culpable conduct of plaintiff as an affirmative defense, unless there is an assertion of a physical condition to excuse conduct, *Dillenbeck v Hess*, 73 NY2d 278, 539 NYS2d 707, 536 NE2d 1126 (1989); *Koump v Smith*, 25 NY2d 287, 303 NYS2d 858, 250 NE2d 857 (1969); *Schnobrich v Schnobrich*, 198 AD2d 850, 604 NYS2d 657 (4th Dept 1993). In addition, a defendant who seeks apportionment in a crossclaim does not waive the physician-patient privilege, *McMahon v Estate of Marianacci*, 198 AD2d 870, 604 NYS2d 656 (4th Dept 1993); *Schnobrich v Schnobrich*, *supra*. By putting in issue mental and emotional condition in a divorce action, plaintiff waives the psychologist-client privilege, *Baecher v Baecher*, 58 AD2d 821, 396 NYS2d 447 (2d Dept 1977); see Annot: 21 ALR3d 912. Where prenatal injury is involved, the mother's physician patient privilege is waived with respect to the period the child is in utero, *Napoleoni v Union Hosp. of the Bronx*, 207 AD2d 660, 616 NYS2d 38 (1st Dept 1994).

The physician-patient privilege is also deemed waived whenever the plaintiff's decedent's physical or mental condition becomes an issue, *Prink v Rockefeller Center, Inc.*, 48 NY2d 309, 422 NYS2d 911, 398 NE2d 517 (1979); see *Kaplowitz by Katz v Borden, Inc.*, 189 AD2d 90, 594 NYS2d 744 (1st Dept 1993) (waiver by mother in bringing derivative action for loss of services based on claim that daughter was injured in utero because of defendants' allegedly furnishing mother with harmful products in workplace); *Tiborsky v Martorella*, 188 AD2d 795, 591 NYS2d 547 (3d Dept 1992) (defendant may call physician consulted by plaintiff); *Feggans v Reliance Ins. Co. of New York*, 100 AD2d 570, 473 NYS2d 824 (2d Dept 1984) (waiver by making claim for no-fault benefits).

The physician-patient privilege may be waived by voluntarily responding to inquiries pertaining to medical history on an examination before trial, *Neferis v DeStefano*, 265 AD2d 464, 697 NYS2d 108 (2d Dept 1999); *Herbst by Herbst v Bruhn*, 106 AD2d 546, 483 NYS2d 363 (2d Dept 1984), by voluntarily offering to provide otherwise privileged information, *Scharlack v Richmond Memorial Hosp.*, 102 AD2d 886, 477 NYS2d 184 (2d Dept 1984), or by introducing testimony or documents concerning otherwise privileged information, see *Williams by Williams v Roosevelt Hosp.*, 108 AD2d 9, 487 NYS2d 767 (1st Dept 1985), *aff'd*, 66 NY2d 391, 497 NYS2d 348, 488 NE2d 94 (1985); *Kanally v DeMartino*, 162 AD3d 142, 77 NYS3d 234 (3d Dept 2018) (where plaintiff alleged defendant doctor deviated from standard of care by failing to read and use decedent's lengthy medical history, plaintiff was required to provide authorizations for 10-year period prior to death); *Yetman v St. Charles Hosp.*, 112 AD2d 297, 491 NYS2d 742 (2d Dept 1985); *Hughson v St. Francis Hosp. of Port Jervis*, 93 AD2d 491, 463 NYS2d 224 (2d Dept 1983). However, a plaintiff who sues solely in a representative capacity, such as guardian, does not thereby waive the physician-patient privilege as to plaintiff's own medical condition, *Roman v Turner Colours, Inc.*, 255 AD2d 571, 681 NYS2d 69 (2d Dept 1998); *Scalone v Phelps Memorial Hosp. Center*, 184 AD2d 65, 591 NYS2d 419 (2d Dept 1992) (in wrongful death action, personal representative, who was also a distributee, does not waive privilege). Similarly a guardian, although asserting a derivative claim of loss for services, does not waive the privilege, *Bolos v Staten Island Hosp.*, 217 AD2d 643, 629 NYS2d 809 (2d Dept 1995); *Teresi v Grecco*, 206 AD2d 517, 615 NYS2d 893 (2d Dept 1994).

A hospital may assert the physician-patient privilege under CPLR 4504(a) to maintain the confidentiality of patient medical records, *Matter of Grand Jury Investigation in New York County*, 98 NY2d 525, 749 NYS2d 462, 779 NE2d 173 (2002). Similarly, a third-party custodian of medical records may seek a protective order, *Cynthia B. v New Rochelle Hosp. Medical Center*, 60 NY2d 452, 470 NYS2d 122, 458 NE2d 363 (1983). The fact that a privilege which would otherwise shield medical information from disclosure has been waived does not necessarily mean that disclosure might not be denied on another basis, e.g. relevance, *Herbst by Herbst v Bruhn*, 106 AD2d 546, 483 NYS2d 363 (2d Dept 1984).

The physician-patient privilege applies to information orally communicated by the patient and information ascertained by the physician by observing the patient's appearance and symptoms, unless those factual observations would be obvious to lay observers, *Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 29 NYS3d 879, 49 NE3d 1171 (2016). However, while the privilege protects confidential communications, it does not shield mere medical facts or incidents of the plaintiff's medical history, *Williams by Williams v Roosevelt Hosp.*, 66 NY2d 391, 497 NYS2d 348, 488 NE2d 94 (1985); *Bolos v Staten Island Hosp.*, 217 AD2d 643, 629 NYS2d 809 (2d Dept 1995); see *Neferis v DeStefano*, 265 AD2d 464, 697 NYS2d 108 (2d Dept 1999). The name of

a party's treating psychiatrist is not generally privileged information, *Neferis v DeStefano*, *supra*.

A physician is liable in tort for breaching physician-patient confidentiality, *Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 29 NYS3d 879, 49 NE3d 1171 (2016); see *MacDonald v Clinger*, 84 AD2d 482, 446 NYS2d 801 (4th Dept 1982); CPLR 4504, but a physician is not liable for disclosing patient records to his or her malpractice insurer when the physician reasonably believes that the patient will be making a malpractice claim, *Rea v Pardo*, 132 AD2d 442, 522 NYS2d 393 (4th Dept 1987). The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages, *Chanko v American Broadcasting Companies, Inc.*, *supra*. For a further discussion of the cause of action for breach of physician-patient confidentiality, see Comment to PJI 2:150, XVIII.

In *Arons v Jutkowitz*, 9 NY3d 393, 850 NYS2d 345, 880 NE2d 831 (2007), the Court of Appeals discussed the impact of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) on the obligation of health care providers to preserve the confidentiality of their patients' information. The issue in *Arons* was whether a party's attorney may conduct an ex parte interview with the adverse party's treating physician when the adverse party has affirmatively placed his or her medical condition in issue. The *Arons* Court held that such informal discovery may be conducted, provided that an authorization conforming to 45 CFR 164.508 is executed by the patient, a court or administrative order has been issued, or the health care provider is responding to a validly issued subpoena, discovery request or other lawful process (with satisfactory assurance that the attorney seeking the interview has made reasonable efforts to ensure that the adverse party has been notified or has made reasonable efforts to secure a qualified protective order), *Arons v Jutkowitz*, *supra*, citing 45 CFR 164.512(e)(1)(i)–(ii). In *Porcelli v Northern Westchester Hosp. Center*, 65 AD3d 176, 882 NYS2d 130 (2d Dept 2009), the Court held that, as an alternative to a similar admonition by the defense attorney seeking to interview plaintiff's physician, plaintiff may include a prominent statement in his or her HIPAA-compliant authorization informing the physician that the purpose of the interview is to assist defense counsel in litigation and that the physician's participation is voluntary.

A plaintiff, by exercising the privilege against self-incrimination with respect to evidence directly material and relevant to the action, opens the way for dismissal of the complaint, *Laverne v Laurel Hollow*, 18 NY2d 635, 272 NYS2d 780, 219 NE2d 294 (1966); *Levine v Bornstein*, 13 Misc2d 161, 174 NYS2d 574 (Sup 1958), *aff'd*, 7 AD2d 995, 183 NYS2d 868 (2d Dept 1959), *aff'd*, 6 NY2d 892, 190 NYS2d 702, 160

NE2d 921 (1959); *Federal Chandros, Inc. v Silverite Const. Co., Inc.*, 167 AD2d 315, 562 NYS2d 64 (1st Dept 1990); Annot: 4 ALR3d 545. Presumably, assertion of the other privileges by a plaintiff would be given like effect, see *Laverne v Laurel Hollow*, supra.

In some situations, a non-party witness may claim privilege. This does not justify an inference against a party, unless that party induced the witness to assert the privilege. Where evidence of such inducement is presented, the jury must be instructed that only if on all the evidence they find such inducement can they draw any inference. However, in a divorce action, even in the absence of evidence of inducement, the paramour's claim of privilege against self-incrimination may be considered a corroborating circumstance, *Crowley v Crowley*, 18 Misc2d 586, 186 NYS2d 60 (Sup 1959). Compare as to corroborative effect of the inference, *Matter of O'Neill*, 184 App Div 75, 171 NYS 514 (1st Dept 1918).

Insurance Law § 3105(d) provides that in an action to rescind or to recover on an insurance policy where a misrepresentation as to prior medical treatment is proved, and the insured or his or her representative prevents full disclosure, the misrepresentation "shall be presumed to have been material"

Federal Annotation: The Federal rule is said to be that no inference may be drawn from any claim of privilege, *Pennsylvania R. Co. v Durkee*, 147 F 99 (2d Cir 1906); *A. B. Dick Co. v Marr*, 95 F Supp 83 (SDNY 1950). However, in *U.S. v Costello*, 275 F2d 355 (2d Cir 1960), aff'd, 365 US 265, 81 SCt 534 (1961), the Second Circuit stated that there was no privilege to remain silent when the proceeding was not criminal and therefore an inference could be drawn in a denaturalization proceeding. The Supreme Court affirming found it unnecessary to pass on the point, *Costello v U. S.*, 365 US 265, 81 SCt 534 (1961). In *N. Sims Organ & Co. v Securities and Exchange Commission*, 293 F2d 78 (2d Cir 1961), a similar inference was drawn in a registration revocation proceeding. Rule 501 of the Federal Rules of Evidence provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

(2) DOCUMENTS OR CHATTEL

Introductory Statement

When evidence is not produced in court, or is spoliated, i.e., lost, altered or destroyed, the court may craft a remedy or impose a sanction on the party responsible for the non-production or spoliation. The remedies or sanctions imposed for the failure to produce or preserve evidence are generally imposed on a sliding scale. The courts weigh the culpability of the alleged perpetrator and the prejudice to the adversary resulting from the non-production or spoliation of the evidence. The cases cited in this Comment must be read in light of these considerations and the principle that the nature of the sanction or remedy to be imposed in a given case is discretionary with the trial court, *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015) (“Our state trial courts possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence”); *Ortega v New York*, 9 NY3d 69, 845 NYS2d 773, 876 NE2d 1189 (2007) (“New York courts . . . possess broad discretion to provide proportionate relief to the party deprived of . . . lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action”).

An adverse or negative inference charge is one form of remedy or sanction for a party’s failure to produce or spoliation of non-testimonial evidence, see *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); *Ortega v New York*, 9 NY3d 69, 845 NYS2d 773, 876 NE2d 1189 (2007). As noted throughout this section, the trial courts have wide discretion concerning discovery issues, including crafting an adverse or negative inference charge. Care must be taken to appropriately tailor each charge to address a number of potential variables, which are discussed in the ensuing Comment. The pattern charge, together with the supplemental charges, are designed to broadly cover those situations where the trial court has exercised its discretion to deliver an adverse or negative inference charge. The pattern charge is designed to address the situation where the court has not made any pre-trial determination regarding whether an adverse or negative inference instruction is warranted. The supplemental charges apply where the trial court has made a pre-trial determination that a party is entitled to some form of an adverse or negative inference instruction.

As discussed in the ensuing Comment, in the course of making a pre-trial determination that a party is entitled to some form of an adverse or negative inference instruction, a trial court may conclude that a jury should determine whether one or more factual predicates to the drawing of an inference has been satisfied. If the court decides to leave for the jury one or more of those predicates, the court may employ

the relevant supplemental charges below. The supplemental charges must be appropriately tailored to account for the particular pre-trial determination made by the trial court and the facts of the case.

PJI 1:77. General Instruction—Evidence—Failure to Produce Evidence at Trial—Where No Pre-Trial Determination was Made

The (plaintiff AB, defendant CD) claims that the (defendant CD, plaintiff AB) has failed to produce in court [*identify document, other physical evidence or electronically-stored information (“ESI”)*], which failure (AB, CD) claims you should consider in connection with (AB, CD’s) claim that [*state claim as relevant to the document, other physical evidence or ESI*]. (AB, CD) also claims that (CD, AB) has failed to offer a reasonable explanation for not producing the [*identify document, other physical evidence or ESI*]. (CD, AB) claims that the [*identify document, other physical evidence or ESI*] [*state CD or AB’s claims such as: the evidence does not exist, the document or item is not important to its claim or a relevant issue, CD or AB has offered a reasonable explanation*].

If you decide that the [*describe specific evidence not produced*] exists, and that (CD, AB) is in possession or control of that evidence, and that (CD, AB) has not offered a reasonable explanation for not producing it, you must decide what importance, if any, it would have had in your deliberations. If you decide that the [*describe specific evidence not produced*] would have been important in your deliberations, you may, but are not required to, conclude that if it had been produced it would not have supported (CD’s, AB’s) position on the issue(s) of [*state relevant issue(s)*] [*add if opposing side produced evidence on the issue(s): and would not contradict the evidence offered by (AB, CD) on the issue(s)*]. Additionally, you may, but are not required to, draw the strongest inference against (CD, AB) on the issue(s) of [*state relevant issue(s)*] that the opposing evidence permits.

If you decide that the [*describe specific evidence*

not produced] **does not exist, or that (CD, AB) is not in possession or control of that evidence, or that the evidence would not have been important in your deliberations, or that (CD, AB) has offered a reasonable explanation for not producing it, the absence of this evidence should have no bearing on your deliberations.**

Comment

Caveat: The pattern charge is designed to address the situation where the court has not made any pre-trial determination regarding whether an adverse or negative inference instruction is warranted in the case. The charge, therefore, incorporates the three elements that must be demonstrated before the jury may draw an adverse or negative inference: that the evidence exists at the time of trial; that the party who allegedly failed to produce the evidence possessed or controlled it; and that the party who allegedly failed to produce the evidence offered no reasonable explanation for not producing it, see this Comment, *infra*. Where there is no dispute as to one or more of these elements, the charge must be modified accordingly.

Based on *Noce v Kaufman*, 2 NY2d 347, 161 NYS2d 1, 141 NE2d 529 (1957); *People ex rel. Woronoff v Mallon*, 222 NY 456, 119 NE 102 (1918); *Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.*, 18 AD3d 286, 795 NYS2d 43 (1st Dept 2005) (citing PJI); *Seward Park Housing Corp. v Cohen*, 287 AD2d 157, 734 NYS2d 42 (1st Dept 2001); *Gruntz v Deepdale General Hosp.*, 163 AD2d 564, 558 NYS2d 623 (2d Dept 1990) (citing PJI); *Ausch v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 43, 511 NYS2d 919 (2d Dept 1987); *Cusumano v New York City Transit Authority*, 75 AD2d 801, 427 NYS2d 644 (2d Dept 1980) (citing PJI); see *Soler v Jersey Boring & Drilling Co., Inc.*, 143 AD3d 421, 39 NYS3d 9 (1st Dept 2016); *Prince, Richardson on Evidence* (11th ed Farrell) § 3-139; *Fisch, New York Evidence* § 1127 (2d ed.).

PJI 1:77 is to be used where a party fails to produce evidence at trial and no pre-trial determination has been made by the court regarding whether an adverse or negative inference instruction is warranted. The supplemental charges (1:77.1, *et seq.*) may be used where a trial court has made a pre-trial determination, such as on a motion for discovery sanctions, see CPLR 3126, or for sanctions or penalties for spoliation of evidence, that a party is entitled to some form of an adverse or negative inference instruction under common law. PJI 1:77 permits, but does not require, the jury to draw an adverse inference, see *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015) (citing PJI). PJI 1:77 should be given, upon request, only when a party has failed to produce a document or other item of physical evidence, and the party seeking the charge has made a *prima facie* showing that the evidence in question actually exists, is in the op-

posing party's possession or under the opposing party's control, and there is no reasonable explanation for its non-production, *Hutchinson v New York City Health and Hospitals Corporation*, 172 AD3d 1035, 101 NYS3d 441 (2d Dept 2019); *Jean-Pierre v Touro College*, 40 AD3d 819, 836 NYS2d 283 (2d Dept 2007); *Wilkie v New York City Health and Hospitals Corp.*, 274 AD2d 474, 711 NYS2d 29 (2d Dept 2000); see *Love v New York Housing Authority*, 251 AD2d 553, 674 NYS2d 750 (2d Dept 1998); *Fares v Fox*, 198 AD2d 396, 603 NYS2d 892 (2d Dept 1993).

PJI 1:77 and 1:77.2 highlight the difference between the missing witness charge (PJI 1:75) and the circumstance where physical evidence is involved. The common law appears to recognize that there is a distinction between oral testimony and physical evidence, the former being more disputable and less conclusive than the latter, see *Reehil v Fraas*, 129 App Div 563, 114 NYS 17 (2d Dept 1908); *Fisch on New York Evidence* 1127, n. 9 (2d ed.). While the inferences for the missing witness charge are always permissive, the court has the discretion to make the inferences mandatory with respect to physical evidence if the appropriate level of culpability has been found with respect to the withholding, suppression, destruction or altering of physical evidence, see *Reehil v Fraas*, *supra*. Except in that limited circumstance, the inferences for physical evidence are the same as for missing witness oral testimony in that the inferences are permissive.

Where Pre-trial Determination Has Been Made by the Court

In the course of making a pre-trial determination that a party is entitled to some form of an adverse or negative inference instruction, a trial court may conclude that a jury should determine whether one or more factual predicates to the drawing of an inference has been satisfied, see *Lilavois v JP Morgan Chase and Co.*, 151 AD3d 711, 54 NYS3d 664 (2d Dept 2017) (adverse inference warranted only if jury did not credit witness' testimony that no surveillance video existed); *Pennachio v Costco Wholesale Corp.*, 119 AD3d 662, 990 NYS2d 54 (2d Dept 2014) (relevance); *Krin v Lenox Hill Hosp.*, 88 AD3d 597, 931 NYS2d 65 (1st Dept 2011) (existence of evidence and relevance); *Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 913 NYS2d 181 (1st Dept 2010) (whether evidence destroyed in ordinary course of business and whether evidence was destroyed after alleged spoliator had notice of plaintiffs' claims); see also *Hutchinson v New York City Health and Hospitals Corporation*, 172 AD3d 1035, 101 NYS3d 441 (2d Dept 2019); *Marcano v Calvary Hosp., Inc.*, 13 AD3d 109, 786 NYS2d 49 (1st Dept 2004). If the court decides to leave for the jury one or more of those predicates, the court may employ the relevant supplemental charges below, see *Saeed for Rashid v New York*, 156 AD3d 735, 67 NYS3d 36 (2d Dept 2017) (remitting for court to conduct hearing to determine whether evidence existed, whether it was intentionally or negligently destroyed, relevancy, and appropriate sanction, if any); *UMS Solutions, Inc. v Biosound Esaote, Inc.*, 145 AD3d 831, 44 NYS3d 93 (2d Dept 2016) (court determined, after hearing, that party intentionally spoliated evidence). The supplemental charges must be appropriately

tailored to account for the particular pre-trial determination made by the trial court and the facts of the case, see *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015).

CPLR 3126 authorizes a trial court to impose a remedy or sanction on a party who refused to obey an order for disclosure or willfully failed to disclose information that the court finds should have been disclosed. The statute sets forth the following non-exhaustive list of remedies and sanctions: an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party. A common, unenumerated remedy or sanction is an adverse inference charge.

Although a trial court has discretion to determine the nature and degree of a CPLR 3126 sanction, the sanction should be commensurate with the particular misconduct or neglect it is designed to punish, and go no further than that, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 976 NYS2d 678, 999 NE2d 156 (2013). A review of the extensive case law applying CPLR 3126 is beyond the scope of this Comment. However, issues related to the adverse inference charge sanction will be addressed.

A party may waive a claim that a remedy or sanction should be imposed on another party for failing to meet its disclosure obligations if the complaining party does not timely move for relief under CPLR 3126, see *Flanagan v Wolff*, 136 AD3d 739, 26 NYS3d 102 (2d Dept 2016); *K-F/X Rentals & Equipment, LLC v FC Yonkers Associates, LLC*, 131 AD3d 945, 15 NYS3d 891 (2d Dept 2015); *Iscowitz v Suffolk*, 54 AD3d 725, 864 NYS2d 78 (2d Dept 2008).

In addition to the remedies and sanctions available under CPLR 3126, a trial court may impose a sanction or penalty for the loss, destruction or alteration of evidence pursuant to the common law doctrine of spoliation. Sanctions and penalties available for common law spoliation are the same as those available under CPLR 3126, see *Ortega v New York*, 9 NY3d 69, 845 NYS2d 773, 876 NE2d 1189 (2007); *Gitman v Martinez*, 169 AD3d 1283, 95 NYS3d 427 (3d Dept 2019); *Page v Niagara Falls Memorial Medical Center*, 167 AD3d 1428, 91 NYS3d 620 (4th Dept 2018). A spoliation sanction or penalty may be imposed on a party who, on notice that evidence may be needed for litigation, intentionally or negligently disposed of crucial or key evidence before the adversary had an opportunity to inspect it, *Gitman v Martinez*, supra; *Page v Niagara Falls Memorial Medical Center*, supra; *Bill's*

Feed Service, LLC v Adams, 132 AD3d 1400, 17 NYS3d 567 (4th Dept 2015); Malouf v Equinox Holdings, Inc., 113 AD3d 422, 978 NYS2d 160 (1st Dept 2014); Strong v New York, 112 AD3d 15, 973 NYS2d 152 (1st Dept 2013); Ortiz v Bajwa Development Corp., 89 AD3d 999, 933 NYS2d 366 (2d Dept 2011); Standard Fire Ins. Co. v Federal Pacific Elec. Co., 14 AD3d 213, 786 NYS2d 41 (1st Dept 2004); see Bruno v Peak Resorts, Inc., 190 AD3d 1132, 138 NYS3d 744 (3d Dept 2021); Lentini v Weschler, 120 AD3d 1200, 992 NYS2d 135 (2d Dept 2014); Pennachio v Costco Wholesale Corp., 119 AD3d 662, 990 NYS2d 54 (2d Dept 2014). For a sanction or penalty to be imposed, the spoliated evidence must be relevant to the ultimate issues in dispute, Pennachio v Costco Wholesale Corp., supra; see Atilas v Golub Corp., 141 AD3d 1055, 36 NYS3d 533 (3d Dept 2016); AJ Holdings Group, LLC v IP Holdings, LLC, 129 AD3d 504, 11 NYS3d 55 (1st Dept 2015). Sanctions or penalties may be imposed under the common law spoliation doctrine for conduct occurring before and after the commencement of an action, see McDonnell v Sandaro Realty, Inc., 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018); Samaroo v Bogopa Service Corp., 106 AD3d 713, 964 NYS2d 255 (2d Dept 2013); Standard Fire Ins. Co. v Federal Pacific Elec. Co., supra; DiDomenico v C & S Aeromatik Supplies, Inc., 252 AD2d 41, 682 NYS2d 452 (2d Dept 1998).

Generally, the decision to impose spoliation sanctions or penalties, as well as the nature and severity of any sanctions or penalties, are matters within the discretion of the court, Weiss v Bellevue Maternity Hosp., 121 AD3d 1480, 995 NYS2d 640 (3d Dept 2014); Hartford Fire Ins. Co. v Regenerative Bldg. Const. Inc., 271 AD2d 862, 706 NYS2d 236 (3d Dept 2000); see Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); Estate of Smalley v Harley-Davidson Motor Company Group LLC, 170 AD3d 1549, 96 NYS3d 402 (4th Dept 2019); Shayovich v 800 Ocean Parkway Apartment Corp., 77 AD3d 814, 909 NYS2d 749 (2d Dept 2010). The nature and severity of the sanction or penalty depends upon a number of factors, including the knowledge and intent of the spoliator, proof of an innocent explanation for the loss or destruction of the evidence, and the degree of prejudice to the opposing party, Rokach v Taback, 148 AD3d 1195, 50 NYS3d 499 (2d Dept 2017); Cioffi v S.M. Foods, Inc., 142 AD3d 520, 36 NYS3d 475 (2d Dept 2016); Samaroo v Bogopa Service Corp., 106 AD3d 713, 964 NYS2d 255 (2d Dept 2013) (citing PJI).

A party seeking sanctions for spoliation of evidence, be it a traditional form of evidence or electronically-stored information, see this Comment *infra*, must show that (1) the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) the evidence was destroyed with a “culpable state of mind” (which includes ordinary negligence), and (3) the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense, Pegasus Aviation I, Inc. v Varig Logistica S.A., 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); McDonnell v Sandaro Realty, Inc., 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018); Gitman v Martinez, 169 AD3d 1283, 95

NYS3d 427 (3d Dept 2019); *Page v Niagara Falls Memorial Medical Center*, 167 AD3d 1428, 91 NYS3d 620 (4th Dept 2018); *Estate of Smalley v Harley-Davidson Motor Company Group LLC*, 170 AD3d 1549, 96 NYS3d 402 (4th Dept 2019); *Hutchinson v New York City Health and Hospitals Corporation*, 172 AD3d 1035, 101 NYS3d 441 (2d Dept 2019); *Saeed for Rashid v New York*, 156 AD3d 735, 67 NYS3d 36 (2d Dept 2017); *Atiles v Golub Corp.*, 141 AD3d 1055, 36 NYS3d 533 (3d Dept 2016). Where the evidence is determined to have been intentionally or wilfully destroyed, its relevance is presumed, *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, *supra*; *Saeed for Rashid v New York*, *supra*; *Golan v North Shore Long Island Jewish Health System, Inc.*, *supra*; *Atiles v Golub Corp.*, *supra*. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party's claim or defense, *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, *supra*; *Saeed for Rashid v New York*, *supra*; *McDonnell v Sandaro Realty, Inc.*, *supra*; *Atiles v Golub Corp.*, *supra*.

Where the loss of the missing evidence does not fatally compromise the affected party's claim or defense or leave the party without the means to prosecute or defend the action, an adverse or negative inference charge, rather than a more severe penalty or sanction such as dismissal, may be an appropriate penalty or sanction for spoliation, *Richter v BMW of North America, LLC*, 166 AD3d 1029, 88 NYS3d 454 (2d Dept 2018) (failure to preserve vehicle door's soft-close mechanism in action premised upon alleged design defect); *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018) (failure to preserve scaffold plank); *Burke v Queen of Heaven Roman Catholic Elementary School*, 151 AD3d 1608, 58 NYS3d 757 (4th Dept 2017) (destruction of stairs before expert's inspection); *Eksarko v Associated Supermarket*, 155 AD3d 826, 63 NYS3d 723 (2d Dept 2017) (negligent destruction of video recording of accident); *Peters v Hernandez*, 142 AD3d 980, 37 NYS3d 443 (2d Dept 2016) (Negligent disposal of video recording of accident); *Sarach v M & T Bank Corp.*, 140 AD3d 1721, 34 NYS3d 303 (4th Dept 2016) (failure to preserve surveillance films); *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 36 NYS3d 2 (1st Dept 2016) (destruction of electronic records); *Mahiques v Niagara*, 137 AD3d 1649, 28 NYS3d 171 (4th Dept 2016) (failure to preserve subject machine); *Morales v New York*, 130 AD3d 792, 13 NYS3d 548 (2d Dept 2015) (spoliation of instrumentality of plaintiff's injury); *Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 913 NYS2d 181 (1st Dept 2010) (erasure of hard drive before scheduled inspection); *Coleman v Putnam Hosp. Center*, 74 AD3d 1009, 903 NYS2d 502 (2d Dept 2010) (failure to preserve fetal heart monitor strips); *Barone v New York*, 52 AD3d 630, 861 NYS2d 709 (2d Dept 2008) (loss of surveillance tape); *Dorsa v National Amusements, Inc.*, 6 AD3d 652, 776 NYS2d 583 (2d Dept 2004) (destruction of relevant records); *Ifraimov v Phoenix Industrial Gas, LLC*, 4 AD3d 332, 772 NYS2d 78 (2d Dept 2004) (failure to preserve both truck and propane tanks involved in fire); *Hulett ex rel. Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 768 NYS2d 535 (4th Dept 2003) (failure to preserve both

audiotape); *Marro v St. Vincent's Hosp.*, 294 AD2d 341, 742 NYS2d 327 (2d Dept 2002) (dismissal of complaint not warranted and negative inference charge was appropriate sanction for plaintiff's destruction of motorcycle where defendant was not deprived of ability to prove defense); see *Krin v Lenox Hill Hosp.*, 88 AD3d 597, 931 NYS2d 65 (1st Dept 2011); *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 926 NYS2d 53 (1st Dept 2011) (citing PJI); *Marcano v Calvary Hosp., Inc.*, 13 AD3d 109, 786 NYS2d 49 (1st Dept 2004) (citing PJI).

An adverse inference charge may be an appropriate sanction in many varied circumstances, including in cases where the destruction or alteration of evidence was intentional but was not demonstrated to have been prompted by an improper motive, *Merrill v Elmira Heights Cent. School Dist.*, 77 AD3d 1165, 909 NYS2d 208 (3d Dept 2010); *Minaya v Duane Reade Intern., Inc.*, 66 AD3d 402, 886 NYS2d 154 (1st Dept 2009); *Hussain v Nowak*, 38 AD3d 1342, 832 NYS2d 337 (4th Dept 2007); *Mylonas v Brookhaven*, 305 AD2d 561, 759 NYS2d 752 (2d Dept 2003); see *Bruno v Peak Resorts, Inc.*, 190 AD3d 1132, 138 NYS3d 744 (3d Dept 2021) (adverse inference warranted where plaintiff deleted blog comment about ski trail conditions after he had retained counsel but before litigation commenced); *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090, 87 NYS3d 86 (2d Dept 2018) (general contractor's failure to preserve broken scaffold plank warranted adverse inference sanction, but not drastic remedy of striking third-party complaint); *Gitman v Martinez*, 169 AD3d 1283, 95 NYS3d 427 (3d Dept 2019) (truck's event data recorder was overwritten when defendant put vehicle back into service; defendant should have reasonably anticipated that multi-vehicle accident resulting in personal injuries would likely result in litigation); *Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 913 NYS2d 181 (1st Dept 2010) (hard drive in defendants' control was erased before scheduled inspection by plaintiff after defendant had been advised of obligation to preserve it; trial court fairly inferred that erasure was either intentional or grossly negligent); *Coleman v Putnam Hosp. Center*, 74 AD3d 1009, 903 NYS2d 502 (2d Dept 2010) (defendant failed to explain loss of fetal heart monitor strips; failure to preserve strips violated regulatory requirement and loss placed plaintiff at significant disadvantage but did not fatally compromise his ability to prosecute case); *Gotto v Eusebe-Carter*, 69 AD3d 566, 892 NYS2d 191 (2d Dept 2010) (same); see also *Estate of Smalley v Harley-Davidson Motor Company Group LLC*, 170 AD3d 1549, 96 NYS3d 402 (4th Dept 2019) (in products liability action, no sanction was warranted where plaintiff authorized insurance carrier to salvage subject motorcycle prior to receiving recall notice from manufacturer that prompted suit). Where the relevancy of destroyed material is unclear and the plaintiff's claims of prejudice are speculative, no sanction is warranted, *Doe v Heckerorth Plumbing & Heating of Woodstock, Inc.*, 192 AD3d 1236, 144 NYS3d 462 (3d Dept 2021).

The trial court did not err in denying plaintiff's request for an adverse inference instruction with respect to defendant's failure to produce videotape evidence of the area surrounding the accident scene

covering an extended period of time prior to the accident, where defendant preserved and produced the videotape evidence of accident itself pursuant to court order and plaintiff did not request the extended footage until months after it had been overwritten, *McAddley v Western Beef Properties, Inc.*, 188 AD3d 536, 132 NYS3d 616 (1st Dept 2020).

Negligent spoliation of evidence by an entity without ties to the underlying litigation does not give rise to an independent cause of action for damages, while spoliation sanctions, such as preclusion, the payment of costs for the development of replacement evidence, or an adverse inference instruction are available against a party that loses, alters, or destroys evidence, *Ortega v New York*, 9 NY3d 69, 845 NYS2d 773, 876 NE2d 1189 (2007) (third-party spoliation); *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 775 NYS2d 754, 807 NE2d 865 (2004) (first-party spoliation); *Scarano v Bribitzer*, 56 AD3d 750, 868 NYS2d 147 (2d Dept 2008); *Wetzler v Sisters of Charity Hosp.*, 17 AD3d 1088, 794 NYS2d 540 (4th Dept 2005). Intentional spoliation of evidence may be the basis for claims of fraudulent misrepresentation and fraudulent concealment, *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 882 NYS2d 60 (1st Dept 2009). A party to a lawsuit that is ordinarily not subject to a direct claim by one of the other parties may be sued by that other party where the spoliation impairs the ability of that other party to sustain a claim or defense, *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 682 NYS2d 452 (2d Dept 1998). Thus, an employee may recover against his or her employer for negligent spoliation of evidence needed to establish a claim against a third party, provided the employer had a duty to preserve the evidence or was on notice that the evidence might be needed for future litigation, *DiDomenico v C & S Aeromatik Supplies, Inc.*, *supra*; see *Monteiro v R.D. Werner Co., Inc.*, 301 AD2d 636, 754 NYS2d 328 (2d Dept 2003); *Ripepe v Crown Equipment Corp.*, 293 AD2d 462, 741 NYS2d 64 (2d Dept 2002); *Curran v Auto Lab Service Center, Inc.*, 280 AD2d 636, 721 NYS2d 662 (2d Dept 2001); *Coley v Arnot Ogden Memorial Hosp.*, 107 AD2d 67, 485 NYS2d 876 (3d Dept 1985).

The principles applied to spoliation of traditional forms of evidence are also applicable to evidence that exists in digital or electronic form, commonly referred to as ESI. A party that seeks sanctions for spoliation of ESI must show that (1) the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) the evidence was destroyed with a “culpable state of mind” (which includes ordinary negligence), and (3) the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense, *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 36 NYS3d 2 (1st Dept 2016); *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 939 NYS2d 321 (1st Dept 2012); *Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 913 NYS2d 181 (1st Dept 2010). A party’s obligation to preserve ESI is triggered when the

party reasonably anticipates litigation to ensue, *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, supra; see *China Development Industrial Bank v Morgan Stanley & Co. Incorporated*, 183 AD3d 504, 124 NYS3d 334 (1st Dept 2020) (applying credible probability standard). Where the evidence is determined to have been intentionally or wilfully destroyed, its relevance is presumed, *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, supra; see *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, supra (intentional or with gross negligence). On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party's claim or defense, *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, supra. The failure to institute a litigation hold does not, standing alone, amount to gross negligence, *id.* Rather, a party's failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the alleged spoliator's culpable state of mind, *id.*; see *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, supra. Absent a showing that the failure to implement a litigation hold resulted in the destruction of ESI, a spoliation sanction may not be imposed, see *Roberts v Corwin*, 118 AD3d 571, 988 NYS2d 180 (1st Dept 2014).

Best Evidence Rule

An assessment of prejudice for purposes of a spoliation remedy or sanction may be affected by the availability of alternative evidence. Although the "best evidence rule" generally requires the production of an original writing when its contents are in dispute, secondary evidence of a writing's contents is admissible where the proponent of the secondary evidence satisfactorily explains the original's unavailability, see *Clarke v Rodriguez*, 16 NY3d 815, 920 NYS2d 776, 945 NE2d 1027 (2011); *Hernandez v Pace Elevator Inc.*, 69 AD3d 493, 894 NYS2d 382 (1st Dept 2010), and has not procured its loss or destruction in bad faith, *Schozer v William Penn Life Ins. Co. of New York*, 84 NY2d 639, 620 NYS2d 797, 644 NE2d 1353 (1994). For purposes of the best evidence rule, video surveillance is considered a writing, *Lawton v Palmer*, 126 AD3d 945, 7 NYS3d 177 (2d Dept 2015). The receipt of secondary evidence of an original writing must be predicated upon threshold factual findings by the court that the absence of the original has been sufficiently explained, that its destruction has not been procured in bad faith, and that the secondary evidence is an accurate and reliable portrayal of the original, *Schozer v William Penn Life Ins. Co. of New York*, supra. Foundational proof of loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original, *id.* In determining whether the foundational proof of loss has been established, the court should give careful consideration to the possible motivation for the non-production of the original, *id.*

Supplemental Charges

PJI 1:77.1

[Where the court concludes there is an issue of fact as to whether the alleged spoliator was on sufficient notice of an impending lawsuit, the following may be charged:]

As you have heard, (plaintiff AB, defendant CD) claims that (CD, AB) failed to preserve [describe specific evidence not preserved], and that (CD, AB) should have preserved the evidence because, at the time the evidence was (lost, destroyed, altered), (CD, AB) was on notice of an impending lawsuit. (AB, CD) further claims that the [describe specific evidence not preserved], if preserved and produced to (AB, CD), would have been important to the issue(s) of [state relevant issue(s)].

(CD, AB) denies [state relevant issue(s): that (he, she, it) was on notice of an impending lawsuit at the time the evidence was (lost, destroyed, altered); that the evidence would have been important to the [state relevant issue(s)].

If you find that (CD, AB) failed to preserve the [describe specific evidence not preserved], and that (CD, AB) was on notice of an impending lawsuit at the time the evidence was (lost, destroyed, altered), and that if the [describe specific evidence not preserved], had been preserved and produced to (AB, CD), the evidence would have been important to the issue(s) of [state relevant issue(s)], then you may, but are not required to, conclude that if it had been produced it would not have supported (CD's, AB's) position on the issue(s) of [state relevant issue(s)] [add if opposing side produced evidence on the issue(s): and would not contradict the evidence offered by (AB, CD) on the issue(s)]. Additionally, you may, but are not required to, draw the strongest inference against (CD, AB) on the issue(s) of [state relevant issue(s)] that the opposing evidence permits.

On the other hand, if you conclude that (CD, AB) was not on notice of an impending lawsuit at the time the evidence was (lost, destroyed, altered), or that, if the evidence had been preserved and

produced to (AB, CD), that the evidence would not have been important to the issue(s) of [state relevant issue(s)], then the absence of this evidence should have no bearing on your deliberations.

See Caveats 1–5 that follow the supplemental charges.

Based on *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 775 NYS2d 754, 807 NE2d 865 (2004); *Bach v New York*, 33 AD3d 544, 827 NYS2d 2 (1st Dept 2006); see *Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 913 NYS2d 181 (1st Dept 2010).

PJI 1:77.2

[Where the court has made a pre-trial determination that the loss, destruction or alteration of evidence was willful and prejudicial, the following may be charged:]

Before this trial began, the court decided that (plaintiff AB, defendant CD) willfully [state as appropriate: destroyed, altered, failed to (preserve, produce)] [describe specific evidence not preserved or produced], and that the evidence would have been important on the issue(s) of [state relevant issue(s)]. You should therefore presume that had it been (preserved, produced), the evidence would have been against (AB's, CD's) position on the issue(s) of [state relevant issue(s)].

See Caveats 1–5 that follow the supplemental charges.

Based on *People ex rel. Woronoff v Mallon*, 222 NY 456, 119 NE 102 (1918); *Armour v Gaffey*, 30 App Div 121, 51 NYS 846 (3d Dept 1898), *aff'd* for reasons in AD opinion, 165 NY 630, 59 NE 1118 (1901); see *People ex rel. Delehanty v McIntyre*, 196 App Div 44, 187 NYS 897 (1st Dept 1921); see also *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); *Atiles v Golub Corp.*, 141 AD3d 1055, 36 NYS3d 533 (3d Dept 2016); *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 36 NYS3d 2 (1st Dept 2016).

PJI 1:77.3

[Where the court has made a pre-trial determination that the loss, destruction or alteration of evidence by the alleged spoliator was negligent, relevance is not presumed, and where the alleged spoliator asserts reason(s)]

that the evidence is not relevant, the following may be charged:]

Before this trial began, the court decided that (defendant CD, plaintiff AB) failed to (preserve, produce) (describe specific evidence not preserved or produced). (AB, CD) asserts that the evidence would have been important to you during your deliberations. (CD, AB) denies that the evidence would have been important to you.

If you find that the evidence that has been (lost, destroyed, altered) would have been important to you during your deliberations, you may, but are not required to, conclude that if it had been (preserved, produced) it would not have supported (CD's, AB's) position on the issue(s) of [state relevant issue(s)] [add if opposing side produced evidence on the issue(s): and would not contradict the evidence offered by (AB, CD) on the issue(s)]. Additionally, you may, but are not required to, draw the strongest inference against (CD, AB) on the issue(s) of [state relevant issue(s)] that the opposing evidence permits.

On the other hand, if you find that the evidence that has been (lost, destroyed, altered) would not have been important to you during your deliberations, then the absence of this evidence should have no bearing on your deliberations.

See Caveats 1–5 that follow the supplemental charges.

Based on *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); see *Golan v North Shore Long Island Jewish Health System, Inc.*, 147 AD3d 1031, 48 NYS3d 216 (2d Dept 2017); *Atiles v Golub Corp.*, 141 AD3d 1055, 36 NYS3d 533 (3d Dept 2016).

PJI 1:77.4

[Where the court has made a pre-trial determination that the loss, destruction or alteration of evidence was willful or done with gross negligence, and relevance is therefore presumed but the alleged spoliator asserts that the evidence is not relevant, the following may be charged:]

Before this trial began, the court decided that (defendant CD, plaintiff AB) failed to (preserve, produce) (*describe specific evidence not preserved or produced*); that (CD, AB) should have preserved the evidence because, at the time the evidence was (lost, destroyed, altered), (CD, AB) was on notice of an impending lawsuit; and that (CD, AB) (willfully, with gross negligence) failed to (preserve, produce) that evidence.

Under the law, when evidence is (lost, destroyed, altered) willfully or with gross negligence, the evidence is presumed to have been important. However, (CD, AB) denies that the evidence was important because (*state reason[s] asserted by CD, AB*). (CD, AB) has the burden of proving that the evidence would not have been important.

If you find that the evidence that has been (lost, destroyed, altered) would have been important to you during your deliberations, you may, but are not required to, conclude that if it had been (preserved, produced) it would not have supported (CD's, AB's) position on the issue(s) of [*state relevant issue(s)*] [*add if opposing side produced evidence on the issue(s): and would not contradict the evidence offered by (AB, CD) on the issue(s)*]. Additionally, you may, but are not required to, draw the strongest inference against (CD, AB) on the issue(s) of [*state relevant issue(s)*] that the opposing evidence permits.

On the other hand, if you find that the evidence that has been (lost, destroyed, altered) would not have been important to you during your deliberations on the issue(s), then the absence of this evidence should have no bearing on your deliberations.

See Caveats 1–5 that follow the supplemental charges.

Based on *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015); *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 36 NYS3d 2 (1st Dept 2016); *AJ Holdings Group, LLC v IP Holdings, LLC*, 129 AD3d 504, 11 NYS3d 55 (1st Dept 2015).

Caveats to Supplemental Charges

Caveat 1: The supplemental charges are premised on the three-prong analysis set forth in *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 26 NYS3d 218, 46 NE3d 601 (2015). The supplemental charges must be appropriately tailored to fit the facts of the case.

Caveat 2: The Court of Appeals has used the language “notice of an impending lawsuit” to describe the duty to preserve evidence, *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 775 NYS2d 754, 807 NE2d 865 (2004); see *Bach v New York*, 33 AD3d 544, 827 NYS2d 2 (1st Dept 2006). The Appellate Division has used related but alternative language, see *Gitman v Martinez*, 169 AD3d 1283, 95 NYS3d 427 (3d Dept 2019) (notice that evidence might be needed for future litigation gives rise to duty to preserve); *Page v Niagara Falls Memorial Medical Center*, 167 AD3d 1428, 91 NYS3d 620 (4th Dept 2018) (same); *Doviak v Finkelstein & Partners, LLP*, 137 AD3d 843, 27 NYS3d 164 (2d Dept 2016) (same); *Bill’s Feed Service, LLC v Adams*, 132 AD3d 1400, 17 NYS3d 567 (4th Dept 2015) (same); *Weiss v Bellevue Maternity Hosp.*, 121 AD3d 1480, 995 NYS2d 640 (3d Dept 2014) (pending litigation or notice of specific claim gives rise to duty to preserve); *Malouf v Equinox Holdings, Inc.*, 113 AD3d 422, 978 NYS2d 160 (1st Dept 2014) (notice that evidence might be needed for future litigation gives rise to duty to preserve); *Strong v New York*, 112 AD3d 15, 973 NYS2d 152 (1st Dept 2013) (same); *Samaroo v Bogopa Service Corp.*, 106 AD3d 713, 964 NYS2d 255 (2d Dept 2013) (same); *Steuhl v Home Therapy Equipment, Inc.*, 23 AD3d 825, 803 NYS2d 791 (3d Dept 2005) (pending litigation or notice of specific claim gives rise to duty to preserve); *Anthony v Wegmans Food Markets, Inc.*, 11 AD3d 953, 782 NYS2d 216 (4th Dept 2004) (same); *Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068, 693 NYS2d 787 (4th Dept 1999) (same). In the First Department, there may be a distinction between the duty to preserve ESI and more traditional forms of evidence, see *Strong v New York*, *supra* (notice that traditional form of evidence might be needed for future litigation gives rise to duty to preserve it); *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 939 NYS2d 321 (1st Dept 2012) (duty to preserve ESI arises once party reasonably anticipates litigation; rejecting notion that pending litigation or notice of specific claim is proper standard).

Caveat 3: The court’s authority to instruct the jury that it “should presume” that the evidence was unfavorable to the alleged spoliator is premised on conduct that is willful, deliberate or contumacious, see *People ex rel. Woronoff v Mallon*, 222 NY 456, 119 NE 102 (1918); *Armour v Gaffey*, 30 App Div 121, 51 NYS 846 (3d Dept 1898), *aff’d* for reasons in AD opinion, 165 NY 630, 59 NE 1118 (1901). PJI 1:77.2 applies when the court elects not to strike the spoliator’s pleading but instead has opted in its discretion to impose the lesser sanction of an adverse inference charge.

Caveat 4: To avoid confusion as to the court’s role in determining

the relevancy of evidence, the supplemental charges use the word “important” rather than “relevant.”

Caveat 5: The supplemental charges assume that the trial court has determined that the evidence exists or existed, that it was in the possession or control of the alleged spoliator, and that there is no reasonable explanation for its loss or destruction. If any of these issues still remain after the court has made a pre-trial determination, the pertinent portion(s) of PJI 1:77 should also be used.

PJI 1:78. General Instruction—Stipulation of Facts

You will remember that during the trial the attorneys made a stipulation in which they agreed to certain facts. This means that there is no dispute as to these facts and that these facts are established for the purposes of this case. You must consider the agreed facts along with all of the other evidence presented and give the agreed facts such weight as you find is appropriate. You will remember that the following facts were agreed to:
[*summarize stipulated facts.*]

Comment

Based upon CPLR 2104.

The parties to litigation may chart their own course through the courts, *Stevenson v News Syndicate Co.*, 302 NY 81, 96 NE2d 187 (1950). While a judgment must be based on evidence as to disputed facts, the parties may determine for themselves what matters are the subject of dispute as to which evidence is required, *Queck-Berner v Macy*, 240 NY 341, 148 NE 543 (1925). By stipulation, the parties may shape the facts to be determined at trial and thus circumscribe relevant issues by excluding matters that could otherwise be litigated, *Deitsch Textiles, Inc. v New York Property Ins. Underwriting Ass'n*, 62 NY2d 999, 479 NYS2d 487, 468 NE2d 669 (1984); *Williams v New York City Health and Hospitals Corp.*, 262 AD2d 231, 694 NYS2d 355 (1st Dept 1999) (as part of settlement between plaintiff and defendant, plaintiff agreed that he would not assert any claims against other parties premised upon their vicarious liability for defendant's conduct); see 22 NYCRR §§ 202.12, 202.26, 202.56 (court may conduct preliminary and pre-trial conferences to consider simplification and limitation of factual and legal issues).

Stipulations which establish facts as undisputed are enforceable, CPLR 2104; *Queck-Berner v Macy*, 240 NY 341, 148 NE 543 (1925); *Hine v New York El. R. Co.*, 149 NY 154, 43 NE 414 (1896); *Salesian*

Soc., Inc. v Ellenville, 58 AD2d 711, 396 NYS2d 711 (3d Dept 1977); Weinstein, Korn & Miller, 9 N.Y. Civ. Prac, § 2104.02. Facts established by stipulation may not be disregarded, Rothbaum v R.H. Macy & Co., 280 App Div 530, 115 NYS2d 197 (2d Dept 1952). Parties may not assert positions which are inconsistent with their stipulations, see Deutsch Textiles, Inc. v New York Property Ins. Underwriting Ass'n, 62 NY2d 999, 479 NYS2d 487, 468 NE2d 669 (1984); Nishman v De Marco, 76 AD2d 360, 430 NYS2d 339 (2d Dept 1980).

A stipulation as to certain facts does not relieve a party from having to produce evidence as to facts not stipulated. Likewise, a stipulation as to certain facts is not necessarily an admission as to the conclusion to be drawn from those facts, O'Brien v Assessor of Mamaroneck, 20 NY2d 587, 285 NYS2d 843, 232 NE2d 844 (1967).

Concessions by one party are to be distinguished from stipulations by all parties. A concession by one party does not necessarily preclude the introduction by other parties of evidence as to the conceded facts. Thus, the proponent of expert testimony is entitled to the opportunity to demonstrate the qualifications of the expert even though the adverse party concedes the witness is an expert, Werner v Sun Oil Co., 65 NY2d 839, 493 NYS2d 125, 482 NE2d 921 (1985); Counihan v J.H. Werbelovsky's Sons, Inc., 5 AD2d 80, 168 NYS2d 829 (1st Dept 1957); see Mahon v Giordano, 30 AD2d 792, 291 NYS2d 854 (1st Dept 1968) (concession that doctor, if called, would testify as to plaintiff's amnesia does not preclude such testimony).

Stipulations are voluntary agreements between parties. A party may refuse, as a matter of trial strategy, to stipulate as to facts and run the risk that the facts as to which a stipulation is offered may not be proven, People v Hills, 140 AD2d 71, 532 NYS2d 269 (2d Dept 1988).

A stipulation is not enforceable unless made between counsel in open court or set forth in a signed writing or reduced to the form of an order and entered, CPLR 2104; see generally Matter of Dolgin Eldert Corp., 31 NY2d 1, 334 NYS2d 833, 286 NE2d 228 (1972).

PJI 1:79. General Instruction—Judicial Notice of Facts During Trial

As you have heard, I have just taken judicial notice of (*state the judicially noticed facts*). As with all other facts established during the trial, you will give it such weight as you determine appropriate in accordance with the instructions that I give you at the conclusion of the trial.

PJI 1:79.1

You will remember that during the trial the

court took judicial notice of the following facts (*summarize the judicially noticed facts*). This means that these facts are established for the purpose of this case. You must consider these facts along with all of the other evidence presented and give these facts such weight as you find appropriate.

Comment

Based on *Hamilton v Miller*, 23 NY3d 592, 992 NYS2d 190, 15 NE3d 1199 (2014); *Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615, 23 NE 9 (1889); *Wood v Northwestern Ins. Co.*, 46 NY 421 (1871); *Ptasznik v Schultz*, 247 AD2d 197, 679 NYS2d 665 (2d Dept 1998).

Judicial notice comes in the place of proof, *Wood v Northwestern Ins. Co.*, 46 NY 421 (1871). A court may take judicial notice of facts that are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy, *Hamilton v Miller*, 23 NY3d 592, 992 NYS2d 190, 15 NE3d 1199 (2014); *People v Jones*, 73 NY2d 427, 541 NYS2d 340, 539 NE2d 96 (1989). Judicial notice may be taken of facts that are a part of the general knowledge of the country, that are generally known, and that have been duly authenticated in repositories of facts, open to all, and especially facts of official, scientific, or historical character, *Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615, 23 NE 9 (1889); see *Ptasznik v Schultz*, 247 AD2d 197, 679 NYS2d 665 (2d Dept 1998) (test is whether facts rest upon knowledge or sources so widely accepted and unimpeachable that it need not be proven).

A court is not bound to take judicial notice of any fact and such determination is left to the sound discretion of the court, depending on the nature of the subject, the issue involved and the apparent justice of the case, *Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615, 23 NE 9 (1889). The court, on its own initiative, may take judicial notice of a particular fact. *Id.* Notice of an intent to take judicial notice and the opportunity to be heard on the issue must be given to the parties as a matter of fundamental fairness, *Caffrey v North Arrow Abstract & Settlement Services, Inc.*, 160 AD3d 121, 73 NYS3d 70 (2d Dept 2018); *Chasalow v Board of Assessors of County of Nassau*, 176 AD2d 800, 575 NYS2d 129 (2d Dept 1991).

See comments following PJI 1:90; 2:82A; 2:220; 2:281; 2:290; CPRL 4511; see generally Guide to NY Evidence Rule 2.01 (Judicial Notice of Facts), <http://www.nycourts.gov/JUDGES/evidence/2-NOTICE/JUDICIALNOTICE.shtml>.

5. THEORY OF CASE

PJI 1:85. General Instruction—Theory of Case

[The Committee recommends that no charge on theory of the case be given except in those extraordinary cases discussed in the Comment.]

Comment

Requests to charge are sometimes phrased in terms of “theory of the case,” or that plaintiff “cannot recover unless he or she proves that he or she was injured in substantially the manner claimed.” Such a charge should not be given because it erroneously suggests that plaintiff cannot recover unless he or she proves that the facts occurred as claimed, even though there is sufficient evidence to justify a verdict in plaintiff’s favor, *Gustavson v Southern Blvd. R. Co.*, 292 NY 309, 55 NE2d 43 (1944); *Tumulty v New York, N.H. & H.R. Co.*, 224 App Div 131, 229 NYS 700 (2d Dept 1928). In *Gustavson v Southern Blvd. R. Co.*, supra, the plaintiff claimed that his car was stopped when struck by defendant’s trolley car. It was held error to charge that, if the jury found that plaintiff’s car was moving when struck, the verdict must be for defendant. The court stated “. . . there was ample evidence to support a jury’s verdict that negligence in the operation of the trolley car was a contributing cause of the decedent’s death. Whether or not the car was moving at the time of the collision was not in any sense determinative of this question”

No general pattern charge as to the theory of the case is suggested as its use would ordinarily be inappropriate. Such a charge must, however, be used in the exceptional case, *Fuchs v Brody*, 282 NY 627, 25 NE2d 977 (1940); *Burger v Fifth Ave. Coach Co.*, 249 NY 583, 164 NE 592 (1928).

Evidence beyond the scope of the complaint and bill of particulars causes some of the difficulty in this area. *Puleo v Casa Domenick Guffanti, Inc.*, 9 AD2d 662, 191 NYS2d 665 (1st Dept 1959), held it error to refuse to charge that plaintiff could recover only if the accident occurred in the manner stated in the bill of particulars, even though there apparently was evidence showing injury in a manner justifying a finding of negligence. Such holding seems to permit recovery only in accordance with the “theory of the case.”

CPLR 3013 and 3017(a) have shifted the requirement that a complaint conform to a “theory of the pleadings” to the necessity of giving notice of the transactions intended to be proved, *Lane v Mercury Record Corp.*, 21 AD2d 602, 252 NYS2d 1011 (1st Dept 1964), aff’d, 18 NY2d 889, 276 NYS2d 626, 223 NE2d 35 (1966); *Jerry v Borden Co.*, 45 AD2d 344, 358 NYS2d 426 (2d Dept 1974); see *Van Gaasbeck v Webatuck Cent. School Dist.*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967);

Diemer v Diemer, 8 NY2d 206, 203 NYS2d 829, 168 NE2d 654 (1960); *Richards v South Buffalo Ry. Co.*, 54 AD2d 310, 388 NYS2d 479 (4th Dept 1976), but it is improper to submit a case to the jury on a theory of liability neither pleaded nor proved, *Lipner v Levy*, 44 AD2d 797, 355 NYS2d 131 (1st Dept 1974). It is reversible error to allow plaintiff to introduce evidence as to a new theory of liability that contradicts the theory in the bill of particulars, *Reich v Prager*, 107 AD2d 555, 483 NYS2d 295 (1st Dept 1985); see *Rojas v New York*, 208 AD2d 416, 617 NYS2d 302 (1st Dept 1994) (proper exercise of discretion to exclude evidence of theory not alleged in notice of claim, in complaint, or in bill of particulars).

The problem raised by plaintiff's offer of evidence not covered by the specific allegations of the complaint or bill of particulars, but which would justify recovery, does not relate to the charge, but to the court's power concerning amendments to conform to the proof under CPLR 3025(c). If such evidence is admitted without objection by defendant, it appears that the jury may consider such evidence in reaching its verdict, *Tumulty v New York, N.H. & H.R. Co.*, 224 App Div 131, 229 NYS 700 (2d Dept 1928); *Newman v Pennsylvania R. Co.*, 33 App Div 171, 53 NYS 456 (1st Dept 1898); see *Pogor v Cue Taxi Service, Inc.*, 43 Misc2d 487, 251 NYS2d 635 (NY City Civ Ct 1964), *aff'd*, 45 Misc2d 933, 258 NYS2d 60 (AppT 1965) (justifying this result on theory of implied order conforming pleading to proof). If defendant objects to such evidence and plaintiff moves to amend to conform to the proof, granting the amendment will eliminate any charge problem, as will denial of plaintiff's motion that results in exclusion of the evidence. If defendant's objection is overruled and the evidence is admitted, although plaintiff made no motion to conform, it would seem that there is no charge problem, merely a question for the appellate court of whether defendant has been prejudicially misled, see *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 444 NYS2d 571, 429 NE2d 90 (1981); *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980); *Reich v Prager*, 107 AD2d 555, 483 NYS2d 295 (1st Dept 1985); see also *Van Derzee v Knight-Ridder Broadcasting, Inc.*, 185 AD2d 1011, 586 NYS2d 839 (3d Dept 1992); *Sharkey v Locust Valley Marine, Inc.*, 96 AD2d 1093, 467 NYS2d 61 (2d Dept 1983); *Dashinsky v Santjer*, 32 AD2d 382, 301 NYS2d 876 (2d Dept 1969). Even a material variance between pleading and proof will not be fatal to plaintiff's cause if the prejudice may be cured by allowing defendant additional time and opportunity to meet the unexpected evidence, *Blair v New York University College of Dentistry*, 15 AD2d 211, 222 NYS2d 1 (1st Dept 1961); CPLR 3025(c); but see *Iannone v Cayuga Const. Corp.*, 66 AD2d 745, 411 NYS2d 599 (1st Dept 1978). It has been held that the mere denial of defendant's objection to the evidence is, by implication, a granting of leave to amend to conform the pleading to the proof, *Pogor v Cue Taxi Service, Inc.*, *supra*.

In the extraordinary case, such as where there is a dispute as to whether plaintiff was injured on defendant's premises, the following instruction may be appropriate.

PJI 1:85.1

Unless you find from the evidence that ([*state determinative fact, as:—*] the bus struck plaintiff while he was on the island platform) the plaintiff has failed to prove negligence and your verdict must be for defendant.

6. WITNESSES

PJI 1:87. General Instructions—Interpreters

You are about to hear testimony in [*identify language other than English*]. An interpreter will provide a translation. You must rely only on the translation provided by the interpreter, even if you understand the language spoken by the witness and even if you disagree with the interpreter's translation. If you believe that the interpreter translated testimony incorrectly, you must advise the court immediately. Do not offer your own translation of any testimony to the other jurors at any point during the trial or the deliberations.

Comment

Caveat: Absent special circumstances, this charge should be given immediately before the witness testifies.

22 NYCRR § 217 provides that “[i]n all civil and criminal cases, when a court determines that a party or witness, or an interested parent or guardian in a Family Court proceeding, is unable to understand or communicate to the extent that he or she cannot meaningfully participate in the proceedings, the court shall appoint an interpreter,” see *People v Lee*, 21 NY3d 176, 969 NYS2d 834, 991 NE2d 692 (2013). Interpreters must file the oath of office that is required by the Constitution with the Clerk of the Court, Judiciary Law § 387; see *People v Lee*, *supra*. The Office of Court Administration internal Court Interpreter Manual and Code of Ethics states that an interpreter must faithfully and accurately interpret what the witness has said without embellishments or omissions, see *Matter of Yovanny L.*, 33 Misc3d 894, 931 NYS2d 485 (Fam Ct 2011). The Interpreter Manual also contains additional guidance as to the interpreter's impartiality, confidentiality, proficiency and professional demeanor, see *id.* Interpreters are enjoined to provide services only in areas where they can perform accurately, and they should inform the court immediately upon learning that an error has been made, see *id.* The Office of Court Administration has issued a benchcard to aid judges in assessing interpreters' competence and performance. The contents of this benchcard are reproduced in *Matter of Yovanny L.*, *supra*.

An interpreter should be a person who is not biased and has no interest in the outcome of the case, *Matter of James L.*, 143 AD2d 533, 532 NYS2d 941 (4th Dept 1988); see *People v Lee*, 21 NY3d 176, 969 NYS2d 834, 991 NE2d 692 (2013). There may be circumstances where no competent disinterested interpreter is available and the court finds that it is necessary to appoint a person with an interest or other

potential source of bias, *People v Lee*, 89 AD3d 633, 933 NYS2d 272 (1st Dept 2011), *aff'd*, 21 NY3d 176, 969 NYS2d 834, 991 NE2d 692 (2013); *Matter of James L.*, *supra*. In such cases, the court must interrogate the interested interpreter to determine the extent of bias and, further, must admonish the interpreter to translate exactly what the witness has said, *Matter of James L.* *supra*; see *People v Lee*, *supra*; *People v Fisher*, 223 NY 459, 119 NE 845 (1918).

In general, the court has discretion to determine whether a witness should be permitted to testify through an interpreter, *People v O'Sullivan*, 258 AD2d 330, 686 NYS2d 2 (1st Dept 1999). The use of an interpreter may be permitted where a witness has limited command of English and the clarity of his or her testimony would otherwise be hindered, *id*; see *People v Morrison*, 244 AD2d 168, 663 NYS2d 841 (1st Dept 1997); *People v Wilson*, 188 AD2d 405, 591 NYS2d 397 (1st Dept 1992). In *Mehmood v Wong*, 18 AD3d 518, 795 NYS2d 86 (2d Dept 2005), a personal injury action, it was held that the trial court's failure to appoint an interpreter deprived plaintiffs of a fair trial where the witness's difficulty in understanding questions and answering them in English was obvious and substantial questions were raised as to the jury's ability to understand the testimony. The appellate court in *Mehmood* held that the trial court's alternative procedure, in which the witness was permitted to request the assistance of an interpreter on a question-by-question basis, was not sufficient to remedy the problem.

The court may, in the exercise of its discretion, determine that an interpreter is competent and that any misunderstandings in the translation process have been rectified, *People v Watkins*, 12 AD3d 165, 786 NYS2d 133 (1st Dept 2004); *People v Nedal*, 198 AD2d 42, 603 NYS2d 454 (1st Dept 1993); *People v Frazier*, 159 AD2d 278, 552 NYS2d 841 (1st Dept 1990); *Matter of James L.*, 143 AD2d 533, 532 NYS2d 941 (4th Dept 1988). Occasional difficulties in translation are not sufficient grounds to challenge a verdict, at least where the difficulties are adequately rectified and the witness's testimony was properly presented to the jury, *People v Kowlessar*, 82 AD3d 417, 918 NYS2d 41 (1st Dept 2011); see *People v Watkins*, *supra* (difficulties in translation did not prevent effective cross-examination of witness). Thus, the court properly exercised its discretion in accepting an interpreter's assurances that there had been adequate communication between herself and the witness, where the juror who originally questioned the precision of the translation assured the court that she detected no real inaccuracies, *People v Staley*, 262 AD2d 30, 692 NYS2d 314 (1st Dept 1999). Whether any difficulties in the translation led to prejudice is an important consideration, see *People v Singleton*, 59 AD3d 1131, 873 NYS2d 838 (4th Dept 2009); *People v Watkins*, *supra*; *People v Pham*, 283 AD2d 952, 725 NYS2d 245 (4th Dept 2001). With respect to the interpreter's competence, consideration must be given to the proposed interpreter's grasp of the English language as well as to his or her ability to follow the oath required by Judiciary Law § 387, *Matter of James L.*, *supra*.

Questions about the reliability of the process may arise when a

juror who understands the language being translated into English raises questions about the accuracy of the translation. In such instances, the questions should be resolved and the court should seek assurances from the juror that he or she can accept the translation, *People v Staley*, 262 AD2d 30, 692 NYS2d 314 (1st Dept 1999). When a juror raises questions about the accuracy of the translation after the verdict has been announced, the rules against impeaching the verdict are applicable and the court should undertake inquiry only in extraordinary circumstances, such as where there is a risk that a juror's knowledge of the witness's language put him or her in the position of an unsworn witness in the jury room, *People v Sanchez*, 185 AD2d 331, 586 NYS2d 149 (2d Dept 1992).

Individuals who are profoundly hearing-impaired or profoundly speech-impaired are competent to testify and may give evidence through an interpreter, *Cowley v People*, 83 NY 464 (1881); *Matter of Luz P.*, 189 AD2d 274, 595 NYS2d 541 (2d Dept 1993). Judiciary Law § 390 authorizes the appointment of "a qualified interpreter of the deaf sign-language." For a discussion of the use of sign language interpreters, see *Matter of Luz P.*, *supra*, and *People v Rodriguez*, 145 Misc2d 105, 546 NYS2d 769 (Sup 1989).

a. EXPERT

PJI 1:90. General Instruction—Expert Witness

You will recall that [state name(s) of expert witness(es)] testified concerning (his, her, their) qualifications in the field(s) of [state profession(s)] and gave (his, her, their) opinion(s) concerning issues in this case. When a case involves a matter of science or art or requires special knowledge or skill that most people do not have, a qualified witness is permitted to state (his, her) opinion(s) for the information of the court and jury. The opinion(s) stated by [state name(s) of expert witness(es)] (was, were) based on particular facts, as (he, she, they) obtained knowledge of them and testified about them or as the attorney(s) who questioned (him, her, them) asked (him, her, them) to assume. You may reject any opinion if you find the facts to be different from the facts that formed the basis for the opinion. You may also reject an opinion if, after careful consideration of all the evidence in the case, including the cross-examination of [state name(s) of expert witness(es)], you decide that an opinion is not convincing. In other words, you are

not required to accept any opinion to the exclusion of the facts and circumstances disclosed by other evidence. Opinion testimony should be evaluated in the same way as the testimony of any other witness. It is given to assist you in reaching a proper conclusion; it is entitled to such weight as you find the witness's qualifications in the field warrant and must be considered by you, but is not controlling upon your judgment.

Comment

Based on *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); *Selkowitz v Nassau*, 45 NY2d 97, 408 NYS2d 10, 379 NE2d 1140 (1978); *Matter of Estate of Sylvestri*, 44 NY2d 260, 405 NYS2d 424, 376 NE2d 897 (1978); *Commercial Casualty Ins. Co. v Roman*, 269 NY 451, 199 NE 658 (1936); *Dougherty v Milliken*, 163 NY 527, 57 NE 757 (1900); *Herring v Hayes*, 135 AD2d 684, 522 NYS2d 583 (2d Dept 1987); see *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *People v Cronin*, 60 NY2d 430, 470 NYS2d 110, 458 NE2d 351 (1983); *Prince, Richardson on Evidence* (11th Ed Farrell) § 7-305.

I. General Considerations

A. Scope of Expert Testimony

The admission of expert testimony on a particular issue is within the discretion of the trial court, *People v Inoa*, 25 NY3d 466, 13 NYS3d 329, 34 NE3d 839 (2015); *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002); *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900, 647 NE2d 105 (1995); *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); see *People v Williams*, 20 NY3d 579, 964 NYS2d 483, 987 NE2d 260 (2013); *People v Williams*, 97 NY2d 735, 742 NYS2d 597, 769 NE2d 343 (2002).

In determining the admissibility of expert testimony, the court should consider the purpose for which the expert testimony is offered, *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002). The guiding principle is that expert testimony should be received “when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror,” *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); see *People v Inoa*, 25 NY3d 466, 13 NYS3d 329, 34 NE3d 839 (2015); *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); see also *Shanika M. v Stephanie G.*, 108 AD3d 717, 968 NYS2d 894 (2d Dept 2013). The role of the trial court is to determine when jurors are able to draw conclu-

sions from the evidence based on their day-to-day experience, their common observation and their knowledge, and whether they would benefit from the specialized knowledge of an expert witness, *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002); *People v Cronin*, 60 NY2d 430, 470 NYS2d 110, 458 NE2d 351 (1983). In other words, the court should determine whether the expert can tell the jurors something significant that they would not ordinarily be expected to know, *People v Young*, 7 NY3d 40, 817 NYS2d 576, 850 NE2d 623 (2006); *People v Lee*, 96 NY2d 157, 726 NYS2d 361, 750 NE2d 63 (2001).

Courts should not exclude expert testimony merely because, to some degree, it invades the jury's province, *People v Lee*, 96 NY2d 157, 726 NYS2d 361, 750 NE2d 63 (2001). Nor should expert testimony be excluded solely because it answers the "ultimate question" in the case, see *People v Cronin*, 60 NY2d 430, 470 NYS2d 110, 458 NE2d 351 (1983). For testimony regarding both the ultimate question and those of lesser significance, admissibility turns on whether the conclusions to be drawn from the facts depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence, *People v Miller*, 91 NY2d 372, 670 NYS2d 978, 694 NE2d 61 (1998); see *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900, 647 NE2d 105 (1995) (whether plaintiff sustained certain categories of "serious injury" recognized by no-fault law); *Broun v Equitable Life Assur. Soc. of U.S.*, 69 NY2d 675, 512 NYS2d 12, 504 NE2d 379 (1986) (whether decedent's death was result of suicide); *Sanders v Otis Elevator Co.*, 232 AD2d 327, 649 NYS2d 19 (1st Dept 1996) (adequacy of defendant's maintenance of elevator); *Vigilant Ins. Co. v Rippner Elec. Const. Corp.*, 196 AD2d 494, 601 NYS2d 137 (2d Dept 1993) (origin of fire); *Larkin v Present Co.*, 152 AD2d 1005, 544 NYS2d 696 (4th Dept 1989) (reasonableness of attorney's fees in quantum meruit action); *Miller v Food Fair Stores, Inc.*, 63 AD2d 766, 404 NYS2d 740 (3d Dept 1978) (hazardous condition of floor due to violation of architectural standards). In deciding whether to admit expert testimony, courts should be mindful that "[a]uthoritative testimony directly instructive of what facts the jury should find as such overtakes the jury's function to decide matters within its unaided competence," *People v Inoa*, 25 NY3d 466, 13 NYS3d 329, 34 NE3d 839 (2015).

Expert testimony may be excluded when the information is not beyond the ordinary knowledge and experience of the trier of facts, *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 386 NYS2d 87, 351 NE2d 735 (1976); *Andersen v Park Center Associates*, 250 AD2d 473, 673 NYS2d 396 (1st Dept 1998); see *People v Inoa*, 25 NY3d 466, 13 NYS3d 329, 34 NE3d 839 (2015); *People v Santi*, 3 NY3d 234, 785 NYS2d 405, 818 NE2d 1146 (2004), or may mislead the jury, *Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 827 NYS2d 143 (1st Dept 2007); *Hageman v Jacobson*, 202 AD2d 160, 608 NYS2d 180 (1st Dept 1994); see *Cusumano v New York*, 15 NY3d 319, 910 NYS2d 410, 937 NE2d 74 (2010); *Fazzzone v Gourlay*, 1 AD3d 678, 766 NYS2d 621 (3d Dept 2003). Expert testimony should be excluded where it is speculative, *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 798 NYS2d 715, 831 NE2d 960 (2005);

Matter of 91st Street Crane Collapse Litigation, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017); *Office Park Corp. v Onondaga*, 64 AD2d 252, 409 NYS2d 854 (4th Dept 1978), *aff'd*, 48 NY2d 765, 423 NYS2d 920, 399 NE2d 950 (1979); *Tucker v Elimelech*, 184 AD2d 636, 584 NYS2d 895 (2d Dept 1992); *Cooke v Bernstein*, 45 AD2d 497, 359 NYS2d 793 (1st Dept 1974). The court may limit expert testimony that is repetitive or cumulative, *Abbott v New Rochelle Hosp. Medical Center*, 141 AD2d 589, 529 NYS2d 352 (2d Dept 1988).

Examples of admissible expert testimony include testimony regarding rape trauma syndrome, *People v Williams*, 20 NY3d 579, 964 NYS2d 483, 987 NE2d 260 (2013); general operating methods and terminology used in street-level narcotics transactions, *People v Brown*, 97 NY2d 500, 743 NYS2d 374, 769 NE2d 1266 (2002); the reliability of eyewitness identification, *People v Lee*, 96 NY2d 157, 726 NYS2d 361, 750 NE2d 63 (2001); the utility of a lock and an intercom in deterring a criminal attacker, *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); plaintiff's amnesia, *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986); the practices of insurers and defendants in evaluating personal-injury and property-damage claims, *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 386 NYS2d 87, 351 NE2d 735 (1976); life care planning, *Tornatore v Cohen*, 162 AD3d 1503, 78 NYS3d 542 (4th Dept 2018); collectability of a theoretical judgment, *McKenna v Forsyth & Forsyth*, 280 AD2d 79, 720 NYS2d 654 (4th Dept 2001) the requirements, restrictions and prohibitions of the Workers' Compensation Law, *People v Dorvilier*, 122 AD3d 642, 996 NYS2d 111 (2d Dept 2014); "packaging engineering" of glass crates, *Grabowski v City Centre Development Co. of Buffalo, L.P.*, 272 AD2d 868, 707 NYS2d 584 (4th Dept 2000); the danger of algae growth, *Fusilli v Caldor, Inc.*, 226 AD2d 246, 641 NYS2d 259 (1st Dept 1996); the standards for teaching novice roller skaters, *Doukas v America on Wheels, Levittown, New York, Inc.*, 154 AD2d 426, 545 NYS2d 928 (2d Dept 1989); the common standards and requirements applicable to placement of barriers in public passageways, *Chanler v Manocherian*, 151 AD2d 432, 543 NYS2d 671 (1st Dept 1989); professional standards for supervising cartwheeling during school recess, *Franck by Franck v Minisink Valley School District*, 136 AD2d 588, 523 NYS2d 573 (2d Dept 1988); proper police practice when a police officer encounters a disabled vehicle on the expressway, *Anderson v Muniz*, 125 AD2d 281, 508 NYS2d 567 (2d Dept 1986); the effect of decedent's chronic ingestion of the drugs prescribed by defendant physician, *Karasik v Bird*, 98 AD2d 359, 470 NYS2d 605 (1st Dept 1984); proper police practice in effectuating an arrest, *Dier v New York*, 79 AD2d 596, 433 NYS2d 510 (2d Dept 1980); the proper methods for cleaning windows from the outside, *Gonzalez v Concourse Plaza Syndicates, Inc.*, 31 AD2d 401, 298 NYS2d 167 (1st Dept 1969). A witness qualified in criminal methods and terminology who has participated in an investigation may testify about the meaning of certain standard coded communications, but not about the meaning of phone conversations in which only veiled language was used, *People v Inoa*, 25 NY3d 466, 13 NYS3d 329, 34 NE3d 839 (2015).

Whether a particular condition or omission violated a regulation may be a proper subject for expert evidence, *Morris v Pavarini Const.*, 9 NY3d 47, 842 NYS2d 759, 874 NE2d 723 (2007) (Industrial Code); *Carter v State*, 119 AD3d 1198, 990 NYS2d 333 (3d Dept 2014) (building code provision governing handrails); *Hoberg v Shree Granesh, LLC*, 85 AD3d 965, 926 NYS2d 578 (2d Dept 2011) (Multiple Dwelling Law); *Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 973 NYS2d 632 (1st Dept 2013) (Industrial Code); *Vosper v Fives 160th, LLC*, 110 AD3d 544, 973 NYS2d 589 (1st Dept 2013) (various provisions of building code); *Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 827 NYS2d 143 (1st Dept 2007) (Industrial Code). More specifically, the interpretation and scope of a regulation or ordinance are questions of law for the court, *Lopez v Chan*, 102 AD3d 625, 959 NYS2d 67 (1st Dept 2013) (building code); *Keneally v 400 Fifth Realty LLC*, *supra* (Industrial Code); *McCoy v Metropolitan Transp. Authority*, 53 AD3d 457, 863 NYS2d 8 (1st Dept 2008); *Franco v Jay Cee of New York Corp.*, *supra*; see *Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 19 NYS3d 580 (2d Dept 2015), but expert evidence may be considered on the meaning of particular specialized terms before the court makes its determination, *Morris v Pavarini Const.*, *supra*; see *Morris v Pavarini Const.*, 22 NY3d 668, 985 NYS2d 202, 8 NE3d 317 (2014).

B. Qualification of Expert Witness

A witness's qualification as an expert is a question to be determined by the court in the exercise of its reasonable discretion and will not be disturbed in the absence of a serious mistake, an error of law, an abuse of discretion or an improvident exercise of discretion, *Werner v Sun Oil Co.*, 65 NY2d 839, 493 NYS2d 125, 482 NE2d 921 (1985); *Meiselman v Crown Heights Hospital*, 285 NY 389, 34 NE2d 367 (1941); see *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981); *McGillvery v New York*, 22 AD3d 537, 802 NYS2d 235 (2d Dept 2005); *Maplewood, Inc. v Wood*, 21 AD3d 933, 801 NYS2d 60 (2d Dept 2005); *Steinbuch v Stern*, 2 AD3d 709, 770 NYS2d 106 (2d Dept 2003); *Pringle v Pringle*, 296 AD2d 828, 744 NYS2d 784 (4th Dept 2002); *Karasik v Bird*, 98 AD2d 359, 470 NYS2d 605 (1st Dept 1984). While a court's decision as to whether a witness should be qualified as an expert is largely discretionary, *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998), the range of allowable discretion is not unlimited, see *Botwinik v Moseson*, 85 AD3d 462, 925 NYS2d 34 (1st Dept 2011); *Khatri v Lazarus*, 225 AD2d 302, 639 NYS2d 1 (1st Dept 1996); *Karasik v Bird*, *supra*. It should be noted that the question of an expert's qualifications is separate and distinct from the question whether the science or body of knowledge on which the expert's evidence is based is sufficiently accepted as reliable in the scientific community. As to the latter question, the test set forth in *Frye v U.S.*, 293 F 1013 (1923), is applicable, *People v Wernick*, 89 NY2d 111, 651 NYS2d 392, 674 NE2d 322 (1996). As to the scope and application of the Frye test, see discussion, *infra*.

An expert witness must possess sufficient skill, training, education,

knowledge, or experience from which it may reasonably be inferred that the information the expert imparts and any opinion that the expert states are reliable, *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); *LaMarque v North Shore University Hosp.*, 227 AD2d 594, 643 NYS2d 221 (2d Dept 1996); see *Meiselman v Crown Heights Hospital*, 285 NY 389, 34 NE2d 367 (1941); *Applewhite v Accuhealth, Inc.*, 81 AD3d 94, 915 NYS2d 223 (1st Dept 2010) (nurse's affidavit submitted on summary judgment). The qualifications of the expert are not necessarily dependent upon formal training or attainment of an academic degree and may be demonstrated by showing practical experience in the field, see *People v Oddone*, 22 NY3d 369, 980 NYS2d 912, 3 NE3d 1160 (2013); *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981); *People v Dorvilier*, 122 AD3d 642, 996 NYS2d 111 (2d Dept 2014); *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 988 NYS2d 58 (1st Dept 2014); *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003); *Zambanini v Otis Elevator Co.*, 242 AD2d 453, 662 NYS2d 41 (1st Dept 1997); *Locilento v John A. Coleman Catholic High School*, 134 AD2d 39, 523 NYS2d 198 (3d Dept 1987); *McGovern v Riverdale Country School Realty Co., Inc.*, 51 AD2d 894, 380 NYS2d 687 (1st Dept 1976); see also *Schechter v 3320 Holding LLC*, 64 AD3d 446, 883 NYS2d 193 (1st Dept 2009) (elevator maintenance employee with no formal training or certification or license in field of elevator maintenance and repair not qualified to offer opinion on cause of failure of interlock device where no evidence that he was qualified through long observation and experience). An expert's alleged lack of knowledge in a particular area of expertise is a factor to be evaluated by the jury in assessing the weight to be accorded the expert's testimony, *Bodensiek v Schwartz*, 292 AD2d 411, 739 NYS2d 405 (2d Dept 2002); *Gordon v Tishman Const. Corp.*, 264 AD2d 499, 694 NYS2d 719 (2d Dept 1999); see *Leavy v Merriam*, 133 AD3d 636, 20 NYS3d 117 (2d Dept 2015) (any lack of skill or expertise of medical expert goes to weight of opinion, not its admissibility).

An otherwise qualified expert who is not licensed in the field may still give expert testimony, *People v Rice*, 159 NY 400, 54 NE 48 (1899); *Selleck v Board of Educ. of Central School Dist. No. 1*, 276 App Div 263, 94 NYS2d 318 (3d Dept 1949); see *Fritz v Burman*, 107 AD3d 936, 968 NYS2d 167 (2d Dept 2013) (fact that physician certified in pediatric care was not certified in that specialty at time of alleged malpractice did not disqualify physician from giving expert opinion where no evidence that standards of care changed; no requirement that expert witness be qualified as expert when events in issue occurred); *Karasik v Bird*, 98 AD2d 359, 470 NYS2d 605 (1st Dept 1984); see also *Howard v Stanger*, 122 AD3d 1121, 996 NYS2d 785 (3d Dept 2014) (defendant expert affidavit not inadmissible because his license was under stayed suspension at time affidavit prepared; however, defendant's failure to reveal suspension in affidavit and other deficiencies rendered his affidavit insufficient on his motion for summary judgment); *Williams v Halpern*, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006) (pathologist's

prior immoral acts and license suspension affected his credibility but did not preclude his testifying as expert). The absence of a license affects the weight but not the admissibility of the testimony, *Williams v Halpern*, supra; but see *Machac v Anderson*, 261 AD2d 811, 690 NYS2d 762 (3d Dept 1999) (chiropractor not licensed to interpret x-rays for detection of fractures not competent to render opinion on that subject). An expert with board certification in internal medicine may be qualified to testify even if the expert does not expressly state that he or she possesses the requisite background and knowledge regarding emergency-room medicine, *Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 894 NYS2d 11 (1st Dept 2010).

While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, *Leavy v Merriam*, 133 AD3d 636, 20 NYS3d 117 (2d Dept 2015); *Bodensiek v Schwartz*, 292 AD2d 411, 739 NYS2d 405 (2d Dept 2002); *Forte v Weiner*, 200 AD2d 421, 606 NYS2d 220 (1st Dept 1994); *Farkas v Saary*, 191 AD2d 178, 594 NYS2d 195 (1st Dept 1993); see *Pares v La Prade*, 266 AD2d 852, 697 NYS2d 413 (4th Dept 1999) (physiatrist may render opinion on need for surgery), the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable, *Samer v Desai*, 179 AD3d 860, 116 NYS3d 377 (2d Dept 2020) (plaintiff's expert who specialized in general and vascular surgery not qualified to render opinion as to orthopaedics or family medicine); *Daniele v Pain Management Center of Long Island*, 168 AD3d 672, 91 NYS3d 496 (2d Dept 2019) (expert board-certified in anesthesiology and pain management failed to lay foundation to testify as expert witness in emergency medicine; pediatrician's experience moonlighting at hospital in 1970's and 1980's was too remote to qualify him testify as expert in emergency medicine as of September 2010); *Donnelly v Parikh*, 150 AD3d 820, 55 NYS3d 274 (2d Dept 2017) (foundation must be laid when physician testifies outside area of specialization); *Ozugowski v New York*, 90 AD3d 875, 935 NYS2d 613 (2d Dept 2011) (physician who was internist and cardiologist failed to establish foundation for his opinion regarding psychiatric treatment); *Mustello v Berg*, 44 AD3d 1018, 845 NYS2d 86 (2d Dept 2007) (general surgeon failed to lay proper foundation for his opinion regarding gastroenterological treatment); *Behar v Coren*, 21 AD3d 1045, 803 NYS2d 629 (2d Dept 2005) (pathologist failed to establish proper foundation to opine on surgical and gastroenterological treatment); *Postlethwaite v United Health Services Hospitals, Inc.*, 5 AD3d 892, 773 NYS2d 480 (3d Dept 2004) (physician whose expertise was confined to anesthesiology and pharmacology properly permitted to testify regarding certain accepted medical practices in internal medicine, gastroenterology, general surgery and nursing, but properly precluded from testifying as to whether surgeon and gastroenterologist correctly diagnosed and treated decedent based upon accepted diagnostic practices in their respective fields).

An expert's affidavit that does not establish the expert's qualifications is of no probative value and is not sufficient to raise a question of

fact on summary judgment, *Ozugowski v New York*, 90 AD3d 875, 935 NYS2d 613 (2d Dept 2011) (opinion of plaintiff's expert, an internist and cardiologist, failed to raise triable issue of fact regarding psychiatric treatment); *Mustello v Berg*, 44 AD3d 1018, 845 NYS2d 86 (2d Dept 2007) (opinion of plaintiff's expert, a general surgeon, failed to raise triable issue of fact regarding gastroenterological treatment administered to plaintiff; expert did not establish specific training or expertise in gastroenterology and did not indicate familiarity with applicable standards of care); *Behar v Coren*, 21 AD3d 1045, 803 NYS2d 629 (2d Dept 2005) (opinion of plaintiffs' expert, a pathologist, insufficient to raise issue of fact regarding efficacy of pediatric surgical and gastroenterological treatment where expert failed to lay foundation for his asserted familiarity with applicable standards of care); see *Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589, 684 NE2d 19 (1997) (professional background of clinical forensic pathologist specializing in performance of autopsies insufficient to qualify him to make judgments about apparent manifestations of intoxication in live individuals); *Samer v Desai*, 179 AD3d 860, 116 NYS3d 377 (2d Dept 2020) (plaintiff's expert who specialized in general and vascular surgery not qualified to render opinion as to orthopaedics or family medicine); *Boltyansky v New York Community Hospital*, 175 AD3d 1478, 108 NYS3d 188 (2d Dept 2019) (plaintiff's expert credentialed as registered nurse, licensed family nurse practitioner, and legal nurse consultant with Ph.D. categorically not qualified to render opinion as to whether fall prevention measures implemented by defendant hospital were in accordance with standard of care); *Pinnock v Mercy Medical Center*, 180 AD3d 1088, 119 NYS3d 559 (2d Dept 2020) (expert in gynecology and obstetrics failed to lay foundation for opinion regarding conduct of general surgeon); *Flanger v 2461 Elm Realty Corp.*, 123 AD3d 1196, 998 NYS2d 502 (3d Dept 2014) (engineering expert's affidavit insufficient where it merely listed "P.E." after his name but did not set forth states in which he held licenses, mention education or type of engineer he was or include a curriculum vitae); *Applewhite v Accuhealth, Inc.*, 81 AD3d 94, 915 NYS2d 223 (1st Dept 2010) (affidavit of nurse of no probative value where no evidence that her general nursing experience afforded her any insight into skills unique to home infusion nurses).

The proponent of the expert testimony is entitled to the opportunity to demonstrate the qualifications of the expert to the jury, see *Werner v Sun Oil Co.*, 65 NY2d 839, 493 NYS2d 125, 482 NE2d 921 (1985); *White v Luna*, 139 AD3d 939, 30 NYS3d 575 (2d Dept 2016), even if the adverse party is willing to concede that the witness is an expert, *People v Hills*, 140 AD2d 71, 532 NYS2d 269 (2d Dept 1988); *Counihan v J.H. Werbelovsky's Sons, Inc.*, 5 AD2d 80, 168 NYS2d 829 (1st Dept 1957).

1. Witness Held Qualified

Cases in which witnesses were deemed to have sufficient qualifications to testify include: *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998) (expert with no formal training in psychology or behavioral sciences permitted

to testify that minimal security afforded by lock and intercom would not have deterred plaintiff's attacker on landlord's premises); *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981) (engineer with practical experience in analyzing performance of allegedly defective product permitted to testify on product design, even though he was not designer of particular product); *Fuller v Preis*, 35 NY2d 425, 363 NYS2d 568, 322 NE2d 263 (1974) (neurologist qualified to testify as to decedent's state of mind prior to suicide); *Michalko v DeLuccia*, 187 AD3d 1365, 133 NYS3d 122 (3d Dept 2020) (cardiologist should have been permitted to offer opinion regarding gastroenterologist's decision to discontinue cardiac medication prior to and after performing colonoscopy); *Holownia v Caruso*, 183 AD3d 1035, 123 NYS3d 291 (3d Dept 2020) (state trooper who investigated hundreds of accidents qualified to offer opinion that vehicle did not contribute to accident); *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 988 NYS2d 58 (1st Dept 2014) (plaintiff-glazier with 30 years' experience competent to testify that glass panes in church steeple do not ordinarily crack); *Williams v Halpern*, 25 AD3d 467, 808 NYS2d 68 (1st Dept 2006) (even though he was not internist or epidemiologist, pathologist competent to give opinion as to how plaintiff contracted hepatitis C); *People v Morehouse*, 5 AD3d 925, 774 NYS2d 100 (3d Dept 2004) (nurse held competent to testify regarding consistency of rape victim's injuries with forcible compulsion); *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003) (court should have considered affidavit of expert who opined that consumers who began smoking in the 1950's and 1960's did not have true understanding of health hazards, where opinion was based on extensive personal experience interviewing and treating smokers and reliable reports and studies); *Ariola v Long*, 197 AD2d 605, 602 NYS2d 666 (2d Dept 1993) (ophthalmologist who never performed laser surgery permitted to testify regarding appropriate standard of care in such surgery); *Hoagland v Kamp*, 155 AD2d 148, 552 NYS2d 978 (3d Dept 1990) (board-certified oral and maxillofacial surgeon may testify regarding state minimum standards of general dentistry); *Doukas v America on Wheels, Levittown, New York, Inc.*, 154 AD2d 426, 545 NYS2d 928 (2d Dept 1989) (witness who had instructed novice roller-skaters on the college level for four years should have been permitted to testify as to proper instruction of novice roller-skaters); *Locilento v John A. Coleman Catholic High School*, 134 AD2d 39, 523 NYS2d 198 (3d Dept 1987) (witness who had educational degrees in field of recreation and who had been athletic director permitted to testify as to scholastic sports activities even though witness had never coached or officiated); *Bowe by Bowe v New York*, 128 AD2d 495, 512 NYS2d 422 (2d Dept 1987) (special education teacher and "evaluator" permitted to testify as to infant plaintiff's coordination and psychomotor problems); *Matter of Steinberg*, 121 AD2d 872, 503 NYS2d 795 (1st Dept 1986) (physician with expertise in geriatric medicine but not psychiatry or psychology competent to evaluate mental aberrations of his patient); *Keane v Sloan-Kettering Institute for Cancer Research*, 96 AD2d 505, 464 NYS2d 548 (2d Dept 1983) (physician allowed to testify about diagnostic procedures available in 1952 even though not admitted to practice until 1971); *Gramza v Gajewski*, 23

AD2d 817, 258 NYS2d 469 (4th Dept 1965) (physiotherapist with bachelor's degree who had done graduate work and was licensed by Education Department permitted to testify concerning muscle spasms and to describe traction treatment by cervical rotation and flexion); see *People v Oddone*, 22 NY3d 369, 980 NYS2d 912, 3 NE3d 1160 (2013) (pathologist could testify based on his experience); *Walker v Commack School Dist.*, 31 AD3d 752, 820 NYS2d 287 (2d Dept 2006) (teacher of physical education for 33 years permitted to testify as to norms for protective equipment in school sport).

2. *Witness Held Not Qualified*

Cases in which witnesses were deemed to have insufficient qualifications to testify include: *Garcia v New York*, 104 AD2d 438, 478 NYS2d 957 (2d Dept 1984), *aff'd*, 65 NY2d 805, 493 NYS2d 127, 482 NE2d 923 (1985) (medical expert may not testify on subject of ballistics); *Baptiste v RLP-East, LLC*, 182 AD3d 444, 122 NYS3d 292 (1st Dept 2020) (accident reconstructionist not qualified to testify that plaintiff's injuries were caused by construction accident, rather than bus accident, since witness was not biomechanical engineer there was no evidence that he had relevant medical training); *Delosh v Amyot*, 186 AD3d 1793, 130 NYS3d 129 (3d Dept 2020) (accident reconstructionist lacking medical training not qualified to render opinion as to whether driver was impaired by prescription drug); *Doviak v Finkelstein & Partners, LLP*, 137 AD3d 843, 27 NYS3d 164 (2d Dept 2016) (out-of-state attorney who was not familiar with New York law not qualified to offer opinion about personal injury litigation in New York); *Shank v Mehling*, 84 AD3d 776, 922 NYS2d 495 (2d Dept 2011) (specialization in hand surgery not sufficient by itself to qualify opinion as to accepted standards of care in field of physical therapy); *Schechter v 3320 Holding LLC*, 64 AD3d 446, 883 NYS2d 193 (1st Dept 2009) (elevator maintenance employee with no formal training or certification or license in field of elevator maintenance and repair not qualified to offer opinion on cause of failure of interlock device where no evidence that he was qualified through long observation and experience); *Kirker v Nicolla*, 256 AD2d 865, 681 NYS2d 689 (3d Dept 1998) (treating surgeon not qualified to testify as to standards of care in fields of work assessment or physical therapy); *Hong v Nassau*, 139 AD2d 566, 527 NYS2d 66 (2d Dept 1988) (mechanical engineer with experience in safety engineering of vehicles not qualified to testify as to design and development of golf courses and recreational areas); *People v Zavaro*, 138 AD2d 430, 525 NYS2d 713 (2d Dept 1988) (certified social worker not qualified to give opinion as to whether criminal defendant suffered from mental disease); *Hileman v Schmitt's Garage, Inc.*, 58 AD2d 1029, 397 NYS2d 501 (4th Dept 1977) (metallurgist not qualified to testify on dynamics); *Molinari v Conforti & Eisele, Inc.*, 54 AD2d 1113, 388 NYS2d 782 (4th Dept 1976) (architect not qualified to give opinion on daily maintenance of temporary lighting system); *McGovern v Riverdale Country School Realty Co., Inc.*, 51 AD2d 894, 380 NYS2d 687 (1st Dept 1976) (teacher/basketball coach not qualified to testify as to the safety of basketball court design); *Lombard v Dobson*, 16 AD2d 1031, 230 NYS2d 47 (4th

Dept 1962) (consulting engineer with few months training in accident analysis not permitted to estimate speed at time of accident); *Dillon v Socony Mobil Oil Co.*, 9 AD2d 835, 192 NYS2d 818 (3d Dept 1959) (architectural engineer without experience in petroleum industry loading platforms not qualified to give opinion on proper design).

C. Weight Accorded Expert Testimony

The weight to be accorded an expert's testimony is a matter for the trier of fact, *Matter of Estate of Sylvestri*, 44 NY2d 260, 405 NYS2d 424, 376 NE2d 897 (1978); *Topel v Long Island Jewish Medical Center*, 76 AD2d 862, 428 NYS2d 507 (2d Dept 1980), *aff'd*, 55 NY2d 682, 446 NYS2d 932, 431 NE2d 293 (1981); *Credit Suisse First Boston v Utrecht-America Finance Co.*, 80 AD3d 485, 915 NYS2d 531 (1st Dept 2011); *Green v William Penn Life Ins. Co. of New York*, 74 AD3d 570, 902 NYS2d 542 (1st Dept 2010); *Adam v Oneonta*, 217 AD2d 894, 629 NYS2d 857 (3d Dept 1995); *Kwasny v Feinberg*, 157 AD2d 396, 557 NYS2d 381 (2d Dept 1990); *Stanley v Ford Motor Co.*, 49 AD2d 979, 374 NYS2d 370 (3d Dept 1975). The jury may consider the nature and extent of the expert's qualifications in determining the weight to be given the testimony, *Meiselman v Crown Heights Hospital*, 285 NY 389, 34 NE2d 367 (1941); *Felt v Olson*, 74 AD2d 722, 425 NYS2d 686 (4th Dept 1980), *aff'd*, 51 NY2d 977, 435 NYS2d 708, 416 NE2d 1043 (1980); *Pringle v Pringle*, 296 AD2d 828, 744 NYS2d 784 (4th Dept 2002); *Beck v Albany Medical Center Hosp.*, 191 AD2d 854, 594 NYS2d 844 (3d Dept 1993).

Where the subject matter of the expert's testimony is within the competence of the expert and is supported by the relevant literature, any defects in the opinion or the foundation of it go to weight to be accorded the opinion, not to its admissibility, *Sadek v Wesley*, 27 NY3d 982, 32 NYS3d 42, 51 NE3d 553 (2016).

Resolving conflicts in the testimony of experts lies solely with the jury, which may accept the theory that it believes best explains the point in issue and is supported by the evidence, *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Lesio v Attardi*, 121 AD3d 1527, 993 NYS2d 810 (4th Dept 2014); *Starobin v Hudson Transit Lines, Inc.*, 112 AD2d 987, 493 NYS2d 12 (2d Dept 1985); see *Gunder v Murthy*, 185 AD2d 915, 587 NYS2d 666 (2d Dept 1992) (weight to be accorded one expert's conflicting statements is peculiarly within province of jury). Further, any apparent discrepancy between an expert's testimony and other evidence in the case goes to the weight of the expert testimony and not its admissibility, *Rivera v New York*, 212 AD2d 403, 622 NYS2d 681 (1st Dept 1995); *Tornatore v Cohen*, 162 AD3d 1503, 78 NYS3d 542 (4th Dept 2018) (where expert projected plaintiff would require greater treatment with respect to certain components of life care plan than he previously received, such testimony went to weight, not admissibility); see also *People v Jackson*, 65 NY2d 265, 491 NYS2d 138, 480 NE2d 727 (1985) (conflicting testimony of experts called by same party presents jury question and does not necessarily result in failure of proof).

A jury is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony, facts disclosed on cross-examination, or both, *Curry v Hudson Valley Hosp. Center*, 104 AD3d 898, 961 NYS2d 563 (2d Dept 2013) (citing PJI). A jury may reject an expert's opinion if it finds the facts to be different from those that formed the basis for the opinion or if, after careful consideration of all the evidence, it disagrees with the opinion, *Hoffner v Nelson*, 169 AD3d 1436, 92 NYS3d 514 (4th Dept 2019); *Curry v Hudson Valley Hosp. Center*, *supra*.

Although the jury ordinarily has the responsibility to determine the weight of the expert's testimony, a jury verdict may be set aside where it is based solely on an opinion of an expert that is speculative, *Kenford Co., Inc. v Erie*, 67 NY2d 257, 502 NYS2d 131, 493 NE2d 234 (1986); *Office Park Corp. v Onondaga*, 64 AD2d 252, 409 NYS2d 854 (4th Dept 1978), *aff'd*, 48 NY2d 765, 423 NYS2d 920, 399 NE2d 950 (1979); *Skipper v New York*, 186 AD2d 439, 589 NYS2d 21 (1st Dept 1992), or where there are no facts in the record to support the expert's opinion, *Matter of Will of Slade*, 106 AD2d 914, 483 NYS2d 513 (4th Dept 1984). However, the jury may not reject an expert's testimony and opinion arbitrarily or without a rational basis, *David Home Builders, Inc. v Misiak*, 91 AD3d 1362, 937 NYS2d 524 (4th Dept 2012); *Williams v New York*, 71 AD3d 1135, 898 NYS2d 208 (2d Dept 2010); *Calderon v Irani*, 296 AD2d 778, 745 NYS2d 610 (3d Dept 2002); see *Curry v Hudson Valley Hosp. Center*, 104 AD3d 898, 961 NYS2d 563 (2d Dept 2013).

D. Compelled Testimony by Experts

1. Parties

An expert generally cannot be compelled to testify to matters of opinion, *People ex rel. Kraushaar Bros. & Co. v Thorpe*, 296 NY 223, 72 NE2d 165 (1947); see *Morgan v New York City Transit Authority*, 24 AD3d 639, 808 NYS2d 388 (2d Dept 2005); *Metropolitan New York Coordinating Council on Jewish Poverty v FGP Bush Terminal, Inc.*, 1 AD3d 168, 768 NYS2d 190 (1st Dept 2003). However, a defendant who is an expert may be required to give a professional opinion concerning the claims of negligence made against him or her, *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964); *Vega v Lapalorcia*, 281 AD2d 623, 722 NYS2d 563 (2d Dept 2001); *Lingener v State Farm Mut. Auto. Ins. Co.*, 195 AD2d 838, 600 NYS2d 395 (3d Dept 1993) (rule permitting defendant to be questioned as expert not limited to medical malpractice actions); see *Lieblich v Saint Peter's Hosp. of City of Albany*, 112 AD3d 1202, 977 NYS2d 780 (3d Dept 2013) (same principle applies to depositions); *Braun v Ahmed*, 127 AD2d 418, 515 NYS2d 473 (2d Dept 1987); *Johnson v New York City Health & Hospitals Corp.*, 49 AD2d 234, 374 NYS2d 343 (2d Dept 1975) (same principle applies to depositions). Plaintiff may compel defendant to testify as an expert even where plaintiff has other expert witnesses available, *Segreti v Putnam Community Hospital*, 88 AD2d 590, 449 NYS2d 785 (2d Dept 1982).

In an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness, *Carvalho v New Rochelle Hospital*, 53 AD2d 635, 384 NYS2d 508 (2d Dept 1976); see *Liebllich v Saint Peter's Hosp. of City of Albany*, 112 AD3d 1202, 977 NYS2d 780 (3d Dept 2013); *Claudino v Mastellone*, 286 AD2d 697, 730 NYS2d 255 (2d Dept 2001). However, where the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from being deposed as an expert, *Carvalho v New Rochelle Hospital*, *supra*; see *Liebllich v Saint Peter's Hosp. of City of Albany*, *supra*.

A party may not be disqualified from testifying as an expert on his or her own behalf merely because he or she has a personal interest in a case, *Zinn v Jefferson Towers, Inc.*, 14 AD3d 398, 789 NYS2d 7 (1st Dept 2005). Where a party testifies as an expert, the penultimate sentence of the charge should be supplemented to inform the jurors that they may take into consideration the expert's adverse interest, see PJI 1:25C.

2. *Adversary's Expert*

A party is ordinarily not permitted to call and pay the other party's expert, since the expert would be placed in the unethical position of accepting retainers from both sides, *Onondaga v Hiawatha Plaza Associates*, 195 AD2d 1009, 600 NYS2d 573 (4th Dept 1993); *Maglione v Cunard S.S. Co.*, 30 AD2d 784, 291 NYS2d 604 (1st Dept 1968); *Gnoj v New York*, 29 AD2d 404, 288 NYS2d 368 (1st Dept 1968); *Gugliano v Levi*, 24 AD2d 591, 262 NYS2d 372 (2d Dept 1965); see *Byczek v City of New York Dept. of Parks*, 81 AD2d 823, 438 NYS2d 596 (2d Dept 1981). An exception to this rule might be made where no other expert is available, see *Gnoj v New York*, *supra*; *Gugliano v Levi*, *supra*. Moreover, an expert who examined a party during pre-trial proceedings and whose report was disclosed to all parties may be called by any party to testify to the substance of the report, *Gilly v New York*, 69 NY2d 509, 516 NYS2d 166, 508 NE2d 901 (1987); see *Hughes v Webb*, 40 AD3d 1035, 837 NYS2d 698 (2d Dept 2007); see also *Arons v Jutkowitz*, 9 NY3d 393, 850 NYS2d 345, 880 NE2d 831 (2007) (recognizing that there is no procedural or ethical rule prohibiting a party's attorney from conducting informal interview of adversary's treating physician).

A party may call an adversary's treating physician as a fact witness, although the witness cannot be compelled to give an expert opinion, see *People ex rel. Kraushaar Bros. & Co. v Thorpe*, 296 NY 223, 72 NE2d 165 (1947); *Metropolitan New York Coordinating Council on Jewish Poverty v FGP Bush Terminal, Inc.*, 1 AD3d 168, 768 NYS2d 190 (1st Dept 2003); see also *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964).

II. Testimony of Expert

A. In General

CPLR 4515 provides that, “[u]nless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based.” However, upon cross-examination, the witness “may be required to specify the data and other criteria supporting the opinion,” *id.*

Although expert opinion is often stated “with a reasonable degree of certainty,” see *People v Allweiss*, 48 NY2d 40, 421 NYS2d 341, 396 NE2d 735 (1979), the expression of an expert’s opinion need not follow any particular form of words; all that is required is testimony reflecting that the opinion is not based on supposition or speculation and is stated in terms from which it can be said that the witness’s opinion reflects an acceptable level of certainty, *Matott v Ward*, 48 NY2d 455, 423 NYS2d 645, 399 NE2d 532 (1979); *Gross v Friedman*, 138 AD2d 571, 526 NYS2d 152 (2d Dept 1988), *aff’d*, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92 (1988); *Koller v Manhattan Eye, Ear & Throat Hosp.*, 168 AD2d 671, 563 NYS2d 497 (2d Dept 1990); see *Duffen v State*, 245 AD2d 653, 665 NYS2d 978 (3d Dept 1997); see also *Canavan v Steenburg*, 170 AD2d 858, 566 NYS2d 960 (3d Dept 1991) (in legal malpractice action, expert testimony setting forth requirements to be followed by “any attorney” sufficient for *prima facie* case, though expert did not specifically state standard of skill required by attorney practicing at an acceptable level in this State).

An expert’s testimony, “off the top of his head,” that the plaintiff had a “50/50” chance of requiring spinal surgery was insufficient to support a jury’s award for the cost of that surgery, *Baptiste v RLP-East, LLC*, 182 AD3d 444, 122 NYS3d 292 (1st Dept 2020).

B. Cross-Examination

1. *In General*

Contradictory statements made by the expert during cross examination do not necessarily preclude the jury from considering the expert’s direct testimony, *Board of Educ., Central School Dist. No. 1, Towns of Camillus, Onondaga, Van Buren, Geddes and Elbridge v Hueber*, 90 AD2d 685, 456 NYS2d 283 (4th Dept 1982). However, an outright statement by the expert that he had “no opinion” on a pivotal question destroys any possible utility of the testimony on that issue, *Nieves v New York*, 91 AD2d 938, 458 NYS2d 548 (1st Dept 1983).

It is improper and prejudicial to permit an expert to be impeached by reference to the witness having testified for the losing side in a similar case, *Feaster v New York City Transit Authority*, 172 AD2d 284, 568 NYS2d 380 (1st Dept 1991).

2. *Use of Learned Treatises*

Cross-examination of an expert witness may include reference by counsel to the contents of scientific books, treatises, reports, pamphlets and the like, *People v Feldman*, 299 NY 153, 85 NE2d 913 (1949); see *Lipschitz v Stein*, 10 AD3d 634, 781 NYS2d 773 (2d Dept 2004). Such cross-examination is permissible only where the witness recognizes a work as authoritative, *People v Laracuate*, 21 AD3d 1389, 801 NYS2d 676 (4th Dept 2005); *Watkins v Labiak*, 6 AD3d 426, 774 NYS2d 340 (2d Dept 2004); *Labate v Plotkin*, 195 AD2d 444, 600 NYS2d 144 (2d Dept 1993); see *Wolf v Persaud*, 130 AD3d 1523, 14 NYS3d 601 (4th Dept 2015) (that expert did not characterize treatise as “authoritative” did not preclude finding that expert deemed it authoritative); see also *Bryant ex rel. Bryant v Bui*, 265 AD2d 848, 695 NYS2d 790 (4th Dept 1999) (defendant physician who testified on deposition that he found “three or four” books authoritative could be compelled to identify those books); *Kirker v Nicolla*, 256 AD2d 865, 681 NYS2d 689 (3d Dept 1998) (citing *Mark v Colgate University*, 53 AD2d 884, 385 NYS2d 621 (2d Dept 1976)) (expert need not have read treatise or scientific book; cross-examination permissible as long as expert recognizes treatise or book as authoritative), or has relied on the work as supporting his or her direct testimony, see *Lenzini v Kessler*, 48 AD3d 220, 851 NYS2d 163 (1st Dept 2008); *McEvoy v Lommel*, 78 App Div 324, 80 NYS 71 (1st Dept 1903). An expert may not foreclose cross-examination by means of a learned treatise by the semantic trick of stating that he or she did not find the work “authoritative” where the expert testifies that he or she relied on the text in his or her profession and finds the work reliable and trustworthy, *Kearney v Papish*, 136 AD3d 690, 24 NYS3d 708 (2d Dept 2016); see *Wolf v Persaud*, 130 AD3d 1523, 14 NYS3d 601 (4th Dept 2015). Where those conditions exist, the witness may be confronted with such parts of the work as are inconsistent with his or her direct testimony for the purpose of affecting the weight to be given the testimony, *Benson v Behrman*, 248 AD2d 153, 670 NYS2d 760 (1st Dept 1998); *Hastings v Chrysler Corp.*, 273 App Div 292, 77 NYS2d 524 (1st Dept 1948); *Egan v Dry Dock, E.B. & B.R. Co.*, 12 App Div 556, 42 NYS 188 (1st Dept 1896); see *People v Rose*, 41 AD3d 742, 840 NYS2d 363 (2d Dept 2007).

The contents of learned works may not be offered as proof of the facts contained therein, *Winiarski v Harris*, 78 AD3d 1556, 910 NYS2d 814 (4th Dept 2010); *Hastings v Chrysler Corp.*, 273 App Div 292, 77 NYS2d 524 (1st Dept 1948); *Prince, Richardson on Evidence* (11th Ed Farrell) § 7-313; see *Lipschitz v Stein*, 10 AD3d 634, 781 NYS2d 773 (2d Dept 2004) (learned works, which are hearsay, not admissible on direct examination); *Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 (2d Dept 2002) (medical texts inadmissible hearsay); *People v Beckwith*, 289 AD2d 956, 734 NYS2d 770 (4th Dept 2001); see also *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689, 723 NE2d 544 (1999) (Physician’s Desk Reference [PDR] and package insert information included with prescription drugs constitute inadmissible hearsay); *Saccone v Gross*, 84 AD3d 1208, 923 NYS2d 878 (2d Dept 2011) (same);

Rosario v New York City Health and Hospitals Corp., 87 AD2d 211, 450 NYS2d 805 (1st Dept 1982) (same):

If the contents of learned works have been raised on the examination of an expert witness, the court should instruct the jury as follows:

PJI 1:90.1

You will recall that [state expert witness's name] was called as a witness by (plaintiff AB, defendant CD). On cross-examination, [state expert witness's name] was asked whether (he, she) recognized (a certain work, certain works) as authoritative. Many professional treatises and articles are written, but they are not necessarily recognized as authoritative by all professionals in the field of [state witness's field of expertise]. Therefore, the fact that [state expert witness's name] did not recognize as authoritative some or all of the works listed by (AB's, CD's) lawyer should not be used by you in deciding the weight to be given [state expert witness's name] testimony.

With regard to those articles or treatises that [state expert witness's name] did recognize as authoritative, they should not be considered by you as proof of any fact. The only purpose for which the statements in those articles and treatises were (read, referred to) is to assist you in evaluating the reliability of [state expert witness's name] testimony. If you find that any statement contained in these articles or treatises is inconsistent with [state expert witness's name] testimony, you may consider that inconsistency in deciding what weight you will give to [state expert witness's name] testimony. You may not consider the contents of the articles or treatises for any other purpose.

Federal Annotation: Fed R Evid 803(18) allows the use of the contents of articles and treatises as evidence of the facts contained therein; however, the document cannot be admitted as an exhibit.

C. Demonstrative Evidence

The term “demonstrative evidence” has been used by the courts to characterize different forms of evidence and exhibits. “Demonstrative

evidence” is sometimes used to characterize an object, exhibit, display, document, or the like that serves as real or substantive evidence in a case (e.g., a summary or chart satisfying ‘voluminous writings’ exception to best evidence rule), *Ed Guth Realty, Inc. v Gingold*, 34 NY2d 440, 358 NYS2d 367, 315 NE2d 441 (1974). The term is also used to describe an exhibit or display that illustrates or demonstrates a witness’s testimony about a matter that is in issue at a trial, *Harvey v Mazal American Partners*, 79 NY2d 218, 581 NYS2d 639, 590 NE2d 224 (1992); see *Hinlicky v Dreyfuss*, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006). Whether a particular exhibit is substantive evidence or limited-purpose demonstrative evidence sometimes presents a close question, such as when an expert uses a chart to outline alleged future damages. Thus, care must be taken by the court to ascertain the actual nature of the exhibit. That determination should be based on the particular circumstances of the case, including the arguments of counsel with respect to the exhibit. Where the demonstrative evidence is submitted for the limited purpose of illustrating or demonstrating a witness’s testimony, supplemental instruction PJI 1:90.2, *infra*, should be given to the jury. Conversely, if the demonstrative evidence is admitted as real or substantive evidence, the supplemental instruction must not be given. The ensuing commentary deals primarily with illustrative, limited-purpose demonstrative evidence.

Charts, maps, models, sketches, diagrams, simulations, recreations and reconstructions are forms of demonstrative evidence, see *Hinlicky v Dreyfuss*, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006) (algorithm used to show steps physician followed to clear plaintiff’s decedent for surgery); *People v Johnson*, 140 NY 350, 35 NE 604 (1893) (sketch used to show location of bloodstain); *People v Potter*, 255 AD2d 763, 682 NYS2d 238 (3d Dept 1998) (summaries of voluminous records and chart depicting how employee might use fictitious entries on employer’s books to conceal thefts); *Flah’s, Inc. v Richard Rosette Elec., Inc.*, 155 AD2d 772, 547 NYS2d 935 (3d Dept 1989) (diagram of electrical system); *Berwick v State*, 107 AD2d 79, 486 NYS2d 260 (2d Dept 1985) (topographical map of similar subdivision offered to show feasibility of development); see *Vinci v Ford Motor Co.*, 45 AD3d 335, 846 NYS2d 9 (1st Dept 2007) (admissibility of crash test film within court’s discretion, but error to exclude expert testimony in rebuttal). Simulations may be allowed only if they are made under conditions that are substantially similar (although not necessarily identical) to the conditions that existed at the time of the event, *Uss v Oyster Bay*, 37 NY2d 639, 376 NYS2d 449, 339 NE2d 147 (1975) (counsel properly permitted to strike model of pole to demonstrate that sign would not fall off; differences between conditions in courtroom and conditions at time of events could be explored through cross-examination).

Computer simulations such as animated portrayals of the events in issue may be admitted if based on evidence in the record, particularly where the jury is advised that the evidence is being admitted to assist the jury’s understanding of expert testimony and not to show what actually happened, *People v Morency*, 93 AD3d 736, 940 NYS2d 138 (2d

Dept 2012); *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3d Dept 2002); see *Kane v Triborough Bridge & Tunnel Authority*, 8 AD3d 239, 778 NYS2d 52 (2d Dept 2004). A trial court was held to have improvidently exercised its discretion in permitting a computer-generated animation to be played for the jury where, among other errors, the court failed to instruct the jury that the animation was being admitted for the limited purpose of illustrating an expert's opinion as to the cause of an accident and that the jury was not to consider the animation itself in determining what actually caused the accident, *Kane v Triborough Bridge & Tunnel Authority*, *supra*.

The party seeking to introduce demonstrative evidence must lay a foundation for its admission by establishing that it is relevant and an accurate and substantially similar representation of what it purports to depict, see *Kane v Triborough Bridge & Tunnel Authority*, 8 AD3d 239, 778 NYS2d 52 (2d Dept 2004); *Santucci v Govel Welding, Inc.*, 168 AD2d 845, 564 NYS2d 518 (3d Dept 1990); *Weinstein v Daman*, 132 AD2d 547, 517 NYS2d 278 (2d Dept 1987); *Norfleet v New York City Transit Authority*, 124 AD2d 715, 508 NYS2d 468 (2d Dept 1986); 5 *Barker and Alexander, Evidence in New York State and Federal Courts* § 11:20, at 1193–1194 (West's NY Prac Series 2004); 2 *McCormick on Evidence* § 214 (7th ed). Where demonstrative evidence is offered, the party opposing admission should be given an opportunity to conduct voir dire, see *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3d Dept 2002); see also *Uss v Oyster Bay*, 37 NY2d 639, 376 NYS2d 449, 339 NE2d 147 (1975) (counsel afforded unrestricted opportunity to cross-examine on courtroom demonstration).

The court has discretion to determine whether to permit a courtroom demonstration, *Uss v Oyster Bay*, 37 NY2d 639, 376 NYS2d 449, 339 NE2d 147 (1975); *Mechanick v Conradi*, 139 AD2d 857, 527 NYS2d 586 (3d Dept 1988). In deciding whether to admit demonstrative evidence, the court must be satisfied that the value of the evidence outweighs its potential for prejudice, see *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3d Dept 2002); see also *Kane v Triborough Bridge & Tunnel Authority*, 8 AD3d 239, 778 NYS2d 52 (2d Dept 2004). Demonstrative evidence may be excluded if it has “any tendency to exaggerate any of the true features which are sought to be proved,” *Mechanick v Conradi*, 139 AD2d 857, 527 NYS2d 586 (3d Dept 1988) (quoting *Boyar-sky v G.A. Zimmerman Corp.*, 240 App Div 361, 270 NYS 134 (1st Dept 1934)).

If the exhibit is received for demonstrative purposes only, the court should give the jury a limiting instruction. The following instruction, modified as necessary to comport with the facts and the demonstrative evidence, should be given to the jury before it has viewed the exhibit, and, where appropriate, in the final charge, see *Hinlicky v Dreyfuss*, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006); *Halls v Kiyici*, 104 AD3d 502, 960 NYS2d 423 (1st Dept 2013); *Kane v Triborough Bridge & Tunnel Authority*, 8 AD3d 239, 778 NYS2d 52 (2d Dept 2004); *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3d Dept 2002); 5 *Barker and Alexander, Evidence in New York State and Federal Courts* § 11:20, at

1194 (West's NY Prac Series 2001):

PJI 1:90.2

The [identify demonstrative exhibit] was (admitted, shown to you) for the limited purpose of illustrating and assisting you to understand the opinion of [state expert witness's name] and may not be considered for any other purpose.

Caveat: It is not clear from the case law whether demonstrative evidence received for the limited purpose of illustrating or demonstrating a witness' testimony should be admitted into evidence or just marked for identification or as a court exhibit. Similarly, the case law does not resolve the question whether the jury may view the limited-purpose demonstrative evidence in the jury room during deliberations. The federal courts have apparently debated this issue, see *Verizon Directories Corp. v Yellow Book USA, Inc.*, 331 F Supp 2d 136 (EDNY 2004); see also McCormick's on Evidence, § 214, pp 20–23 (7th Ed).

The supplemental charge recognizes that some trial courts admit into evidence limited-purpose demonstrative evidence, while others mark such evidence for identification or as a court exhibit. In the absence of appellate case law resolving these questions, a trial court must decide them based on the particular circumstances of a given case or the parties may resolve them by agreement.

D. Use of an Expert's Live Video and Deposition Testimony

Ordinarily, an expert, like any other witness, must testify in person. However, where the deposition of "a person authorized to practice medicine" has been taken, the deposition may be used at trial by any party, without having to demonstrate that the physician is unavailable or that special circumstances exist, CPLR 3117(a)(4). It appears that the deposition may be used only as against parties who were given notice of deposition and an opportunity to cross-examine, see CPLR 3107; Weinstein-Korn-Miller, *New York Civil Practice*, § 3117.05. A deposition may be recorded by video or audio tape, CPLR 3113(b); 22 NYCRR § 202.15.

Expert witnesses have also been permitted to give live video testimony, *State v Robert F.*, 25 NY3d 448, 13 NYS3d 319, 34 NE3d 829 (2015); see also *People v Wrotten*, 14 NY3d 33, 896 NYS2d 711, 923 NE2d 1099 (2009) (complaining witness). However, because live televised testimony is not the equivalent of in-person testimony, the decision to excuse a witness from testifying in the courtroom must be weighed carefully and live televised testimony should be permitted only in exceptional circumstances upon a fact-specific finding of necessity, *State v Robert F.*, *supra*.

III. Basis of Expert's Opinion

The traditional rule has been that an expert opinion must be based upon facts in evidence or personally known to the witness, *People v Miller*, 91 NY2d 372, 670 NYS2d 978, 694 NE2d 61 (1998); *People v Jones*, 73 NY2d 427, 541 NYS2d 340, 539 NE2d 96 (1989); *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *Cassano v Hagstrom*, 5 NY2d 643, 187 NYS2d 1, 159 NE2d 348 (1959); *Abrams v Bute*, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016). However, the permissible bases of expert opinion have been expanded, *People v Jones*, *supra*; *People v Sugden*, 35 NY2d 453, 363 NYS2d 923, 323 NE2d 169 (1974); see *Hamsch v New York City Transit Authority*, *supra*; *People v Stone*, 35 NY2d 69, 358 NYS2d 737, 315 NE2d 787 (1974).

Under modern principles, an expert may testify to an opinion based on (a) personal knowledge of the facts upon which the opinion rests, (b) facts and material in evidence (real or testimonial), (c) out-of-court material that is derived from a witness subject to full cross-examination, and (d) out-of-court material that is of the kind accepted in the profession as a basis in forming an opinion and is accompanied by evidence establishing its reliability, *People v Jones*, 73 NY2d 427, 541 NYS2d 340, 539 NE2d 96 (1989); *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept 2002); see *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *State v John S.*, 23 NY3d 326, 991 NYS2d 532, 15 NE3d 287 (2014); *State v Charada T.*, 23 NY3d 355, 991 NYS2d 9, 14 NE3d 362 (2014); *State v Floyd Y.*, 22 NY3d 95, 979 NYS2d 240, 2 NE3d 204 (2013); *People v Goldstein*, 6 NY3d 119, 810 NYS2d 100, 843 NE2d 727 (2005). These four permissible bases for expert opinions are discussed in detail below.

A. Facts Known by Witness

An expert's opinion may be based upon the expert's personal knowledge of the facts upon which the opinion rests, *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *Cassano v Hagstrom*, 5 NY2d 643, 187 NYS2d 1, 159 NE2d 348 (1959); *Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept 2002); *Pennzoil Co. v Carlson*, 178 AD2d 1005, 579 NYS2d 784 (4th Dept 1991); see *Adkins v Queens Van-Plan, Inc.*, 293 AD2d 503, 740 NYS2d 389 (2d Dept 2002) (expert may give opinion based on examination of plaintiff).

B. Facts in Evidence

An expert opinion may be based on facts that are in evidence, *Admiral Ins. Co. v Joy Contractors, Inc.*, 19 NY3d 448, 948 NYS2d 862, 972 NE2d 103 (2012); *Cassano v Hagstrom*, 5 NY2d 643, 187 NYS2d 1, 159 NE2d 348 (1959); see *Matter of 91st Street Crane Collapse Litigation*,

154 AD3d 139, 62 NYS3d 11 (1st Dept 2017); *Natale v Niagara Mohawk Power Corp.*, 135 AD2d 955, 522 NYS2d 364 (3d Dept 1987). Even where the expert witness did not visit the scene of plaintiff's sidewalk accident, the expert's affidavit was not impermissibly "speculative," since it was based on a review of documentary evidence and photographs, which had been identified as accurate, *Cuevas v New York*, 32 AD3d 372, 821 NYS2d 37 (1st Dept 2006). An expert may base an opinion on judicially-noticed facts, provided that an adequate and timely opportunity is provided to adverse parties to challenge applicability of judicial notice and to cross-examine the expert as to his or her opinion, *People v Jones*, 73 NY2d 427, 541 NYS2d 340, 539 NE2d 96 (1989). An expert opinion must be supported by facts in the record or generally known to the witness, and by not by guessing or speculation, *Ippolito v Consolidated Edison of New York, Inc.*, 177 AD3d 715, 113 NYS3d 717 (2d Dept 2019).

It is improper to question an expert based on hypothetical questions relying on facts not fairly inferable from the record, *Naughton v Arden Hill Hosp.*, 215 AD2d 810, 625 NYS2d 746 (3d Dept 1995). The failure to establish an adequate factual basis for expert testimony may render it inadmissible, *Matter of 91st Street Crane Collapse Litigation*, 154 AD3d 139, 62 NYS3d 11 (1st Dept 2017); *Erosa v Rinaldi*, 270 AD2d 384, 704 NYS2d 891 (2d Dept 2000); see *Kosiorek v Bethlehem Steel Corp.*, 145 AD2d 935, 536 NYS2d 614 (4th Dept 1988). If cross-examination reveals that an expert's opinion is based on facts not in evidence, the jury must be instructed to disregard the opinion, *Lopato v Kinney Rent-A-Car, Inc.*, 73 AD2d 565, 423 NYS2d 42 (1st Dept 1979); see also *Quinones v St. Vincent's Hospital of City of New York*, 20 AD2d 529, 244 NYS2d 690 (1st Dept 1963), *aff'd*, 16 NY2d 572, 260 NYS2d 842, 208 NE2d 786 (1965) (opinion of traumatic injury not admissible where X-rays and testimony of attending doctors indicated disease).

C. Out of Court Material Derived from Witness Subject to Cross-Examination

An expert may testify to an opinion based on material that came from a witness subject to full cross-examination on trial, but may not testify with respect to a report prepared by a second witness who did not testify, *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *Fred Singer Direct Marketing, Inc. v Media Resource Group, Inc.*, 305 AD2d 456, 759 NYS2d 333 (2d Dept 2003); *Flamio v State*, 132 AD2d 594, 517 NYS2d 756 (2d Dept 1987). Thus, where witnesses testified as to changes in decedent's physical and mental condition following his contact with a high voltage power line, medical experts could properly testify that contact with the power line caused decedent's death, *Natale v Niagara Mohawk Power Corp.*, 135 AD2d 955, 522 NYS2d 364 (3d Dept 1987). Additionally, an expert witness may base his or her opinion on an out-of-court written statement of a witness who testified at the trial, *Flamio v State*, *supra*; see *Adkins v Queens Van-Plan, Inc.*, 293 AD2d 503, 740 NYS2d 389 (2d Dept 2002) (expert may not testify to statements in treating physicians'

reports as they were not in evidence and treating physicians did not testify); *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 (2d Dept 1984) (expert may not rely primarily on opinions of witnesses who did not testify).

D. Professional Reliability Exception

Under the professional reliability exception to the traditional rule, expert testimony may be based on material of an out-of-court origin if it is of the kind accepted in the profession as reliable for forming an opinion, *Hinlicky v Dreyfuss*, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006); *People v Goldstein*, 6 NY3d 119, 810 NYS2d 100, 843 NE2d 727 (2005); *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *People v Sugden*, 35 NY2d 453, 363 NYS2d 923, 323 NE2d 169 (1974); *Tornatore v Cohen*, 162 AD3d 1503, 78 NYS3d 542 (4th Dept 2018); *People v Howard*, 134 AD3d 1153, 21 NYS3d 423 (3d Dept 2015); *Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept 2002).

In order to qualify for the professional reliability exception, there must be evidence establishing the reliability of each type of out-of-court material, *Hamsch v New York City Transit Authority*, 63 NY2d 723, 480 NYS2d 195, 469 NE2d 516 (1984); *People v Howard*, 134 AD3d 1153, 21 NYS3d 423 (3d Dept 2015) (expert, an insurance investigator, permitted to rely on information obtained in interviews with electrical consultant and individual with knowledge of facts relating to fire that expert investigated because expert's testimony demonstrated that information was reliable); *Caleb v Severson Environmental Services, Inc.*, 117 AD3d 1421, 984 NYS2d 749 (4th Dept 2014) (expert permitted to rely on measurements in report not admitted in evidence as expert testified information was of type relied on in profession and measurements not otherwise disputed or challenged); see *People v Goldstein*, 6 NY3d 119, 810 NYS2d 100, 843 NE2d 727 (2005) (material does not have to be universally accepted; widespread acceptance by professionals of good reputation sufficient).

In *Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept 2002), the court held that the reliability of the particular source of the information must be shown, see *D'Andraia v Pesce*, 103 AD3d 770, 960 NYS2d 154 (2d Dept 2013). This requirement was not satisfied where an expert who sent samples to an independent laboratory testified that reports such as those generated by the laboratory are generally relied on by professionals in his field, but did not conduct, supervise or observe the testing and did not describe the testing procedures or otherwise indicate that he had personal knowledge of the specific tests conducted, *A-Tech Concrete Co., Inc. v Tilcon New York, Inc.*, 60 AD3d 603, 874 NYS2d 565 (2d Dept 2009).

Where an expert relies on otherwise inadmissible hearsay evidence that has been deemed reliable, the testimony is admissible only if the hearsay evidence is not the principal basis for the expert's opinion but

rather is merely a link in the chain that led to the expert's opinion, *Ciocca v Park*, 21 AD3d 671, 799 NYS2d 677 (3d Dept 2005), *aff'd*, 5 NY3d 835, 805 NYS2d 539, 839 NE2d 892 (2005); *Tornatore v Cohen*, 162 AD3d 1503, 78 NYS3d 542 (4th Dept 2018); *Kendall v Amica Mut. Ins. Co.*, 135 AD3d 1202, 23 NYS3d 702 (3d Dept 2016); *People v Howard*, 134 AD3d 1153, 21 NYS3d 423 (3d Dept 2015); *O'Brien v Mbugua*, 49 AD3d 937, 853 NYS2d 392 (3d Dept 2008); *People v Wlasiuk*, 32 AD3d 674, 821 NYS2d 285 (3d Dept 2006); *Anderson v Dainack*, 39 AD3d 1065, 834 NYS2d 564 (3d Dept 2007); *Sigue v Chemical Bank*, 284 AD2d 246, 727 NYS2d 86 (1st Dept 2001); *Brown v Albany*, 271 AD2d 819, 706 NYS2d 261 (3d Dept 2000); *Borden v Brady*, 92 AD2d 983, 461 NYS2d 497 (3d Dept 1983). Thus, even where otherwise inadmissible evidence is found to be reliable, it may not be the sole basis for the expert's opinion, *Delosh v Amyot*, 186 AD3d 1793, 130 NYS3d 129 (3d Dept 2020); *O'Brien v Mbugua*, 49 AD3d 937, 853 NYS2d 392 (3d Dept 2008).

While an expert's opinion may be based in part on statements made out of court, whether hearsay evidence becomes admissible solely because of its use as a basis for expert testimony remains an open question in New York, *Hinlicky v Dreyfuss*, 6 NY3d 636, 815 NYS2d 908, 848 NE2d 1285 (2006); see *State v Floyd Y.*, 22 NY3d 95, 979 NYS2d 240, 2 NE3d 204 (2013); *People v Goldstein*, 6 NY3d 119, 810 NYS2d 100, 843 NE2d 727 (2005). In *State v Floyd Y.*, 22 NY3d 95, 979 NYS2d 240, 2 NE3d 204 (2013), the Court of Appeals rejected an "inflexible rule excluding all basis hearsay," at least in MHL article 10 proceedings, and held that basis hearsay is admissible where it satisfies stated "reliability and substantive relevance requirements."

Several Appellate Division opinions, however, have stated that the admission of the underlying basis information is violative of the rule against hearsay and is therefore not permitted, *D'Andraia v Pesce*, 103 AD3d 770, 960 NYS2d 154 (2d Dept 2013); *Adkins v Queens Van-Plan, Inc.*, 293 AD2d 503, 740 NYS2d 389 (2d Dept 2002); *Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept 2002). Applying this principle, some intermediate appellate courts have refused to permit the proponent of an expert witness's testimony to use the professional reliability exception to introduce in evidence a report prepared by a non-testifying physician, *Schwartz v Gerson*, 246 AD2d 589, 668 NYS2d 223 (2d Dept 1998); *Borden v Brady*, 92 AD2d 983, 461 NYS2d 497 (3d Dept 1983). In some cases, courts have authorized expert witnesses to describe the contents of out-of-court material on which they have relied as long as the material is being used for the limited purpose of informing the jury of the basis of the expert's opinion and not for the truth of the matters related, *People v Palacios*, 302 AD2d 540, 755 NYS2d 268 (2d Dept 2003); *People v Wright*, 266 AD2d 246, 697 NYS2d 667 (2d Dept 1999); *People v Campbell*, 197 AD2d 930, 602 NYS2d 282 (4th Dept 1993); see *O'Brien v Mbugua*, 49 AD3d 937, 853 NYS2d 392 (3d Dept 2008). This line of cases, however, is questionable in light of the Court of Appeals' decision in *State v Floyd Y.*, 22 NY3d 95, 979 NYS2d 240, 2 NE3d 204 (2013).

In *State v Floyd Y.*, 22 NY3d 95, 979 NYS2d 240, 2 NE3d 204 (2013), the Court held that, in a case arising under Article 10 of the Mental Hygiene Law, hearsay basis testimony may be admissible not for its truth but rather to assist the trier of fact to understand and evaluate the expert's opinion, but only where limiting instructions are given and, critically, only where (1) the proponent demonstrates through evidence that the hearsay is reliable; and (2) the court determines that the probative value of the evidence in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect, see *State v John S.*, 23 NY3d 326, 991 NYS2d 532, 15 NE3d 287 (2014); *State v Charada T.*, 23 NY3d 355, 991 NYS2d 9, 14 NE3d 362 (2014); see *State v Francisco R.*, 191 AD3d 989, 141 NYS3d 505 (2d Dept 2021) (expert relied upon findings from prison disciplinary hearing); *State v Abdul A.*, 123 AD3d 1047, 999 NYS2d 501 (2d Dept 2014). The *Floyd Y.* opinion seems to suggest that its holding was applicable only in civil proceedings brought pursuant to Mental Hygiene Law Art 10. To the extent that decisions such as *People v Palacios*, 302 AD2d 540, 755 NYS2d 268 (2d Dept 2003); *People v Wright*, 266 AD2d 246, 697 NYS2d 667 (2d Dept 1999); and *People v Campbell*, 197 AD2d 930, 602 NYS2d 282 (4th Dept 1993), suggest that basis hearsay may be admissible for the same limited purpose in non-Article 10 cases and without an evidentiary showing of reliability or a weighing of prejudice against probative worth, those cases would appear to contradict *Floyd Y.* For a Comment and charges on the rule discussed in *State v Floyd Y.*, supra, see PJI 8:8.5 and 8:8.6.

Federal Annotation: At the time that the Federal Rules of Evidence were enacted (1975), Rule 703 provided that a testifying expert could base his or her opinion on facts or data “perceived by or made known to him at or before the hearing” and that such facts or data need not themselves be admissible in evidence “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” In 2000, Rule 703 was amended to provide:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury to evaluate the opinion substantially outweighs their prejudicial effect.

Noting that courts had reached different results on the issue, the Advisory Committee stated that the Rule had been amended “to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.” The Advisory Committee further stated that the 2000 amendment “provides a

presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." If the probative value of the facts or data outweighs prejudice, the Advisory Committee Note states that a limiting instruction must be given, upon request, advising the jury to consider the information only for the purpose of evaluating the expert's opinion, and not as substantive evidence.

In *Williams v Illinois*, 132 SCt 2221 (2012), a plurality of the Court observed that there are at least four safeguards to prevent the abuse of Rule 703 as a conduit for hearsay. One such safeguard is that experts are generally precluded from disclosing inadmissible evidence to the jury.

While New York courts have referred to Rule 703, the Court of Appeals has not decided whether the New York rule is the same as or is less or more restrictive than the federal rule, *People v Goldstein*, 6 NY3d 119, 810 NYS2d 100, 843 NE2d 727 (2005); *Gordon v Brown*, 84 NY2d 574, 620 NYS2d 749, 644 NE2d 1305 (1994) (New York has no rule of evidence comparable to Rule 703).

E. Admissibility of Medical and Hospital Reports as Business Reports

Hospital records fall within the business records exception to the rule against hearsay when they reflect acts, occurrences or events that relate to diagnosis, prognosis or treatment, *People v Ortega*, 15 NY3d 610, 917 NYS2d 1, 942 NE2d 210 (2010); *Williams v Alexander*, 309 NY 283, 129 NE2d 417 (1955). Likewise, physicians' office records, supported by the statutory foundation of CPLR 4518 (a) are admissible into evidence as business records, see *Bronstein-Becher v Becher*, 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006); *Progressive Northeastern Ins. Co. v Randazzo*, 24 AD3d 560, 808 NYS2d 262 (2d Dept 2005); *Fanelli v di Lorenzo*, 187 AD2d 1004, 591 NYS2d 658 (4th Dept 1992); *Hefte v Bellin*, 137 AD2d 406, 524 NYS2d 42 (1st Dept 1988); *Wilson v Bodian*, 130 AD2d 221, 519 NYS2d 126 (2d Dept 1987); *McClure by Young v Baier's Automotive Service Center, Inc.*, 126 AD2d 610, 511 NYS2d 50 (2d Dept 1987).

Hospital records relating to the condition or treatment of a patient may be authenticated as business records upon a "certification" from an appropriate official pursuant to CPLR 4518(c) and CPLR 2306(a). The statute authorizes certification of hospital records produced by non-parties whether or not pursuant to subpoena so long as the custodian or other qualified witness attests in accordance with the rule, see *People v Montgomery*, 195 AD2d 886, 600 NYS2d 814 (3d Dept 1993) (admissibility of records not dependent on service of subpoena); *Joyce v Kowalcewski*, 80 AD2d 27, 437 NYS2d 809 (4th Dept 1981) (properly authenticated records produced voluntarily by out-of state hospital are

admissible). Although there is no specific certification provision for physicians' office records, such records are admissible if supported by the statutory foundation set forth in CPLR 4518(a), *Bronstein-Becher v Becher*, 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006); *Wilson v Bodian*, 130 AD2d 221, 519 NYS2d 126 (2d Dept 1987); see *Viera v Khasdan*, 185 AD3d 405, 126 NYS3d 462 (1st Dept 2020) (dental records created in the regular course of business are admissible as business records to the extent they are germane to the diagnosis and treatment of the patient); see also CPLR 3122-a. However, admitting uncertified hospital records may be harmless error if not published or provided to jury during deliberations. *Harris v Campbell*, 155 AD3d 1622, 65 NYS3d 616 (4th Dept 2017).

CPLR 3122-a, which is not limited to medical records, provides a means to establish the foundation for the business records exception without the necessity of testimony from the records custodian. Prior to August 11, 2014, only business records produced pursuant to subpoena duces tecum under CPLR 3120 were clearly eligible for CPLR 3122-a certification, but an amendment states that certification may be used as to business records produced by non-parties whether or not pursuant to subpoena. The right to object to the admission of such records is nevertheless retained for any reason other than the failure to satisfy the requirements of CPLR 4518(a); see CPLR 3122-a(c); see also Recommendations to the Advisory Committee on Civil Practice.

With respect to medical records, the failure to object within the time frame established by CPLR 3122-a does not waive any objection to the admissibility of the entries in such records based on other rules of evidence, *Siemucha v Garrison*, 111 AD3d 1398, 975 NYS2d 518 (4th Dept 2013); see *Afridi v Glen Oaks Village Owners, Inc.*, 49 AD3d 571, 854 NYS2d 446 (2d Dept 2008). A similar provision providing a means to authenticate the results of a medical or diagnostic procedure or test is embodied in CPLR 4532-a.

Diagnoses, conclusions and opinions pertinent to diagnosis, prognosis or treatment contained in hospital records are admissible, *People v Kohlmeyer*, 284 NY 366, 31 NE2d 490 (1940); *Davis v A.H. Robins Co.*, 99 AD2d 342, 473 NYS2d 182 (1st Dept 1984); see *Progressive Northeastern Ins. Co. v Randazzo*, 24 AD3d 560, 808 NYS2d 262 (2d Dept 2005). Similarly, at least in the Second Department, entries in physicians' office records, including medical opinions and conclusions, are admissible when pertinent to diagnosis, prognosis or treatment, *Wilson v Bodian*, 130 AD2d 221, 519 NYS2d 126 (2d Dept 1987) (drawing a distinction between physicians' office records and physicians' medical reports); see *Murray v Weisenfeld*, 37 AD3d 432, 829 NYS2d 592 (2d Dept 2007); *Bruce-Bishop v Jafar*, 302 AD2d 345, 753 NYS2d 890 (2d Dept 2003). In the First and Third Departments, there are cases holding that records and reports containing medical opinions and diagnosis are not admissible under CPLR 4518, *Donoso v Motor Vehicle Accident Indemn. Corp.*, 118 AD3d 461, 988 NYS2d 139 (1st Dept 2014); *Rickert v Diaz*, 112 AD3d 451, 976 NYS2d 80 (1st Dept 2013); *Komar v*

Showers, 227 AD2d 135, 641 NYS2d 643 (1st Dept 1996); Rodriguez v Zampella, 42 AD2d 805, 346 NYS2d 558 (3d Dept 1973). However, to the extent these cases are based on Rodriguez v Zampella, supra, they may be questionable authority, see Matter of Harvey U, 116 AD2d 351, 501 NYS2d 920 (3d Dept 1986), rev'd on other grounds, 68 NY2d 624, 505 NYS2d 70, 496 NE2d 229 (1986); see also Hefte v Bellin, 137 AD2d 406, 524 NYS2d 42 (1st Dept 1988).

Medical reports which are not made within the ordinary course of diagnosis or treatment of a patient are not admissible under the business records exception, Williams v Alexander, 309 NY 283, 129 NE2d 417 (1955); see Donoso v Motor Vehicle Accident Indemn. Corp., 118 AD3d 461, 988 NYS2d 139 (1st Dept 2014); Rickert v Diaz, 112 AD3d 451, 976 NYS2d 80 (1st Dept 2013); Bronstein-Becher v Becher, 25 AD3d 796, 809 NYS2d 140 (2d Dept 2006). Such reports, which are generally prepared for litigation purposes, are not the systematic, routine day-to-day type of records envisioned by the business records exception to the hearsay rule, Wilson v Bodian, 130 AD2d 221, 519 NYS2d 126 (2d Dept 1987); see Daniels v Simon, 99 AD3d 658, 951 NYS2d 745 (2d Dept 2012); Bronstein-Becher v Becher, supra; Komar v Showers, 227 AD2d 135, 641 NYS2d 643 (1st Dept 1996); see also Palmer v Hoffman, 318 US 109, 63 S Ct 477 (1943).

Where details of how a particular injury occurred are not useful for purposes of medical diagnosis, prognosis or treatment, they are not considered to have been recorded in the regular course of a hospital's business, People v Ortega, 15 NY3d 610, 917 NYS2d 1, 942 NE2d 210 (2010); Williams v Alexander, 309 NY 283, 129 NE2d 417 (1955); see Nieves v New York City Housing Authority, 200 AD2d 427, 606 NYS2d 224 (1st Dept 1994). Nonetheless, a number of Appellate Division opinions have stated that an entry in a hospital record about how an injury occurred is admissible, even if not germane to diagnosis, prognosis or treatment, if the entry is inconsistent with the party's position at trial and there is evidence to connect the party to the admission, Berkovits v Chaaya, 138 AD3d 1050, 31 NYS3d 531 (2d Dept 2016); Robles v Polytemp, Inc., 127 AD3d 1052, 7 NYS3d 441 (2d Dept 2015); Barris v One Beard Street, LLC, 126 AD3d 831, 6 NYS3d 262 (2d Dept 2015). Benavides v New York, 115 AD3d 518, 982 NYS2d 85 (1st Dept 2014); Grant v New York City Transit Authority, 105 AD3d 445, 963 NYS2d 63 (1st Dept 2013); Kamolov v BIA Group, LLC, 79 AD3d 1101, 915 NYS2d 588 (2d Dept 2010); Smolinski v Smolinski, 78 AD3d 1642, 912 NYS2d 820 (4th Dept 2010); Preadakaj v Alps Realty of N.Y. Corp., 69 AD3d 455, 894 NYS2d 21 (1st Dept 2010); Coker v Bakkal Foods, Inc., 52 AD3d 765, 861 NYS2d 384 (2d Dept 2008); Berrios v TEG Management Corp., 35 AD3d 775, 826 NYS2d 740 (2d Dept 2006); Cuevas v Alexander's, Inc., 23 AD3d 428, 805 NYS2d 605 (2d Dept 2005); Echeverria v New York, 166 AD2d 409, 560 NYS2d 473 (2d Dept 1990); Gunn v New York, 104 AD2d 848, 480 NYS2d 365 (2d Dept 1984); Allstate Ins. Co. v Spadaccini, 52 AD2d 813, 383 NYS2d 605 (1st Dept 1976). These opinions, all of which are more recent than Williams v Alexander, supra, do not attempt to reconcile their holdings with Williams and People v Ortega, supra.

Even if an entry in a medical record as to the patient's history is germane to diagnosis, prognosis or treatment, the entry is inadmissible if the source of the information is unknown, *Progressive Northeastern Ins. Co. v Randazzo*, 24 AD3d 560, 808 NYS2d 262 (2d Dept 2005); *Ginsberg by Ginsberg v North Shore Hosp.*, 213 AD2d 592, 624 NYS2d 257 (2d Dept 1995). The patient, however, need not be the source of the information to make the record admissible, *Crisci v Sadler*, 253 AD2d 447, 676 NYS2d 646 (2d Dept 1998) (parents of infant plaintiff).

The Court of Appeals requires that each participant in the chain producing the record, from the initial declarant to the final entrant, be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception, *Matter of Leon RR*, 48 NY2d 117, 421 NYS2d 863, 397 NE2d 374 (1979); *Johnson v Lutz*, 253 NY 124, 170 NE 517 (1930). Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well, *Matter of Leon RR*, *supra*; see *People v Cratsley*, 86 NY2d 81, 629 NYS2d 992, 653 NE2d 1162 (1995). However, without addressing the business duty requirement, some cases hold that, where a physician's office records are admissible, the included records, reports and correspondence generated by other medical professionals and laboratories with respect to the patient's diagnosis, prognosis and treatment are also admissible, *Cohn v Haddad*, 244 AD2d 519, 664 NYS2d 621 (2d Dept 1997); *Freeman v Kirkland*, 184 AD2d 331, 584 NYS2d 828 (1st Dept 1992).

Entries in medical records which are unclear due to abbreviations or otherwise should not be admitted into evidence, *Wilson v Bodian*, 130 AD2d 221, 519 NYS2d 126 (2d Dept 1987).

Redaction of inadmissible entries in medical records, with receipt into evidence of the admissible portions, is appropriate, *People v Egbert*, 122 AD2d 599, 505 NYS2d 12 (4th Dept 1986).

F. Disclosure of Basis

1. At Trial

When expert testimony is offered at trial, a properly qualified expert witness may state the opinion and reasons for it without first specifying the technical data upon which the opinion is based, leaving the development of that data to cross-examination, CPLR 4515; see *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (1998); *Tarlowe v Metropolitan Ski Slopes, Inc.*, 28 NY2d 410, 322 NYS2d 665, 271 NE2d 515 (1971). Weaknesses in the expert's qualifications and foundational support are appropriate subjects for cross-examination, *Adamy v Ziriakus*, *supra*. However, CPLR 4515 does not change the basic principle that an expert's opinion not based on facts is "worthless," *Caton v Doug Urban Const. Co.*, 65 NY2d 909, 493 NYS2d 453, 483 NE2d 128 (1985); see *Diaz v New York Downtown Hosp.*, 99 NY2d 542,

754 NYS2d 195, 784 NE2d 68 (2002); *People v Jones*, 73 NY2d 427, 541 NYS2d 340, 539 NE2d 96 (1989), nor does it mean that an opposing party cannot move to preclude or strike the testimony, or move for dispositive relief based upon a failure of proof.

2. *On Summary Judgment*

Ordinarily, a qualified expert's opinion, such as a conclusion that plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of defendants but not where the expert's affidavit is conclusory and nonspecific, *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796 (1994); see *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095, 69 NYS3d 410 (3d Dept 2018). An expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that its conclusions are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor, *Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589, 684 NE2d 19 (1997); see *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195, 784 NE2d 68 (2002); *Grynberg v Giffen*, 119 AD3d 526, 989 NYS2d 103 (2d Dept 2014); *Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 (2d Dept 2002); *Bova v Saratoga*, 258 AD2d 748, 685 NYS2d 834 (3d Dept 1999) (expert's affidavit lacking both reference to outside material supporting conclusions and litany of witness's professional licenses, degrees, or other affiliations insufficient); *Marconi v Reilly*, 254 AD2d 463, 678 NYS2d 785 (2d Dept 1998) (toxicologist's affidavit regarding effects of alcohol sufficiently probative to defeat summary judgment where opinion based on knowledge acquired through expert's personal professional experience and affidavit included scientific data underlying conclusions); see also *People v Oddone*, 22 NY3d 369, 980 NYS2d 912, 3 NE3d 1160 (2013) (expert may base opinion on experience). Thus, the "expert" affidavit of a registered architect and licensed engineer indicating that the window through which decedent fell lacked necessary safety features was insufficient to defeat summary judgment, where the affidavit cited no authority, treatise, standard, applicable building code provision, article or other corroborating evidence, *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 798 NYS2d 715, 831 NE2d 960 (2005). Similarly, a meteorologist's affidavit opining that there was a storm in progress when the plaintiff fell on ice and snow was insufficient where it was not accompanied by the meteorological data on which the opinion was based, *Schuster v Dukarm*, 38 AD3d 1358, 831 NYS2d 619 (4th Dept 2007).

Although an expert's affidavit cannot be merely speculative, a medical expert's opinion on deviation from relevant standards need not be based on medical literature, studies or professional group rules if it does not involve a novel scientific theory, *Mitrovic v Silverman*, 104 AD3d 430, 961 NYS2d 75 (1st Dept 2013). Such an opinion may be based instead on personal knowledge acquired through professional experience, *id.*

IV. Novel Scientific Evidence

A. Background

In determining admissibility of novel scientific evidence, New York State courts have adhered to the test set forth in *Frye v United States*, 293 F 1013 (DC Cir 1923), which holds that, to be sufficiently reliable to be admissible, novel evidence must be generally accepted in the relevant scientific community, *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014); *People v Angelo*, 88 NY2d 217, 644 NYS2d 460, 666 NE2d 1333 (1996); *People v Wesley*, 83 NY2d 417, 611 NYS2d 97, 633 NE2d 451 (1994); *Nonnon v New York*, 32 AD3d 91, 819 NYS2d 705 (1st Dept 2006), *aff'd*, 9 NY3d 825, 842 NYS2d 756, 874 NE2d 720 (2007); *Johnson v Guthrie Medical Group, P.C.*, 125 AD3d 1445, 3 NYS3d 828 (4th Dept 2015); see *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 (2016). The general-acceptance test is ordinarily used to determine the reliability of the expert's methodologies used to reach deductions and conclusions, *Sean R. ex rel. Debra R. v BMW of North America, LLC*, *supra*; *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006); *People v Wernick*, 89 NY2d 111, 651 NYS2d 392, 674 NE2d 322 (1996); *Nonnon v New York*, *supra*; *Frye v Montefiore Medical Center*, 100 AD3d 28, 951 NYS2d 4 (1st Dept 2012); *Muhammad v Fitzpatrick*, 91 AD3d 1353, 937 NYS2d 519 (4th Dept 2012); *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 (2d Dept 2011); *Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42, 929 NYS2d 264 (2d Dept 2011). "General acceptance" does not necessarily require that a majority of scientists in the discipline subscribe to the expert's conclusion; rather, the test demands only that those espousing the theory or conclusion must have followed generally accepted scientific principles and methodology in evaluating data and reaching conclusions, *Johnson v Guthrie Medical Group, P.C.*, *supra*; *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 (2d Dept 2011); *Lugo v New York City Health and Hospitals Corp.*, *supra*; *Zito v Zabarsky*, 28 AD3d 42, 812 NYS2d 535 (2d Dept 2006); see *Sean R. ex rel. Debra R. v BMW of North America, LLC*, *supra*; *Sadek v Wesley*, 117 AD3d 193, 986 NYS2d 25 (1st Dept 2014), *aff'd*, 27 NY3d 982, 32 NYS3d 42, 51 NE3d 553 (2016).

Before 1993, the *Frye* analysis was almost exclusively confined to the admissibility of scientific evidence in criminal cases, and the opinion in *Frye v United States*, 293 F 1013 (DC Cir 1923), was cited in only a few instances, see *People v Taylor*, 75 NY2d 277, 552 NYS2d 883, 552 NE2d 131 (1990) (rape trauma syndrome); *People v Smith*, 63 NY2d 41, 479 NYS2d 706, 468 NE2d 879 (1984) (bite mark analysis); *People v Hughes*, 59 NY2d 523, 466 NYS2d 255, 453 NE2d 484 (1983) (hypnotic induced memory); *People v Middleton*, 54 NY2d 42, 444 NYS2d 581, 429 NE2d 100 (1981) (bite mark comparisons). In 1993, however, the United States Supreme Court held in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 113 S Ct 2786 (1993), that Federal Rule of Evidence 702 did not require rigid adherence to the general-acceptance standard

of Frye. Instead, the Daubert Court set forth four non-exclusive factors for determining admissibility: (1) general acceptance in the relevant scientific community, (2) peer review and publication, (3) known error rate, and (4) maintenance of proper standards. Although the Daubert Court eschewed a strict test for admissibility, it stressed that federal trial judges must still act as “gatekeepers” to prevent unreliable and irrelevant scientific data from being placed before juries in civil as well as criminal cases. The importance of “gatekeeping” was emphasized in *General Elec. Co. v Joiner*, 522 US 136, 118 SCt 512 (1997), and expanded to include non-scientific technical evidence in *Kumho Tire Co., Ltd. v Carmichael*, 526 US 137, 119 SCt 1167 (1999). In *General Elec. Co. v Joiner*, supra, a case involving allegations that the plaintiff’s exposure to PCB’s caused his cancer, the court stated, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.” After *Daubert*, New York State and federal trial courts began holding hearings or reviewing paper submissions in a variety of civil contexts before admitting expert evidence based on novel science, see *Bennett v Saeger Hotels, Inc.*, 209 AD2d 946, 619 NYS2d 424 (4th Dept 1994) (stating that Frye test applies in civil cases).

Notwithstanding the decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 113 SCt 2786 (1993), the New York Court of Appeals reiterated its adherence to the Frye standard for admissibility of scientific evidence in *People v Wesley*, 83 NY2d 417, 611 NYS2d 97, 633 NE2d 451 (1994), and has repeatedly applied that standard in both criminal, *People v Abney*, 13 NY3d 251, 889 NYS2d 890, 918 NE2d 486 (2009) (abuse of discretion to exclude expert on eye witness identification); *People v LeGrand*, 8 NY3d 449, 835 NYS2d 523, 867 NE2d 374 (2007); *People v Lee*, 96 NY2d 157, 726 NYS2d 361, 750 NE2d 63 (2001); *People v Wernick*, 89 NY2d 111, 651 NYS2d 392, 674 NE2d 322 (1996) (“neonaticide syndrome” evidence); *People v Angelo*, 88 NY2d 217, 644 NYS2d 460, 666 NE2d 1333(1996) (polygraph results); *People v Wesley*, supra (DNA evidence), and civil cases, *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014); see *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006). However, while the *Frye* general-acceptance standard continues to control in New York, the State’s trial judges have embraced the “gatekeeper” role and have increasingly taken an active part in assessing the admissibility of “novel” scientific evidence in formal hearings, see *People v Santiago*, 17 NY3d 661, 934 NYS2d 746, 958 NE2d 874 (2011); *People v LeGrand*, 8 NY3d 449, 835 NYS2d 523, 867 NE2d 374 (2007); *Styles v General Motors Corp.*, 20 AD3d 338, 799 NYS2d 38 (1st Dept 2005) (remitting for *Frye* hearing to determine reliability of trial expert’s theory, which combined two different, previously accepted crash tests); *DeMeyer v Advantage Auto*, 9 Misc3d 306, 797 NYS2d 743 (Sup 2005); *Clemente v Blumenberg*, 183 Misc2d 923, 705 NYS2d 792 (Sup 1999).

B. Application of the Frye Test in New York

The Frye test has traditionally asked whether the expert’s

methodologies and deductions have gained general acceptance as reliable in the relevant scientific community, *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 (2016); see *Frye v Montefiore Medical Center*, 100 AD3d 28, 951 NYS2d 4 (1st Dept 2012) (plaintiff's expert's opinion on causation inadmissible where other experts on whose work plaintiff's expert relied submitted affidavits directly controverting plaintiff's expert's theories and explaining how plaintiff's expert had misinterpreted their work); see *State v Ian I.*, 127 AD3d 766, 7 NYS3d 199 (2d Dept 2015) (court should have held *Frye* hearing where, although use of actuarial risk assessment instruments is scientifically accepted as means to measure risk of recidivism, use of such instruments to determine existence of mental abnormality as defined in Mental Hygiene Law § 10.03[i] is novel). The burden of proving general acceptance rests upon the party offering the disputed expert testimony, *Nonnon v New York*, 32 AD3d 91, 819 NYS2d 705 (1st Dept 2006), *aff'd*, 9 NY3d 825, 842 NYS2d 756, 874 NE2d 720 (2007); *Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42, 929 NYS2d 264 (2d Dept 2011); *Zito v Zabarsky*, 28 AD3d 42, 812 NYS2d 535 (2d Dept 2006); *Saulpaugh ex rel. Saulpaugh v Krafte*, 5 AD3d 934, 774 NYS2d 194 (3d Dept 2004). In determining whether a theory has gained general acceptance in the relevant scientific community, the court may consider controlled studies, clinical data, professional literature, recognized text books, peer review and judicial opinions indicating general acceptance of the theory, see *Lahey v Kelly*, 71 NY2d 135, 524 NYS2d 30, 518 NE2d 924 (1987); *Shah v Rahman*, 167 AD3d 671, 88 NYS3d 228 (2d Dept 2018) (court properly relied upon previous rulings in other court proceedings as aid to determining admissibility); *Lewin v Suffolk*, 18 AD3d 621, 795 NYS2d 659 (2d Dept 2005); *Pauling v Orentreich Medical Group*, 14 AD3d 357, 787 NYS2d 311 (1st Dept 2005); *Saulpaugh ex rel. Saulpaugh v Krafte*, *supra*; *People v Scoon*, 303 AD2d 525, 756 NYS2d 100 (2d Dept 2003); *People v Morales*, 227 AD2d 648, 643 NYS2d 217 (2d Dept 1996); see also *Heckstall v Pincus*, 19 AD3d 203, 797 NYS2d 445 (1st Dept 2005) (unverified listings and reporting of adverse reactions from drug not generally accepted in scientific community as evidence of causation).

Where the scientific evidence proffered is not novel but there may be insufficient foundation for its application in the specific case, the court focuses not on the general reliability concerns addressed in the *Frye* test but on the specific reliability of the procedures followed to generate the evidence, *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006); *Shah v Rahman*, 167 AD3d 671, 88 NYS3d 228 (2d Dept 2018); *Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42, 929 NYS2d 264 (2d Dept 2011); *Jackson v Nutmeg Technologies, Inc.*, 43 AD3d 599, 842 NYS2d 588 (3d Dept 2007). In such cases, there must be a separate inquiry concerning whether there is a sufficient foundation to apply the science to a particular case before the expert evidence is admissible, *Parker v Mobil Oil Corp.*, *supra*; see *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 (2016); *Shah v Rahman*, *supra*. However, the court may conduct a preliminary assessment as to whether there is

a sufficiently reliable basis for the evidence, *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006); *Nonnon v New York*, 32 AD3d 91, 819 NYS2d 705 (1st Dept 2006), *aff'd*, 9 NY3d 825, 842 NYS2d 756, 874 NE2d 720 (2007); *Muhammad v Fitzpatrick*, 91 AD3d 1353, 937 NYS2d 519 (4th Dept 2012); *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 (2d Dept 2011); *Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42, 929 NYS2d 264 (2d Dept 2011); *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 (2d Dept 2010); *Jackson v Nutmeg Technologies, Inc.*, 43 AD3d 599, 842 NYS2d 588 (3d Dept 2007); see *Sadek v Wesley*, 117 AD3d 193, 986 NYS2d 25 (1st Dept 2014), *aff'd*, 27 NY3d 982, 32 NYS3d 42, 51 NE3d 553 (2016).

In ruling upon whether a proper foundation has been established, the court should not make a determination on whether the evidence is true, *Nonnon v New York*, 32 AD3d 91, 819 NYS2d 705 (1st Dept 2006), *aff'd*, 9 NY3d 825, 842 NYS2d 756, 874 NE2d 720 (2007); *Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42, 929 NYS2d 264 (2d Dept 2011). Once the Frye reliability test and foundation requirements have been satisfied, it is for the jury to consider the weight of the evidence, including any possible infirmities in the collection and analysis of data, *Nonnon v New York*, *supra*. The fact that there is no textual material to directly support the expert's testimony may be relevant to the weight, not the admissibility, of the testimony, *Lugo v New York City Health and Hospitals Corp.*, *supra*; *Zito v Zabarsky*, 28 AD3d 42, 812 NYS2d 535 (2d Dept 2006). Testimony from an expert who gives an opinion based on personal experience rather than published studies is admissible without regard to established scientific basis as long as it is subject to cross-examination and the jury is not misled into thinking that the opinion reflects generally accepted principles, *People v Oddone*, 22 NY3d 369, 980 NYS2d 912, 3 NE3d 1160 (2013).

There is a question whether Frye's "general acceptance" standard should be applied to the theory or conclusion reached by the expert, or to the principles and methodology used in arriving at the theory or conclusion, or to both. The courts have sometimes used terms such as "theory," "methodology," "principles" and "conclusion." Before its decision in *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014), the Court of Appeals appeared to limit Frye's "general acceptance" standard to the methodology upon which the expert's opinion was based, see *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006); *People v Wesley*, 83 NY2d 417, 611 NYS2d 97, 633 NE2d 451 (1994); *People v Middleton*, 54 NY2d 42, 444 NYS2d 581, 429 NE2d 100 (1981); see also *People v Oddone*, 22 NY3d 369, 980 NYS2d 912, 3 NE3d 1160 (2013) (expert opinion based upon personal experience, and not scientific principle supported by published studies or texts, not barred by Frye); *Doviak v Finkelstein & Partners, LLP*, 137 AD3d 843, 27 NYS3d 164 (2d Dept 2016) (same). In *Cornell*, however, the Court of Appeals noted that, in the area of social science, it has gone beyond consideration of methodology and measured the reliability of experts' conclusions and theories against the Frye standard, *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762,

986 NYS2d 389, 9 NE3d 884 (2014) (citing *People v LeGrand*, 8 NY3d 449, 835 NYS2d 523, 867 NE2d 374 (2007); *People v Taylor*, 75 NY2d 277, 552 NYS2d 883, 552 NE2d 131 (1990)). The Cornell Court noted that the expert in that case failed to show that his “theory of causation enjoyed general scientific acceptance” because he “departed from the generally accepted methodology for evaluating epidemiological evidence.” Cornell cited both *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 113 SCt 2786 (1993), and *General Elec. Co. v Joiner*, 522 US 136, 118 SCt 512 (1997), for the proposition that “even where the expert is using reliable principles and is extrapolating from reliable data, a court may exclude opinion if there is ‘too great an analytical gap between the data and the opinion proffered’ ” or “if the opinion evidence is connected to existing data only by the *ipse dixit* of the expert,” see *Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 870 NYS2d 266 (1st Dept 2008).

Subsequently, some courts have applied the Frye “general acceptance” standard to an expert’s “causation theory” outside of the social science context, *Matter of Bausch & Lomb Contact Lens Solution Index Product Liability Litigation*, 125 AD3d 461, 999 NYS2d 743 (1st Dept 2015) (citing *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014)); *Pullman v Silverman*, 125 AD3d 562, 5 NYS3d 38 (1st Dept 2015) (“general acceptance” applied to both theory and methodology); see *Marso v Novak*, 42 AD3d 377, 840 NYS2d 53 (1st Dept 2007) (rejecting “methodology-only approach, noting that Frye also applies “when there is a generally or widely held view in the scientific community rejecting [the expert’s] conclusions outright”). Other courts, however, have refused to apply the “general acceptance” standard to an expert’s theory or conclusion, see *Johnson v Guthrie Medical Group, P.C.*, 125 AD3d 1445, 3 NYS3d 828 (4th Dept 2015); *Keilany B. ex rel. Xiomara S. v New York*, 122 AD3d 424, 997 NYS2d 372 (1st Dept 2014) (expert’s opinion regarding standard of care in treating injured’s condition not “the type of novel theory that necessitates [Frye] hearing”); *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 (2d Dept 2011) (discussing applicability of Frye); see also *Sadek v Wesley*, 117 AD3d 193, 986 NYS2d 25 (1st Dept 2014) (same), *affd* 27 NY3d 982, 32 NYS3d 42, 51 NE3d 553 (2016).

In the medical malpractice context, courts have, with increasing frequency, applied the Frye and Parker analyses to exclude expert theories of causation that are not derived from sound or generally accepted methodology, *Frye v Montefiore Medical Center*, 100 AD3d 28, 951 NYS2d 4 (1st Dept 2012); *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 933 NYS2d 323 (2d Dept 2011); *Lugo v New York City Health and Hospitals Corp.*, 89 AD3d 42, 929 NYS2d 264 (2d Dept 2011); *Marso v Novak*, 42 AD3d 377, 840 NYS2d 53 (1st Dept 2007); *Cumberbatch v Blanchette*, 35 AD3d 341, 825 NYS2d 744 (2d Dept 2006); *Saulpaugh ex rel. Saulpaugh v Krafte*, 5 AD3d 934, 774 NYS2d 194 (3d Dept 2004); *Lara v New York City Health and Hospitals Corp.*, 305 AD2d 106, 757 NYS2d 740 (1st Dept 2003); *Selig v Pfizer, Inc.*, 290 AD2d 319, 735 NYS2d 549 (1st Dept 2002); *Stanski v Ezersky*, 250 AD2d 422, 673 NYS2d 90 (1st

Dept 1998). However, the application of Frye in *Zito v Zabarsky*, 28 AD3d 42, 812 NYS2d 535 (2d Dept 2006), was found to be too restrictive where the expert's "novel" causation theory was supported by an extrapolation from certain generally accepted scientific principles. Similarly, the trial court's determination to exclude plaintiff's expert's causation theory after a Frye hearing was found to be error in *Marsh v Smyth*, 12 AD3d 307, 785 NYS2d 440 (1st Dept 2004), and *Sadek v Wesley*, 117 AD3d 193, 986 NYS2d 25 (1st Dept 2014), *affd* 27 NY3d 982, 32 NYS3d 42, 51 NE3d 553 (2016).

V. Specific Issues for Expert Testimony

A. Causation

Expert testimony has been admitted as to the cause or effect of a particular event, *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980) (effect presence of lobby attendant may have on deterring criminal activity); *Tarlowe v Metropolitan Ski Slopes, Inc.*, 28 NY2d 410, 322 NYS2d 665, 271 NE2d 515 (1971) (cause of skiing accident); *Karasik v Bird*, 98 AD2d 359, 470 NYS2d 605 (1st Dept 1984) (effect of medication); *Ward v Kovacs*, 55 AD2d 391, 390 NYS2d 931 (2d Dept 1977) (effect that taking LSD may have had on hand infection).

In toxic tort cases, expert opinion is often introduced to establish the causative relationship between the injured's exposure and his or her symptoms. In such cases, both "general causation" and "specific causation" must be shown, *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 (2016); *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014); *Nemeth v Brenntag North America*, 183 AD3d 211, 123 NYS3d 12 (1st Dept 2020); see *Nonnon v New York*, 88 AD3d 384, 932 NYS2d 428 (1st Dept 2011). "General causation" refers to the conclusion, generally accepted in the scientific community, that there is a cause-and-effect relationship between exposure to a toxin and particular symptoms, *Cornell v 360 West 51st Street Realty, LLC*, *supra*; see *Sean R. ex rel. Debra R. v BMW of North America, LLC*, *supra*. "Specific causation" refers to the conclusion that plaintiff was exposed to the toxin and that it actually caused his or her symptoms, *id.* Notably, an expert's testimony establishing an "association" or "linkage" between exposure and certain symptoms is not alone sufficient to prove "general causation," *Cornell v 360 West 51st Street Realty, LLC*, *supra*; see *Sean R. ex rel. Debra R. v BMW of North America, LLC*, *supra*; *Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 870 NYS2d 266 (1st Dept 2008). Standards promulgated by regulatory agencies as protective measures are also not sufficient to demonstrate legal causation, *Cornell v 360 West 51st Street Realty, LLC*, *supra*; *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006); see *Hamilton v Miller*, 23 NY3d 592, 992 NYS2d 190, 15 NE3d 1199 (2014) (in scientifically complex cases such as those involving lead paint injuries, general causation requires proof through scientific evidence that exposure can cause

plaintiffs alleged injuries; plaintiffs burden of proving general causation not satisfied by court's taking judicial notice of legislative statutory preamble opining on dangers of exposure).

Generally, the foundation for opinion evidence on causation should include a statement that (a) the injured was exposed to a particular toxin, (b) the toxin is capable of causing the injured's illness or symptoms (general causation) and (c) the injured was exposed to sufficient levels of the toxin to cause his or her illness or symptoms (specific causation), *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 (2016); *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014); *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 (2006); *Matter of New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 (1st Dept 2017), *aff'd*, 32 NY3d 1116, 91 NYS3d 784, 116 NE3d 75 (2018); *Nemeth v Brenntag North America*, 183 AD3d 211, 123 NYS3d 12 (1st Dept 2020); *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095, 69 NYS3d 410 (3d Dept 2018); *Nonnon v New York*, 88 AD3d 384, 932 NYS2d 428 (1st Dept 2011). However, it is not always necessary for plaintiff's expert precisely to quantify the exposure level, as long as whatever method of establishing causation used is generally accepted in the scientific community, *Sean R. ex rel. Debra R. v BMW of North America, LLC*, *supra*; *Parker v Mobil Oil Corp.*, *supra*; *Nonnon v New York*, *supra*; *Jackson v Nutmeg Technologies, Inc.*, 43 AD3d 599, 842 NYS2d 588 (3d Dept 2007); *Matter of New York City Asbestos Litigation*, *supra*; *Kendall v Amica Mut. Ins. Co.*, 135 AD3d 1202, 23 NYS3d 702 (3d Dept 2016). At a minimum though, there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of the agent that are known to cause the kind of harm that the plaintiff claims to have suffered, *Sean R. ex rel. Debra R. v BMW of North America, LLC*, *supra*; *Matter of New York City Asbestos Litigation*, *supra*; *Matter of New York City Asbestos Litigation (Robaey)*, 186 AD3d 401, 129 NYS3d 48 (1st Dept 2020). For example, in a case involving an alleged injury from exposure to benzene at the workplace, the Court of Appeals suggested that exposure levels could be estimated through the use of a mathematical model, comparison to the exposure levels of study subjects and qualitative means, *Parker v Mobil Oil Corp.*, *supra*; see *Nonnon v New York*, *supra*.

In *Nemeth v Brenntag North America*, 183 AD3d 211, 123 NYS3d 12 (1st Dept 2020), the plaintiff established general causation through a physician's opinion that asbestos in talc is capable of causing peritoneal mesothelioma, which opinion was based upon peer reviewed articles that reported epidemiological studies, case studies, her review of governmental and international agency positions on asbestos safety, and her personal experience treating patients with mesothelioma. As to specific causation, although there was no precise quantification of the amount of asbestos to which the plaintiff was exposed, the expert's opinion that the peritoneal mesothelioma was caused by the talc was sufficient to raise a jury question, as it was based upon the plaintiff's testimony regarding her frequent use of the talc, the known latency pe-

riod for the development of the disease, and an experiment showing the releasability of asbestos from the talc used in the product at issue. In *Matter of New York City Asbestos Litigation (Robaey)*, 186 AD3d 401, 129 NYS3d 48 (1st Dept 2020), the plaintiff established specific causation through expert testimony that visible brake dust from gaskets, containing between 50% and 85% asbestos, which dust necessarily contained several thousand times the safe amount of asbestos, caused the decedent's peritoneal mesothelioma. Since dust the plaintiff was regularly exposed to was visible, studies specific to the quantity of asbestos released while scraping brake gaskets were not necessary. In *Jackson v Nutmeg Technologies, Inc.*, 43 AD3d 599, 842 NYS2d 588 (3d Dept 2007), the court held that an adequate foundation was laid despite the fact that only marginal levels of toxin were found in the air and surfaces at plaintiff's work site, where there was evidence that the particular toxin dissipates rapidly, plaintiff's expert affirmed that the manner in which the toxin had been fed into the steam system caused concentrated levels to be released, the expert's conclusion on causation was based on a report that detailed the epidemiological methods he used to conduct the study and the facts relating to plaintiff's accident were compared to those recorded in other studies.

In contrast, in a case involving symptoms allegedly resulting from exposure to dampness and mold, the expert evidence of causation was insufficient where the expert failed to specify the level of exposure needed to produce plaintiff's symptoms and plaintiff failed to offer a reliable measurement of the level of mold in the apartment, *Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 870 NYS2d 266 (1st Dept 2008); see *Cleghorne v New York*, 99 AD3d 443, 952 NYS2d 114 (1st Dept 2012). In *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 884 (2014), plaintiff could not establish general causation where defendant's expert opined that it is not generally accepted within the relevant scientific community that exposure to mold can cause the particular illnesses of which plaintiff complained. In *Cornell*, plaintiff's expert made no effort to identify the specific disease-causing agent to which plaintiff was allegedly exposed, nor did he attempt to quantify plaintiff's level of exposure to an allegedly "unusual mixture" of molds. The Cornell Court declined on the evidence presented to accept the view that the performance of a differential diagnosis was sufficient to prove that plaintiff had been exposed to enough of a toxic agent to establish specific causation where general causation had not been established. However, the Cornell Court noted that there is no categorical rule that exposure to dampness and mold cannot be considered a cause of a plaintiff's disease, *Cornell v 360 West 51st Street Realty, LLC*, *supra*. In *Matter of New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 (1st Dept 2017), *aff'd*, 32 NY3d 1116, 91 NYS3d 784, 116 NE3d 75 (2018), although the plaintiff presented evidence showing an increased risk and association between asbestos and mesothelioma, she failed to either quantify the decedent's exposure levels or otherwise provide any scientific expression of exposure level with respect to the defendant's products.

As to the use of an "odor threshold analysis" to show that a plaintiff

was exposed to a certain level of a substance, see *Sean R. ex rel. Debra R. v BMW of North America, LLC*, 26 NY3d 801, 28 NYS3d 656, 48 NE3d 937 (2016) (concluding that “symptom-threshold” methodology, unlike “odor threshold analysis,” has not been shown to be generally accepted in scientific community).

B. Malpractice

In malpractice cases, plaintiff must present expert testimony to support the allegations of malpractice, unless the alleged act of malpractice is within the competence of a lay jury, 530 East 89 Corp. v Unger, 43 NY2d 776, 402 NYS2d 382, 373 NE2d 276 (1977) (architectural malpractice); *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20, 255 NYS2d 65, 203 NE2d 469 (1964) (medical malpractice); see *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003) (same); *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997) (discussing necessity of expert testimony in medical malpractice cases based upon *res ipsa loquitur*); *Koehler v Schwartz*, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140 (1979) (medical malpractice); *Columbus v Smith & Mahoney P.C.*, 259 AD2d 857, 686 NYS2d 235 (3d Dept 1999) (negligent design); PJI 2:150; PJI 2:152, PJI 2:153 and PJI 2:154. Failure to adduce expert testimony as to causation in a medical malpractice action may result in the failure to make out a *prima facie* case, see *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 (2d Dept 1996); *Kennedy v Peninsula Hosp. Center*, 135 AD2d 788, 522 NYS2d 671 (2d Dept 1987).

As a general rule, in a medical malpractice action against a doctor, the opinion of a witness who is not a doctor as to the proper course of treatment is not competent evidence on the issue of defendant’s negligence, *Parese v Shankman*, 300 AD2d 1087, 752 NYS2d 503 (4th Dept 2002); *Jordan v Glens Falls Hosp.*, 261 AD2d 666, 689 NYS2d 538 (3d Dept 1999); see *Elliot v Long Island Home, Ltd.*, 12 AD3d 481, 784 NYS2d 615 (2d Dept 2004); *LaMarque v North Shore University Hosp.*, 227 AD2d 594, 643 NYS2d 221 (2d Dept 1996). A medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, but the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that his or her opinion is reliable, *Tsimbler v Fell*, 123 AD3d 1009, 999 NYS2d 863 (2d Dept 2014); *Mitrovic v Silverman*, 104 AD3d 430, 961 NYS2d 75 (1st Dept 2013); *Ozugowski v New York*, 90 AD3d 875, 935 NYS2d 613 (2d Dept 2011); *Mustello v Berg*, 44 AD3d 1018, 845 NYS2d 86 (2d Dept 2007); *Behar v Coren*, 21 AD3d 1045, 803 NYS2d 629 (2d Dept 2005); *Postlethwaite v United Health Services Hospitals, Inc.*, 5 AD3d 892, 773 NYS2d 480 (3d Dept 2004). Although the absence of the same specialty may impact the weight to be given to the opinion, it does not render it inadmissible, *Goldschmidt v Cortland Regional Medical Center, Inc.*, 190 AD3d 1212, 141 NYS3d 522 (3d Dept 2021). Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered, *Keane v Dayani*, 178

AD3d 797, 114 NYS3d 93 (2d Dept 2019) (although radiologist was qualified to render opinion as to whether fracture was detectable on X-ray, he failed to lay foundation to render orthopedic opinion as to whether defendant's failure to diagnose fracture caused plaintiff's subsequent injuries); *DiLorenzo v Zaso*, 148 AD3d 1111, 50 NYS3d 503 (2d Dept 2017) (pediatrician and neonatologist failed to lay proper foundation for opinion regarding rheumatology); *Ozugowski v New York*, supra (internist/cardiologist failed to establish foundation for opinion regarding psychiatric treatment); *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 50 NYS3d 395 (1st Dept 2017) (general surgeon failed to lay proper foundation for opinion regarding gastroenterological treatment); *Mustello v Berg*, supra (same); *Behar v Coren*, supra (pathologist failed to establish proper foundation to opine on surgical and gastroenterological treatment); *Postlethwaite v United Health Services Hospitals, Inc.*, supra (physician whose expertise confined to anesthesiology and pharmacology properly permitted to testify regarding certain accepted medical practices in internal medicine, gastroenterology, general surgery and nursing, but properly precluded from testifying as to whether surgeon and gastroenterologist correctly diagnosed and treated decedent based upon accepted diagnostic practices in their respective fields); see *Escobar v Allen*, 5 AD3d 242, 774 NYS2d 28 (1st Dept 2004) (podiatrist licensed to treat the type of injury sustained by plaintiff should not have been precluded from testifying against defendant physician without exploring information concerning his or her professional and educational experience); *Parese v Shankman*, supra.

Whether a duty is owed by a consulting physician to a treating physician and, ultimately to the patient, is a question of law and expert opinion on the subject is not permissible, *Sawh v Schoen*, 215 AD2d 291, 627 NYS2d 7 (1st Dept 1995); *Lipton by Lipton v Kaye*, 214 AD2d 319, 624 NYS2d 590 (1st Dept 1995); but see *Cogswell by Cogswell v Chapman*, 249 AD2d 865, 672 NYS2d 460 (3d Dept 1998) (question of fact as to whether doctor-patient relationship had arisen where there was evidence that defendant doctor had more than informal interest and involvement in plaintiff's condition and in light of defendant's expertise in area of treatment and emergency room doctor's lack of expertise in area).

C. Speed

The opinion evidence of a properly qualified police officer is admissible and sufficient to sustain a conviction for speeding even in the absence of a mechanical device to gauge a vehicle's speed, *People v Olsen*, 22 NY2d 230, 292 NYS2d 420, 239 NE2d 354 (1968). Additionally, where a proper foundation is laid, lay witnesses may properly be allowed to testify as to the speeds of automobiles and buses, *Senecal v Drollette*, 304 NY 446, 108 NE2d 602 (1952); *Guthrie v Overmyer*, 19 AD3d 1169, 797 NYS2d 203 (4th Dept 2005); *Sweeney v Peterson*, 1 AD3d 650, 766 NYS2d 255 (3d Dept 2003); *Lo Faso v Jamaica Buses, Inc.*, 63 AD2d 998, 406 NYS2d 131 (2d Dept 1978); *Beechey v De Sorbo*, 53 AD2d 727, 383 NYS2d 925 (3d Dept 1976); see *Nikolov v Cheek-*

towaga, 96 AD3d 1372, 946 NYS2d 734 (4th Dept 2012) (lay witness's testimony inadmissible where witness stated that she "was not a driver" and "can't tell speed"). In *Soto v New York City Transit Authority*, 6 NY3d 487, 813 NYS2d 701, 846 NE2d 1211 (2006), the Court of Appeals upheld the admission of a plaintiff's estimate of his own running speed where the plaintiff established a sufficient foundation by demonstrating that he had two years' experience running on a treadmill calibrated to measure miles per hour.

D. Accident Reconstruction

Cases in which testimony from accident reconstruction experts has been approved include: *Wellington v New York City Transit Authority*, 117 AD3d 592, 985 NYS2d 872 (1st Dept 2014) (explanation of how photographs demonstrated that accident was bus driver's fault); *Hilton v Jones*, 114 AD3d 1113, 981 NYS2d 223 (3d Dept 2014) (testimony based on accident reconstruction report); *Felicia v Boro Crescent Corp.*, 105 AD3d 697, 964 NYS2d 158 (2d Dept 2013) (accident reconstruction testimony); *Van Scooter v 450 Trabold Road, Inc.*, 206 AD2d 865, 616 NYS2d 129 (4th Dept 1994) (testimony that lack of bumper on truck contributed to injuries); *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991) (testimony as to how unusual configuration and traffic patterns of intersection affected plaintiff's conduct in his attempt to cross street); *Sitaras v James Ricciardi & Sons, Inc.*, 154 AD2d 451, 545 NYS2d 937 (2d Dept 1989) (testimony that plaintiff's vehicle would have been more heavily damaged if accident had occurred as plaintiff described); *Norfleet v New York City Transit Authority*, 124 AD2d 715, 508 NYS2d 468 (2d Dept 1986) (accident-reconstruction evidence admissible even where there were certain dissimilarities between simulation and actual accident, at least where several variations more favorable to plaintiff than actual conditions); see *Cabrera v Port Authority of New York*, 185 AD3d 491, 128 NYS3d 1 (1st Dept 2020) (trial court erred in precluding defendants' accident reconstruction expert since proposed testimony was based on evidence in the record concerning the accident, and was not entirely speculative and not a novel scientific theory to require Frye hearing).

In the following cases, accident-reconstruction evidence from experts was held inadmissible: *Groninger v Mamaroneck*, 17 NY3d 125, 927 NYS2d 304, 950 NE2d 908 (2011) (plaintiff's expert engineer's testimony speculative where premises inspection made and photographs taken over two years after accident); *Feldsberg v Nitschke*, 49 NY2d 636, 427 NYS2d 751, 404 NE2d 1293 (1980) (investigator properly precluded from testifying as to cause of skid marks, since he was not shown to have been familiar with circumstances of particular accident); *Costanzo v Chautauqua*, 110 AD3d 1473, 972 NYS2d 791 (4th Dept 2013) (accident reconstruction expert's affidavit speculative and of no probative worth where expert failed to submit data on which opinions based); *Lopez v Yannotti*, 24 AD2d 758, 263 NYS2d 523 (2d Dept 1965) (insufficient record evidence to support opinion of police officer's accident reconstruction testimony).

E. Biomechanical Engineers

In personal injury actions, the testimony of a biomechanical engineer is sometimes offered to establish the amount of force generated as a result of an event (such as an automobile accident), that the amount of force did or did not cause the plaintiff's injuries (i.e., the mechanics of injuries), or both, see *Shillingford v New York City Transit Authority*, 147 AD3d 465, 46 NYS3d 110 (1st Dept 2017); *Vargas v Sabri*, 115 AD3d 505, 981 NYS2d 914 (1st Dept 2014). Cases in which opinions from biomechanical engineers were allowed include: *Shillingford v New York City Transit Authority*, supra (opinion regarding maximum force that may have been applied to plaintiff and likelihood that it caused resulting injury); *Vargas v Sabri*, supra (opinion that force of accident could not have caused alleged injuries; biomechanical engineer's lack of medical training did not render him unqualified); *Plate v Palisade Film Delivery Corp.*, 39 AD3d 835, 835 NYS2d 324 (2d Dept 2007) (opinion regarding whether force of impact in accident could have caused injury or exacerbated preexisting injury); *Valentine v Grossman*, 283 AD2d 571, 724 NYS2d 504 (2d Dept 2001) (opinion that force generated in accident was not sufficient to cause alleged injury); but see *Harris v Campbell*, 155 AD3d 1622, 65 NYS3d 616 (4th Dept 2017) (treating physician who is also biomechanical engineer could not testify on information not in medical record); but see *Gates v Longden*, 120 AD3d 980, 991 NYS2d 229 (4th Dept 2014) (biomechanical engineer, who was not medical doctor, lacked requisite qualifications to render opinion regarding injury causation).

F. Miscellaneous Issues

Expert testimony may be used to establish the monetary value of the services of a homemaker in an action for her wrongful death, *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); see *Smith v M.V. Woods Const. Co.*, 309 AD2d 1155, 764 NYS2d 749 (4th Dept 2003) (vocational rehabilitation expert not qualified to express opinion on past and future loss of earnings, past and future loss of household services and future medical expenses; such matters are generally the subject of expert testimony by an economist); see also PJI 2:320.3. As to the use of expert testimony to establish the extent of future lost business profits, see *Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 953 NYS2d 7 (1st Dept 2012).

Value is not strictly a subject for expert testimony, *S. Nicolia & Sons Realty Corp. v A.J.A. Concrete Ready Mix, Inc.*, 137 AD3d 994, 30 NYS3d 636 (2d Dept 2015). The opinion of a nonexpert witness may be received concerning the value of property where the witness is shown to be acquainted with the value of similar things, *id.* The amount of knowledge that a witness must be shown to possess in order to qualify to testify to an opinion as to value is largely discretionary with the judge, *id.*

VI. Pre-trial Procedure

A. Expert Disclosure Requirements Under CPLR 3101(d)(1)

CPLR 3101(d)(1)(i) provides that, upon request, each party must identify the experts he or she intends to call at trial and must also disclose in reasonable detail (a) the subject matter on which each expert is expected to testify, (b) the substance of the facts and opinions on which each expert is expected to testify, (c) the qualifications of each expert witness and (d) a summary of the grounds for each expert's opinion, see *Carter v Isabella Geriatric Center, Inc.*, 71 AD3d 443, 896 NYS2d 332 (1st Dept 2010) (dismissing complaint where all of plaintiff's claims required expert testimony and expert disclosure statements contained a "sea of generalities"). CPLR 3101(d)(1)(i) only applies to expert witnesses, not fact witnesses, *Sheppard v Blitman/Atlas Building Corp.*, 288 AD2d 33, 734 NYS2d 1 (1st Dept 2001). Expert disclosure need not be as detailed as the expert's report, which need not itself be disclosed, see *Barrowman v Niagara Mohawk Power Corp.*, 252 AD2d 946, 675 NYS2d 734 (4th Dept 1998). Where a party for good cause shown has retained an expert too close to the time of trial to give the adversary appropriate notice, the party is not automatically precluded from introducing the expert's testimony at the trial. In fact, preclusion as a penalty for late disclosure is not permitted where "good cause" exists for a party's retention of an expert "an insufficient period of time before the commencement of trial to give appropriate notice," CPLR 3101(d)(1)(i); see *Shopsin v Siben & Siben*, 289 AD2d 220, 733 NYS2d 697 (2d Dept 2001) (preclusion improvident where delay not willful or intentional and prejudice could be obviated by adjournment); *Carrington v International Paper Co.*, 184 AD2d 137, 591 NYS2d 600 (3d Dept 1992); see also *Burbige v Siben & Ferber*, 115 AD3d 632, 981 NYS2d 537 (2d Dept 2014) (preclusion of expert testimony not required where delay in disclosure not willful and no prejudice shown); *Rowan v Cross County Ski & Skate, Inc.*, 42 AD3d 563, 840 NYS2d 414 (2d Dept 2007) (preclusion of expert testimony not required where delay in retaining expert not willful and disclosure occurred two weeks before scheduled trial date); *Quinn v Artcraft Const., Inc.*, 203 AD2d 444, 610 NYS2d 598 (2d Dept 1994) (preclusion permitted where party failed to show good cause of late retention of expert). Instead, on motion of any party made before or at trial, or on its own initiative, the court may fashion an order in the interest of justice, CPLR 3101(d)(1)(i).

Moreover, CPLR 3212(b) provides, in relevant part, that "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101(d)(1)(i)] was not furnished prior to the submission of the affidavit." That provision took effect on December 11, 2015 and applies to all pending cases for which a summary judgment motion was made on or after that date and all cases commenced on or after it, L 2015, ch 529, § 2.

For motions made prior to the effective date, the fact that disclosure has occurred after the filing of a note of issue and certification of readi-

ness does not, by itself, render the disclosure untimely or require that the expert's affidavit be disregarded on a motion for summary judgment, *Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 (2d Dept 2012). In *Rivers v Birnbaum*, the Second Department clarified its view that "the fact that the disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely," see *Abreu v Metropolitan Transp. Authority*, 117 AD3d 972, 986 NYS2d 557 (2d Dept 2014); *Buchanan v Mack Trucks, Inc.*, 113 AD3d 716, 979 NYS2d 342 (2d Dept 2014); *Begley v New York*, 111 AD3d 5, 972 NYS2d 48 (2d Dept 2013).

Rather, that fact is but one factor for the trial court to use in determining whether disclosure was untimely and, if untimely, whether the court should nevertheless, in its discretion, impose a sanction short of preclusion, *Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 (2d Dept 2012). At least one post-*Rivers* decision, however, indicates that a party's failure to disclose his or her expert pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness precludes a court, absent good cause, from considering an affidavit submitted by that party's expert in the context of a timely motion for summary judgment, see *DeSimone v New York*, 121 AD3d 420, 993 NYS2d 551 (1st Dept 2014).

1. Failure to Comply with Expert Disclosure Requirements

Trial courts possess broad discretion in their supervision of expert disclosure under CPLR 3101(d)(1)(i), *Rivera v Montefiore Medical Center*, 28 NY3d 999, 41 NYS3d 454, 64 NE3d 274 (2016). A determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with 3101(d)(1)(i) is left to the sound discretion of the trial court, *id.*; see *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095, 69 NYS3d 410 (3d Dept 2018). Where a defendant's timely-served CPLR 3101(d)(1)(i) statement contained a purported deficiency that was readily apparent from the face of the statement and could have been raised before trial, but the plaintiff did not object to the alleged deficiency until mid-trial immediately prior to the expert's testimony, the trial court acted within its discretion in determining that the time to challenge the statement's content had passed, *id.* Supreme Court has broad discretion in determining whether to impose the sanction of preclusion for a failure of timely disclosure regarding expert testimony, see *Hansel v Lamb*, 257 AD2d 795, 684 NYS2d 20 (3d Dept 1999); *Marra v Hensonville Frozen Food Lockers Inc.*, 189 AD2d 1004, 592 NYS2d 525 (3d Dept 1993). Where a party has failed to provide required disclosure, the court may preclude the testimony of the undisclosed expert, *Harris v Campbell*, 155 AD3d 1622, 65 NYS3d 616 (4th Dept 2017); *Donacik v Pool Mart, Inc.*, 270 AD2d 921, 705 NYS2d 784 (4th Dept 2000); *Hudson v Manhattan and Bronx Surface Transit Operating Authority*, 188 AD2d 355, 591 NYS2d 31 (1st Dept 1992); *Olden v Bolton*, 137 AD2d 878, 524 NYS2d 562 (3d Dept 1988). There is no specific time limit for disclosing

information about a party's experts, *Mead v Dr. Rajadhyax' Dental Group*, 34 AD3d 1139, 824 NYS2d 790 (3d Dept 2006); *Gushlaw v Roll*, 290 AD2d 667, 735 NYS2d 667 (3d Dept 2002); see *Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 (2d Dept 2012). The Third Judicial District has adopted a local rule requiring an expert disclosure response to be served with or before the filing of the Note of Issue, but the Third Department has held that the courts have discretion to excuse untimely disclosure in the absence of prejudice or intentional misconduct, *Washington v Albany Housing Authority*, 297 AD2d 426, 746 NYS2d 99 (3d Dept 2002); *Gushlaw v Roll*, *supra*. Individual judges, local districts and particular parts (including the Commercial Division and the Matrimonial Parts) may have rules establishing deadlines for expert disclosures, see 22 NYCRR 202.70(g)(13)(c).

2. *Medical, Dental and Podiatric Malpractice Actions*

In an action for medical, dental or podiatric malpractice, a party responding to a request for disclosure under CPLR 3101(d)(1)(i) may omit the names of medical, dental or podiatric experts but is still required to disclose all of the other information about such experts required by the statute, CPLR 3101(d)(1)(i). The First, Second, and Third Departments have held that a plaintiff in a medical malpractice action may avoid full disclosure of his or her expert's qualifications only when he or she can establish that there is a reasonable probability that such disclosure (a) would lead to the discovery of the actual identity of its expert and (b) would cause the expert to be subjected to unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, *Kanally v DeMartino*, 162 AD3d 142, 77 NYS3d 234 (3d Dept 2018); *Mattis v Keen*, 54 AD3d 610, 864 NYS2d 6 (1st Dept 2008); *Thomas v Alleyne*, 302 AD2d 36, 752 NYS2d 362 (2d Dept 2002). In contrast, the Fourth Department has held that if disclosure of the expert's qualifications would tend to reveal the expert's identity, the qualifications may be withheld, *Thompson v Swiantek*, 291 AD2d 884, 736 NYS2d 819 (4th Dept 2002).

Despite efforts by parties to force disclosure of the names of their adversaries' expert by moving for summary judgment and thereby requiring the submission of the expert's affidavit, the courts have held that a party opposing a summary judgment motion in a medical, dental or podiatric malpractice action may do so without disclosing the identity of the party's medical experts, as long as an unredacted version of the physician's affidavit is provided in camera, *Turi v Birk*, 118 AD3d 979, 988 NYS2d 670 (2d Dept 2014); *Rojas v McDonald*, 267 AD2d 130, 701 NYS2d 21 (1st Dept 1999); *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994); see *Napierski v Finn*, 229 AD2d 869, 646 NYS2d 415 (3d Dept 1996). However, a party moving for summary judgment in a medical, dental or podiatric malpractice action must reveal the identity of any expert submitting an affidavit in support of the motion, *Rivera v Albany Medical Center Hosp.*, 119 AD3d 1135, 990 NYS2d 310 (3d Dept 2014); *Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 (2d Dept 1998).

CPLR 3101(d)(1) applies only to experts retained to give testimony at trial, and not to treating physicians, *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095, 69 NYS3d 410 (3d Dept 2018); *Logan v Roman*, 58 AD3d 810, 872 NYS2d 491 (2d Dept 2009); *Mantuano v Mehale*, 258 AD2d 566, 685 NYS2d 467 (2d Dept 1999), even where the treating physician is offering expert testimony at trial, *Harris v Campbell*, 155 AD3d 1622, 65 NYS3d 616 (4th Dept 2017), quoting *Hamer v New York*, 106 AD3d 504, 965 NYS2d 99 (1st Dept 2013); *Malanga v New York*, 300 AD2d 549, 752 NYS2d 391 (2d Dept 2002); *Overeem v Neuheoff*, 254 AD2d 398, 679 NYS2d 74 (2d Dept 1998); but see *Norton v Nguyen*, 49 AD3d 927, 853 NYS2d 671 (3d Dept 2008).

3. Commercial Division Rules

The Uniform Rules for Commercial Division cases, which may be found in 22 NYCRR § 202.70, contain provisions with respect to expert disclosure. Those Rules, along with the Individual Part Rules, should be consulted for a complete understanding of the current expert disclosure requirements in the Commercial Division.

B. Required Medical Disclosure in Personal Injury and Wrongful Death Actions—22 NYCRR § 202.17

Section 202.17 of the Uniform Rules for the Supreme and County Courts, 22 NYCRR § 202.17, provides for physical examinations and exchange of medical reports in personal injury and wrongful death actions. A party's obligation to provide a report under § 202.17 of the Uniform Rules may not be avoided by the failure of the medical expert to prepare a report after the examination, *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995). Under § 202.17(h), plaintiff may be precluded from offering in evidence any hospital record not made available for inspection pursuant to the rule unless the court orders otherwise. Further, no party may offer (a) evidence of injuries or conditions not set forth or challenged in the medical reports exchanged between the parties or (b) testimony of any treating or examining physician whose medical report has not been exchanged, see *Stern v Calzado*, 163 AD2d 299, 557 NYS2d 156 (2d Dept 1990). However, plaintiffs are not required to document or create medical evidence of every alleged injury. Thus, 202.17(b)(1) does not oblige plaintiffs to hire a medical provider to conduct an examination solely for purposes of litigation. Rather, plaintiffs are required only to produce reports from medical providers who have previously treated or examined them, *Hamilton v Miller*, 23 NY3d 592, 992 NYS2d 190, 15 NE3d 1199 (2014) (plaintiffs, who alleged childhood injuries from lead paint, may never have been contemporaneously treated for such injuries).

Notwithstanding 22 NYCRR § 202.17, a medical expert may testify regarding a party's injury without an exchange of medical reports if the expert's testimony is based solely upon the records already in evidence and not upon the expert's examination of the injured party, *Putchlawski v Diaz*, 192 AD2d 444, 597 NYS2d 10 (1st Dept 1993); *Campoli v*

Lobmeyer, 183 AD2d 1049, 583 NYS2d 639 (3d Dept 1992); Markey v Eiseman, 114 AD2d 887, 495 NYS2d 61 (2d Dept 1985). The expert may be permitted to testify, even if he or she examined a party, where the testimony will be based solely upon other evidence in the case, Neils v Darmochwal, 6 AD3d 589, 774 NYS2d 809 (2d Dept 2004). However, if the opinion being offered is also based upon an examination, it will be precluded, Kelly v Tarnowski, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995); Erena v Colavita Pasta & Olive Oil Corp., 199 AD2d 729, 605 NYS2d 475 (3d Dept 1993). Absent unfair surprise to the opposing party, a treating or examining physician is permitted to testify regarding causation notwithstanding any failure to provide an opinion regarding causation in disclosure under § 202.17, see Kowalsky v Suffolk, 139 AD3d 903, 34 NYS3d 75 (2d Dept 2016); Moreno v Roberts, 161 AD2d 1099, 557 NYS2d 657 (3d Dept 1990); see also Overeem v Neuhooff, 254 AD2d 398, 679 NYS2d 74 (2d Dept 1998) (CPLR 3101[d][1][i]); Holshek v Stokes, 122 AD2d 777, 505 NYS2d 664 (2d Dept 1986) (physician properly allowed to testify that plaintiff's condition permanent, since permanence not an "injury" or "condition" within § 202.17).

b. INTERESTED**PJI 1:92. General Instruction—Interested Witness—Employee of Party**

The fact that the witness AB was and still is employed by (plaintiff, defendant) and the testimony you have heard of (his, her) relationship with (his, her) employer may be considered by you in deciding whether the testimony of AB is in any way influenced by the employment relationship with (plaintiff, defendant).

Comment

Based on *Hoffman v Florida East Coast Hotel Co.*, 187 App Div 146, 175 NYS 387 (1st Dept 1919). An employee who was an actor in the transaction out of which the action arose, may, because of a motive to shield the witness from blame, be interested, see PJI 1:25C. But the mere employer-employee relationship, while it may give rise to bias, does not make the employee interested, *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948); *Della Croce v New York*, 3 AD2d 920, 162 NYS2d 703 (2d Dept 1957), and the question of whether the relationship gives rise to bias is usually for the jury, *Coleman v New York City Transit Authority*, 41 AD2d 812, 341 NYS2d 344 (1st Dept 1973). Nor is a former employee interested, *Essig v Lumber Operating & Mfg. Co.*, 183 App Div 198, 170 NYS 192 (2d Dept 1918), unless he was an actor in the transaction, *Jett v New York*, 140 AD3d 511, 34 NYS3d 424 (1st Dept 2016). It is error to refuse to give the suggested charge if the witness is an employee of a party at the time of trial, *Adams v Supermarkets General Corp.*, 138 AD2d 253, 525 NYS2d 208 (1st Dept 1988); *Dobro v Sloan*, 48 AD2d 243, 368 NYS2d 621 (4th Dept 1975) (citing PJI), and where the employer will benefit as a result of the verdict, the jury may find that the employee witness is in fact interested, see *Christensen v Pittston Stevedoring Corp.*, 283 App Div 1088, 131 NYS2d 546 (2d Dept 1954); *Majestic v Louisville & N.R. Co.*, 147 F2d 621 (6th Cir 1945). The charge should not be given where the witnesses were not employees of the defendant, *Mayer v Oswego County Ob-Gyn, P.C.*, 207 AD2d 985, 617 NYS2d 92 (4th Dept 1994) (witnesses were labor room nurses not employed by defendant physician).

The distinction between an interested witness (see PJI 1:25C) and one whose relationship with the party might result in bias, is apparently one of degree, the former suggesting more careful scrutiny, *Hoffman v Florida East Coast Hotel Co.*, 187 App Div 146, 175 NYS 387 (1st Dept 1919); *Hoes v Third Ave. R. Co.*, 5 App Div 151, 39 NYS 40 (1st Dept 1896). Therefore, there is a difference in emphasis between the pattern charge and PJI 1:25C. In either case it is for the jury to

determine what effect, if any, the interest or possible bias might have on the testimony, *People v Gerdvane*, 210 NY 184, 104 NE 129 (1914); *Hoffman v Florida East Coast Hotel Co.*, *supra*; *Hoes v Third Ave. R. Co.*, *supra*. Charging that a particular witness is disinterested may be error because the relationship with the party (e.g. “friendly relations”) might have a tendency to produce bias, which may be considered by the jury, *People v Manning*, 278 NY 40, 15 NE2d 181 (1938).

As to the witness who has settled with the party for whom the witness testified, it would seem that an adaptation of the pattern charge would be appropriate, see Comment to PJI 1:25C.

**PJI 1:93. General Instruction—Interested Witness—
Compensation of Fact Witness**

You will recall that EF testified on behalf of (AB, CD). When a person like EF is subpoenaed to come to court as a witness to tell you what he/she (saw, heard or did) with respect to anything that happened relating to the case [*add where appropriate: and not as an expert*], the subpoenaed witness is entitled to receive \$15 per day and 23 cents per mile for travel to and from the court for each day he/she attends. That amount of money may not fully compensate the witness for loss of time from work or from business, so the party who subpoenaed the witness may, but is not required to, pay the person for the reasonable value of the time away from work or the business lost in coming to and from the court, waiting and testifying, as long as the amount paid is not disproportionately more than what is reasonable compensation for the time away from work or business that the witness lost. A payment is disproportionate if it is substantially, or significantly, more than such reasonable compensation. If, on the basis of EF’s testimony about how much he/she received and the work time or business lost, you conclude that the amount was disproportionately more than what was reasonable for the loss of work time or business, you may take that into consideration in deciding whether the amount paid to EF influenced what he/she told you about what he/she (saw, heard, did) in connection with what happened in this case.

Comment

Caveat 1: The mileage fee under CPLR 8001 does not apply to travel wholly within a city.

Caveat 2: It is within the trial court's discretion to determine whether the charge is warranted in the context of a particular payment to a witness, and to oversee how much testimony should be permitted relative to the lost time and other expenses for which the fact witness is being compensated, *Caldwell v Cablevision Systems Corp.*, 20 NY3d 365, 960 NYS2d 711, 984 NE2d 909 (2013).

Based on *Caldwell v Cablevision Systems Corp.*, 20 NY3d 365, 960 NYS2d 711, 984 NE2d 909 (2013).

CPLR 8001(a) provides that one who is compelled by subpoena to appear at trial is entitled to a \$15 daily attendance fee and \$0.23 per mile in mileage fees. However, to procure the testimony of a fact witness, it is often necessary to pay the witness's actual expenses in attending court as well as reasonable compensation for the time lost, *Caldwell v Cablevision Systems Corp.*, 20 NY3d 365, 960 NYS2d 711, 984 NE2d 909 (2013). Additionally, there are many incidental expenses in relation to the prosecution or defense of an action that can properly be paid by a party, *id.* Thus, an attorney may pay more than the amounts mandated by CPLR 8001(a), although he or she may not pay a subpoenaed witness whatever fee is demanded, however exorbitant it might be, *Caldwell v Cablevision Systems Corp.*, *supra*.

The testimony of a subpoenaed fact witness who receives a fee in excess of CPLR 8001(a)'s mandatory fee is admissible, but the trial court should, in a proper case, charge the jury as to the witness' potential bias in light of the alleged excessiveness of the fee, *Caldwell v Cablevision Systems Corp.*, 20 NY3d 365, 960 NYS2d 711, 984 NE2d 909 (2013). If a timely request is made, a charge addressing the specific issue of the payment to the witness must be given, *id.* A general instruction regarding bias or prejudice of a witness is not sufficient, *id.* The jury should be instructed that a fact witness may be compensated for lost time, but that compensation for time lost from work or business that is disproportionately greater than what is reasonable should be considered whether in determining whether the compensation had the effect of influencing the witness' testimony, *id.* (citing PJI).

An attorney may not enter into an agreement to pay a fact witness in exchange for favorable testimony where payment is contingent on the success of a party, *Caldwell v Cablevision Systems Corp.*, 20 NY3d 365, 960 NYS2d 711, 984 NE2d 909 (2013).

**PJI 1:94. General Instruction—Use of Pre-Trial
Deposition Upon Trial**

You are about to hear the lawyer for (plaintiff,

defendant) read portions of a document referred to as an examination before trial of (plaintiff, defendant, the witness AB). You may hear the lawyers refer to this document as an EBT or deposition.

At some point before this trial began the (plaintiff, defendant, witness AB), under oath, answered certain questions put to (him, her) by the lawyers for (plaintiff, defendant, all parties). A stenographer recorded the questions and answers and transcribed them into a document which the (plaintiff, defendant, witness AB) later signed before a notary public. The portions of the transcript of the examination before trial that you will hear are to be considered as if (plaintiff, defendant, witness AB) were testifying from the witness stand.

Comment

Based on CPLR 3117. The pattern charge was approved in *Matter of Matteo*, 134 AD2d 261, 520 NYS2d 594 (2d Dept 1987).

The pattern charge relates to only one of the uses that may be made of a pre-trial deposition. In addition to its use in lieu of an unavailable witness, a deposition may be used to contradict or impeach the testimony of the witness, CPLR 3117(a)(1), and, even though the witness who has been examined before trial testifies upon trial, the deposition may be used as evidence of the facts contained therein, see *Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518, 289 NYS2d 183, 236 NE2d 467 (1968); Comment, PJI 1:66.

The deposition of a party may be used by an adversary for any purpose, CPLR 3117(a)(2), see *Feldsberg v Nitschke*, 49 NY2d 636, 427 NYS2d 751, 404 NE2d 1293 (1980) (use of adversary's deposition is subject to trial court's general power to limit the scope of reexamination of witness previously called, and to the court's power to limit the presentation of repetitive, cumulative and time-consuming evidence). Answers to interrogatories may be used against the party who supplied the answers, CPLR 3131; *Bigelow v Acands, Inc.*, 196 AD2d 436, 601 NYS2d 478 (1st Dept 1993); but may not be used by the answering party as part of its evidence in chief, *United Bank Ltd. v Cambridge Sporting Goods Corp.*, 41 NY2d 254, 392 NYS2d 265, 360 NE2d 943 (1976).

Use by plaintiff of the defendant's deposition as part of the plaintiff's proof does not bind the plaintiff to the version of the facts contained in the defendant's deposition, *Spampinato v A. B. C. Consol. Corp.*, 35 NY2d 283, 360 NYS2d 878, 319 NE2d 196 (1974).

While the use of the deposition of a witness as evidence in chief normally requires a showing that the witness is unavailable, CPLR 3117(a)(3)(i)–(iv); see *Nazito v Holton*, 96 AD2d 550, 465 NYS2d 62 (2d Dept 1983) (defendant unavailable), or that there are exceptional circumstances permitting its use, CPLR 3117(a)(3), special provision is made for the use of the deposition of “a person authorized to practice medicine . . ., by any party without the necessity of showing unavailability or special circumstances . . .,” CPLR 3117(a)(4).

7. VERDICT

PJI 1:95. General Verdict

In reporting your verdict to the court, you will state either that it is in favor of the defendant or that it is in favor of the plaintiff. If your verdict is in favor of the plaintiff, you will state the amount you award to the plaintiff.

Comment

The pattern charge refers to an oral general verdict in a case where there is a single plaintiff and a single defendant and a single amount to be awarded. While the traditional rule has been that use of a special verdict is within the discretion of the court, CPLR 4111(a), special verdicts have become mandatory in virtually all tort litigation. Special verdicts, which itemize damages, are required in many types of actions, CPLR 4111(d), 4111(e) and 4111(f). Even where not strictly required, special verdicts are essential where there are multiple theories, multiple parties, comparative fault questions, complex issues or where their use would help jurors reach a decision. However, the failure to object to the submission of a case on a general verdict constitutes a waiver of the right to a special verdict, *Kahl v Loffredo*, 221 AD2d 679, 633 NYS2d 612 (3d Dept 1995). For a complete discussion, see PJI 1:97.

Absent the consent of all parties, a verdict rendered by a jury of less than six is a nullity, even if there is unanimity among a jury of five, *Waldman v Cohen*, 125 AD2d 116, 512 NYS2d 205 (2d Dept 1987); see *Sharrow v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995) (all six jurors must deliberate on all issues). To avoid a mistrial resulting from an insufficient number of jurors, the court should ensure, particularly where the trial is expected to be lengthy, that a sufficient number of alternates be impaneled, see CPLR 4106.

Where a verdict is to be rendered as a Special Verdict or a General Verdict Supported by Written Interrogatories, PJI 1:26 should be given.

I. Verdicts; generally

There are three types of civil verdicts: (1) a general verdict, which requires the jury to find for the plaintiff or the defendant, and state the amount of damages, if any, awarded to the prevailing party, see PJI 1:95; (2) a special verdict, which requires the jury to make factual findings, leaving the court to determine which party is entitled to judgment, CPLR 4111(a); and (3) a general verdict supported by written interrogatories, CPLR 4111(c), *National Equipment Corp. v Ruiz*, 19 AD3d 5, 794 NYS2d 2 (1st Dept 2005). When a special verdict is utilized, the court submits to the jury written questions susceptible of brief answer or

written forms of the several findings that might properly be made, or uses any other appropriate method of submitting the issues and requiring written findings, CPLR 4111(b). When a general verdict supported by written interrogatories is utilized, the court requires the jury to answer one or more written interrogatories on issues of fact. Despite the terminology of CPLR 4111, general verdicts supported by written interrogatories are often referred to as special verdicts. For ease of reference in this section, special verdicts and general verdicts supported by written interrogatories are both referred to as “interrogatory-based verdicts.”

II. Interrogatory-based verdicts

A. Actions in which interrogatory-based verdicts must or should be used

1. Background

Historically, juries used general verdicts to determine civil actions, and the use of interrogatory-based verdicts rested in the discretion of the trial court, see *Noga v Monroe Medi-Trans*, 78 AD2d 988, 433 NYS2d 927 (4th Dept 1980); *Johnson v Artkraft Strauss Sign Corp.*, 45 AD2d 482, 359 NYS2d 773 (1st Dept 1974). However, amendments to the CPLR and other laws, as well the need to foster informed review of jury verdicts, have made interrogatory-based verdicts essential in civil litigation.

2. Specific actions

a. Itemizing damages

Interrogatory-based verdicts, which require juries to itemize damages, are mandatory in medical and dental malpractice actions, CPLR 4111(d); see *McDougald v Garber*, 135 AD2d 80, 524 NYS2d 192 (1st Dept 1988), *mod* on other grounds, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); PJI 2:151A(1), 2:151A(2), and in all other types of actions to recover for personal injuries, property damage or wrongful death, CPLR 4111(e); see PJI 2:301; see also *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995) (citing PJI). In addition to permitting informed review of verdicts rendered in cases subject to CPLR 4111, interrogatory-based verdicts provide courts with information necessary to prepare judgments in those cases, see *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); see also CPLR articles 50-A and 50-B; PJI 2:277 (“Structured Judgments in Personal Injury Actions”).

b. Apportionment of fault

An interrogatory-based verdict is required in an action in which the jury will be asked to determine whether a plaintiff was comparatively at fault for his or her damages, see CPLR article 14-A; PJI 2:36. Thus, it is reversible error for the court to refuse a party’s request for an

interrogatory-based verdict in any tort action in which plaintiff's comparative fault is in issue, *Russo v Jess R. Rifkin*, D.D.S., P.C., 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985); see *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995). The principle established by Russo applies to all trials, including bifurcated trials, *Russo v Jess R. Rifkin*, D.D.S., P.C., *supra*. The use of an interrogatory-based verdict that clearly expresses the percentages of fault attributed by the jury to each party enables the court to have the "more precise definition of the jury's finding" needed to ascertain which of multiple, plausible sets of calculations was adopted by the jury, *Russo v Jess R. Rifkin*, D.D.S., P.C., *supra*; see *Reyes v 38 Sickles Street Corp.*, 188 AD2d 518, 591 NYS2d 469 (2d Dept 1992). Where the issues of comparative fault and damages are tried together, the verdict sheet must provide for separate answers to each issue in order to prevent jury confusion and an unintended double reduction of a plaintiff's verdict, *Luppino by Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986). Forms for interrogatory-based verdicts in comparative negligence cases can be found in PJI 2:36.

Likewise, interrogatory-based verdicts are imperative in cases involving apportionment of fault among joint tortfeasors. Thus, interrogatory-based verdicts are essential in determining fault for purposes of contribution, see PJI 2:275, and are equally essential in determining the liability of each joint tortfeasor to plaintiff pursuant to CPLR Article 16, "Limited Liability of Persons Jointly Liable," *id*, or the culpability of a non-party for the purpose of applying GOL 15-108, see PJI 2:275A, 2:275B, 2:275C. They are also essential where the rights of defendants as between themselves may turn on findings made by the jury in assessing each defendant's liability to plaintiff, see *Abram v Lyon Steel Rigging Corp.*, 111 AD2d 291, 489 NYS2d 281 (2d Dept 1985).

c. Complex litigation

Interrogatory-based verdicts are essential where there are multiple theories, multiple parties, complex issues, or where their use would help jurors reach a decision, see *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980); *Harvey v Suds N' Fluff Laundromat, Inc.*, 194 AD2d 644, 599 NYS2d 86 (2d Dept 1993); *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 480 NYS2d 328, 20 Ed Law Rep 929 (2d Dept 1984); *Caputo v Frankel*, 89 AD2d 595, 452 NYS2d 649 (2d Dept 1982); *O'Boyle v Avis Rent-A-Car System, Inc.*, 78 AD2d 431, 435 NYS2d 296 (2d Dept 1981); *Quigley v Suffolk County*, 75 AD2d 888, 428 NYS2d 46 (2d Dept 1980).

If multiple theories are submitted to the jury and one of the theories is found insufficient on appeal, a general verdict may not stand, *Davis v Caldwell*, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741 (1981); *DePasquale v Morbark Industries, Inc.*, 221 AD2d 409, 633 NYS2d 543 (2d Dept 1995); *Steidel v County of Nassau*, 182 AD2d 809, 582 NYS2d 805 (2d Dept 1992); *Duffey by Duffey v Fear*, 121 AD2d 928, 505 NYS2d

136 (1st Dept 1986); see *Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); see also *Cirasuolo v Cahill*, 119 AD2d 986, 500 NYS2d 881 (4th Dept 1986) (special verdict not required because record supported all theories of liability).

d. Miscellaneous actions

Where plaintiff is attempting to establish a “serious injury” pursuant to Insurance Law § 5102(d), the verdict sheet should contain separate interrogatories with respect to each theory of serious injury asserted, *Burlingame v Toal*, 262 AD2d 942, 691 NYS2d 814 (4th Dept 1999); see *Hoffman v S.J. Hawk, Inc.*, 258 AD2d 618, 685 NYS2d 767 (2d Dept 1999); *Velez v Svehla*, 229 AD2d 528, 645 NYS2d 842 (2d Dept 1996).

The issues of negligence and proximate cause generally pose discreet questions, see PJI 2:70, and, therefore, separate interrogatories on those subjects should be provided to the jury, see *Ceravole v Giglio*, 152 AD2d 648, 543 NYS2d 524 (2d Dept 1989); *Brogan v Zummo*, 92 AD2d 533, 459 NYS2d 293 (2d Dept 1983); but see *Orens v Secofsky*, 60 AD2d 866, 401 NYS2d 259 (2d Dept 1978).

In medical malpractice cases, all claimed departures from the standard of care for which there is support in the trial record should be itemized in the verdict sheet, *Abato v Beller*, 122 AD3d 554, 996 NYS2d 298 (2d Dept 2014); *Steidel v County of Nassau*, 182 AD2d 809, 582 NYS2d 805 (2d Dept 1992); see *Davis v Caldwell*, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741 (1981); *Spagnole v Staten Island University Hosp.*, 77 AD3d 816, 908 NYS2d 883 (2d Dept 2010); *Forman v Davidson*, 74 AD2d 505, 424 NYS2d 711 (1st Dept 1980); *Killeen v Reinhardt*, 71 AD2d 851, 419 NYS2d 175 (2d Dept 1979); see also *Coakley v Parkway Hosp.*, 103 AD3d 680, 959 NYS2d 722 (2d Dept 2013) (multiple interrelated departures that did not constitute separate theories of malpractice do not have to be separately itemized, but rather may be telescoped into single interrogatory); *Velasquez v Skory*, 49 AD3d 1056, 857 NYS2d 735 (3d Dept 2008) (same); *Cicione v Meyer*, 33 AD3d 646, 823 NYS2d 173 (2d Dept 2006) (merger of two theories of liability in interrogatory on informed consent claim made it possible for jury to find that defendant was not liable on one of the theories, and, due to the wording of interrogatory, not consider the other, separate theory). However, a plaintiff will not be entitled to a separately itemized interrogatory with respect to an alleged departure where he or she failed to adduce expert evidence of it at trial, *Prediletto v Syed*, 166 AD3d 1456, 89 NYS3d 359 (3d Dept 2018); *Aronov v Kanarek*, 166 AD3d 574, 88 NYS3d 73 (2d Dept 2018). If a plaintiff presents more than one theory of medical malpractice but the jury is given only one departure to consider and answers it in defendant’s favor, the verdict should be set aside if it is against any fair interpretation of the evidence, *Harris v Parwez*, 13 AD3d 675, 785 NYS2d 781 (3d Dept 2004).

It is error to combine Labor Law §§ 240(1) and 241(6) claims into a

single question on a verdict sheet, *Baptiste v RLP-East, LLC*, 182 AD3d 444, 122 NYS3d 292 (1st Dept 2020).

B. Preparing interrogatories

The verdict sheet should be clear and unambiguous, *Moore v John Bohlson Associates, Inc.*, 141 AD2d 468, 530 NYS2d 6 (1st Dept 1988); see *Lawson v Brookdale Hosp. Medical Center*, 43 AD3d 880, 842 NYS2d 44 (2d Dept 2007); *Ferguson v City of New York*, 201 AD2d 422, 607 NYS2d 939 (1st Dept 1994). The interrogatory-based verdict should contain interrogatories on all elements of the cause of action or defense as to which factual issues exist, see *Duran v Temple Beth Sholom, Inc.*, 155 AD3d 690, 64 NYS3d 278 (2d Dept 2017) (new trial required when court improperly denied plaintiff's request to give jury specific instruction); *Staudacher v City of Buffalo*, 155 AD2d 956, 547 NYS2d 770 (4th Dept 1989) (new trial on issue of punitive damages required where verdict sheet did not separate claims for punitive damages on each cause of action and against each of several defendants); *Kosiorek v Bethlehem Steel Corp.*, 145 AD2d 935, 536 NYS2d 614 (4th Dept 1988) (new trial required where verdict sheet failed to contain, as precondition for assessment of damages, interrogatories with respect to negligence and proximate cause); see also *Siagha v Salant Jerome, Inc.*, 271 AD2d 274, 706 NYS2d 634 (1st Dept 2000) (court's failure to include interrogatory requiring jury to conclude prior to awarding damages that plaintiff's injuries were proximately caused by injury producing event may be harmless error where issue of proximate causation was fully explained in charge).

Single questions on special verdict sheets that combine claims with words such as "and/or" or "any" are disfavored because they make it impossible to later determine on which claim or claims the jury found in favor of the plaintiff, *Baptiste v RLP-East, LLC*, 182 AD3d 444, 122 NYS3d 292 (1st Dept 2020); *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 639 NYS2d 329 (1st Dept 1996).

Although there is no statutory provision for such procedure, it is suggested that prior to summations the court should inform counsel of the questions that are intended for submission to the jury, see *Caprara v Chrysler Corp.*, 71 AD2d 515, 423 NYS2d 694 (3d Dept 1979), *aff'd*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981); *Williams v Brosnahan*, 295 AD2d 971, 746 NYS2d 219 (4th Dept 2002) (citing PJI); CPLR 4110-b.

In reviewing and explaining verdict sheets by the use of examples, the court must take care not to place its imprimatur on possible factual determinations, see *Brown v Moodie*, 116 AD2d 980, 498 NYS2d 603 (4th Dept 1986).

C. CPLR 4113(a) & the five-sixths rule in civil trials

A verdict may not be rendered by less than five-sixths of the jurors

constituting a jury, CPLR 4113(a). A jury's vote that contains fewer than five votes in favor of a party is tantamount to no verdict, *State v Exxon Corp.*, 7 AD3d 926, 777 NYS2d 539 (3d Dept 2004). Where five-sixths of the jurors constituting a jury cannot agree after being kept together for as long as is deemed reasonable by the court, the court shall discharge the jury and direct a new trial, CPLR 4113(b); see *State v Exxon Corp.*, *supra*; see also PJI 1:100 ("To Jury Unable to Agree").

Where an interrogatory-based verdict is used, the agreement of "any five" jurors is required to answer each question, *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 480 NYS2d 328, 20 Ed Law Rep 929 (2d Dept 1984). Each question is treated separately from the others and the validity of the verdict "does not depend upon the consistency of individual juror voting patterns," *id.* A valid interrogatory-based verdict requires that all six jurors participate in the underlying deliberations and the parties are entitled to a process in which each juror deliberates on all questions and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five, *Sharrow v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995). Thus, if there is a 5-1 vote on liability after the first stage of a bifurcated trial, all jurors, including the liability dissenter, are required to participate in the assessment of damages, *id.*; see *Arizmendi v City of New York*, 56 NY2d 753, 452 NYS2d 15, 437 NE2d 274 (1982). It is error to instruct the jury that each answer arrived at is conclusive on all jurors since it gives inordinate importance to the order in which questions are answered and reduces the parameters of the debate on the later questions, *Sharrow v Dick Corp.*, *supra*. Absent the consent of all parties, a verdict rendered by a deliberating jury made up of fewer than six is a nullity, even if there is unanimity among a jury of five, *id.*; *Waldman v Cohen*, 125 AD2d 116, 512 NYS2d 205 (2d Dept 1987). To avoid a mistrial resulting from an insufficient number of jurors, the court should ensure, particularly where the trial is expected to be lengthy, that a sufficient number of alternates is impaneled, see CPLR 4106; PJI 1:29.

D. Post-trial and appellate considerations

In order to preserve for appellate review an argument relating to the content of a verdict sheet (e.g., the presence or omission of a particular interrogatory, the wording of an interrogatory), a party must raise the particular argument to the trial court, see *Komlosi v Cuomo*, 99 AD3d 458, 952 NYS2d 488 (1st Dept 2012); *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991); *New England Mut. Life Ins. Co. v Detectives' Endowment Ass'n*, 174 AD2d 454, 571 NYS2d 239 (1st Dept 1991). Thus, if a party wants a particular interrogatory posed in the verdict sheet, the party must request such an interrogatory or object to the verdict sheet on the ground that it does not contain the desired interrogatory, see *Suria v Shiffman*, 67 NY2d 87, 499 NYS2d 913, 490 NE2d 832 (1986); *Rabito v Deer Park Management Services, LLC*, 106 AD3d 798, 965 NYS2d 524 (2d Dept 2013); *Love v Rockwell's Intern. Enterprises, LLC*, 83 AD3d 914, 922 NYS2d 131 (2d Dept 2011); *Lohan*

v Evanczyk, 229 AD2d 844, 646 NYS2d 213 (3d Dept 1996); see also Kayser ex rel. Kayser v Sattar, 57 AD3d 1245, 870 NYS2d 537 (3d Dept 2008). However, review may be had if the error is so fundamental in nature as to warrant a new trial, Grace v New York City Transit Authority, 123 AD3d 401, 998 NYS2d 36 (1st Dept 2014); Kayser ex rel. Kayser v Sattar, supra. An error is fundamental in this regard if it prevented the jury from fairly considering the trial issues, e.g., error confused or created doubt as to the legal principles to be applied, see Grace v New York City Transit Authority, supra; Ciarelli v Lynch, 22 AD3d 987, 803 NYS2d 236 (3d Dept 2005).

Generally, the failure to object to the submission of a case on a general verdict constitutes a waiver of the right to an interrogatory-based verdict, see Kahl v Loffredo, 221 AD2d 679, 633 NYS2d 612 (3d Dept 1995); see also Tart v New York Bronx Pediatric Medicine, P.C., 116 AD3d 515, 984 NYS2d 19 (1st Dept 2014). Where an interrogatory-based verdict is required by law but one party objects to the use of the device, that party may not later obtain a reversal on the ground that a general verdict was used, Lucente v Nassau County, 106 AD2d 433, 482 NYS2d 528 (2d Dept 1984); see Russo v Jess R. Rifkin, D.D.S., P.C., 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985) (stipulation to dispense with itemized verdict as to damages).

The failure to itemize damages pursuant to CPLR 4111 does not necessarily warrant reversal, Parkin v Cornell University, Inc., 182 AD2d 850, 581 NYS2d 914, 73 Ed Law Rep 754 (3d Dept 1992) (no evidence supporting various categories); Rivera v New York City Transit Authority, 161 AD2d 132, 555 NYS2d 254 (1st Dept 1990), rev'd on other grounds 77 NY2d 322, 567 NYS2d 629, 569 NE2d 432 (1991). Furthermore, to preserve for appellate review the issue of failure to comply with CPLR 4111, counsel must object at trial, Tucker v Elimelch, 184 AD2d 636, 584 NYS2d 895 (2d Dept 1992); Gursky v New York City Transit Authority, 162 AD2d 256, 559 NYS2d 126 (1st Dept 1990).

The propriety of a verdict sheet must be examined within the context of the charge as a whole, Turturro v City of New York, 127 AD3d 732, 5 NYS3d 306 (2d Dept 2015), leave to appeal granted, 2015 WL 6143534 (NY 2015); Simone v McNamara, 59 AD3d 349, 873 NYS2d 621 (1st Dept 2009); Smith v Taylor, 304 AD2d 902, 757 NYS2d 617 (3d Dept 2003); Brewster v Prince Apartments, Inc., 264 AD2d 611, 695 NYS2d 315 (1st Dept 1999); Plunkett v Emergency Medical Service of New York City, 234 AD2d 162, 651 NYS2d 462 (1st Dept 1996).

The court has the power to set aside one of several findings in an interrogatory-based verdict either on the law or as against the weight of the evidence, New England Mut. Life Ins. Co. v Detectives' Endowment Ass'n, 174 AD2d 454, 571 NYS2d 239 (1st Dept 1991); see Loja v Lavelle, 132 AD3d 637, 17 NYS3d 483 (2d Dept 2015) (setting aside as against weight of evidence jury's apportionment of fault); Gregware v City of New York, 132 AD3d 51, 15 NYS3d 21 (1st Dept 2015) (same).

In addition to their utility in the original action, the answers to

questions from one case may aid in establishing the scope of the collateral estoppel effect of the judgment, thus limiting future litigation, see *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 492 NYS2d 584, 482 NE2d 63 (1985); *Schabe v Hampton Bays Union Free School Dist.*, 103 AD2d 418, 480 NYS2d 328, 20 Ed Law Rep 929 (2d Dept 1984).

III. Inconsistent verdicts

A. Inconsistent verdicts; generally

Where an interrogatory-based verdict is used the potential for an inconsistent verdict is present. A verdict is inconsistent when the jury's answers to two or more interrogatories cannot possibly be logically reconciled, *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); see *Barry v Manglass*, 55 NY2d 803, 447 NYS2d 423, 432 NE2d 125 (1981); *Bellinson Law, LLC v Iannucci*, 116 AD3d 401, 983 NYS2d 21 (1st Dept 2014); *Applebee v County of Cayuga*, 103 AD3d 1267, 962 NYS2d 533 (4th Dept 2013).

The most common example of an inconsistent verdict is where a jury apportions fault to a party that it determined was not liable, see *Motta by Motta v Eldred Central School District*, 172 AD3d 1575, 101 NYS3d 472 (3d Dept 2019); *Magee v Cumberland Farms, Inc.*, 145 AD3d 769, 43 NYS3d 125 (2d Dept 2016); *Kumar v PI Associates, LLC*, 125 AD3d 609, 3 NYS3d 372 (2d Dept 2015); *D'Annunzio v Ore*, 119 AD3d 512, 989 NYS2d 503 (2d Dept 2014); *Allen v Lowczus*, 118 AD3d 1258, 988 NYS2d 350 (4th Dept 2014); *Kelly v Greitzer*, 83 AD3d 901, 921 NYS2d 302 (2d Dept 2011); *Dubec v New York City Housing Authority*, 39 AD3d 410, 834 NYS2d 165 (1st Dept 2007); *Palmer v Walters*, 29 AD3d 552, 814 NYS2d 689 (2d Dept 2006); *Mateo v 83 Post Ave. Associates*, 12 AD3d 205, 784 NYS2d 520 (1st Dept 2004); *Bowes v Noone*, 298 AD2d 859, 748 NYS2d 440 (4th Dept 2002). However, a verdict is internally consistent, where the jury determined that the defendant was not negligent, and then, ignoring the verdict sheet's instruction to cease deliberations, went on to answer the interrogatory pertaining to the plaintiff's alleged comparative negligence, *Li v Moon*, 177 AD3d 655, 109 NYS3d 894 (2d Dept 2019).

The fixing by a jury of an amount for plaintiff's damages is not, standing alone, inconsistent with the determination of no liability and should not be taken as an allocation of responsibility to the defendant, *Peters v Port Authority Trans-Hudson Corp.*, 234 AD2d 205, 651 NYS2d 500 (1st Dept 1996); see *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980); *Alcantara v Knight*, 123 AD3d 622, 1 NYS3d 24 (1st Dept 2014).

The issues of whether a defendant was negligent and whether that negligence was a proximate cause of a plaintiff's injuries are usually independent, and a jury's finding that a defendant was negligent but that the negligence was not a proximate cause of the plaintiff's injuries is in-

consistent only in the exceptional case where the two issues are inextricably interwoven, *Pavlou v City of New York*, 8 NY3d 961, 836 NYS2d 506, 868 NE2d 186 (2007); *Coma v City of New York*, 97 AD3d 715, 949 NYS2d 98 (2d Dept 2012); PJI 2:70; see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016); *Berner v Little*, 137 AD3d 1675, 28 NYS3d 519 (4th Dept 2016); *Watson v Jade Luxury Transp. Corp.*, 114 AD3d 495, 982 NYS2d 1 (1st Dept 2014); *Dessasore v New York City Housing Authority*, 70 AD3d 440, 895 NYS2d 44 (1st Dept 2010); *Alexander v City of New York*, 21 AD3d 389, 800 NYS2d 436 (2d Dept 2005).

B. Inconsistency among answers to written interrogatories

When there is an inconsistency in a general verdict accompanied by answers to interrogatories, the trial judge's options depend on the manner of the inconsistency. If the answers to the interrogatories are consistent with one another, but one or more of such answers conflict with the general verdict, the court has discretion to enter judgment according to the answers to the interrogatories, require the jury to reconsider its verdict, or declare a mistrial, CPLR 4111(c); *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980). Where a jury's answers to interrogatories with respect to liability are consistent with one another, but inconsistent with the damage award, the trial court has discretion to require the jury to reconsider the verdict, order a new trial, or enter judgment pursuant to the jury's answers, *Mayer v Goldberg*, 241 AD2d 309, 659 NYS2d 877 (1st Dept 1997); see *Files v Ken Goewey Dodge, Inc.*, 33 AD3d 1109, 822 NYS2d 663 (3d Dept 2006). If the answers to the interrogatories are inconsistent with one another, the court's options are limited to requiring the jury to reconsider its verdict or declaring a mistrial, CPLR 4111(c); *Marine Midland Bank v John E. Russo Produce Co., Inc.*, *supra*; *Motta by Motta v Eldred Central School District*, 172 AD3d 1575, 101 NYS3d 472 (3d Dept 2019); *Ledogar v Forbes*, 84 AD3d 749, 922 NYS2d 508 (2d Dept 2011); *Leal v Simon*, 147 AD2d 198, 542 NYS2d 328 (2d Dept 1989); see *Ki Tak Song v Oizumi*, 120 AD3d 557, 990 NYS2d 639 (2d Dept 2014).

Where the jury is discharged before an inconsistent verdict is resolved, the only remedy will be a new trial, *Motta by Motta v Eldred Central School District*, 172 AD3d 1575, 101 NYS3d 472 (3d Dept 2019); see *Bellinson Law, LLC v Iannucci*, 116 AD3d 401, 983 NYS2d 21 (1st Dept 2014); *Applebee v County of Cayuga*, 103 AD3d 1267, 962 NYS2d 533 (4th Dept 2013); *Vera v Bielomatik Corp.*, 199 AD2d 132, 605 NYS2d 75 (1st Dept 1993); see also *Rivas v New York City Transit Authority*, 103 AD3d 414, 959 NYS2d 178 (1st Dept 2013) (new trial on apportionment required where four of six jurors claimed on polling that verdict sheet did not reflect their vote and trial court discharged jury prior to resolving discrepancy). Where the court discovered an inconsistency in the verdict sheet after the jury was discharged, the court's consultation with the jury foreperson, in open court, could not take the place of full jury reconsideration, and a new trial was necessary, *Motta by Motta v Eldred Central School District*, *supra*.

Generally, directing the jury to reconsider its verdict is preferable to declaring a mistrial, see *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 643 NYS2d 211 (2d Dept 1996). But, a mistrial should be directed if the jury is hopelessly confused, *Leal v Simon*, 147 AD2d 198, 542 NYS2d 328 (2d Dept 1989); see *Cortes v Edoo*, 228 AD2d 463, 644 NYS2d 289 (2d Dept 1996). Before directing the jury to reconsider its verdict, the trial judge should explain to the jury the inconsistency in the verdict, *Ledogar v Forbes*, 84 AD3d 749, 922 NYS2d 508 (2d Dept 2011), and provide it with any further instructions necessary to resolve any confusion that led to the inconsistency, see *Roberts v County of Westchester*, 278 AD2d 216, 717 NYS2d 276 (2d Dept 2000); *Cortes v Edoo*, *supra*; see also *Kelly v Greitzer*, 83 AD3d 901, 921 NYS2d 302 (2d Dept 2011).

On reconsideration of its verdict, the jury is free to substantively alter its original answers, as the jury is not bound by its responses on the original verdict sheet, see *Kelly v Greitzer*, 83 AD3d 90, 921 NYS2d 302 (2d Dept 2011); *Mateo v 83 Post Ave. Associates*, 12 AD3d 205, 784 NYS2d 520 (1st Dept 2004); *Bowes v Noone*, 298 AD2d 859, 748 NYS2d 440 (4th Dept 2002); *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 643 NYS2d 211 (2d Dept 1996); see also *Ki Tak Song v Oizumi*, 120 AD3d 557, 990 NYS2d 639 (2d Dept 2014). Where a jury is sent back to reconsider its verdict, the jury should be instructed that it is free to reconsider all of its answers, *Alvarez v Beltran*, 121 AD3d 488, 994 NYS2d 331 (1st Dept 2014).

The inadvertent failure of the jury to answer a particular interrogatory was not a fatal defect where, before the jury was discharged, the jury was directed to resume deliberations and explicitly answer the omitted interrogatory, *Schnarch v Owen*, 124 AD2d 372, 507 NYS2d 315 (3d Dept 1986).

Unless a party objects to an alleged inconsistency in a verdict before the jury is discharged, any argument that the verdict is inconsistent will be unpreserved for appellate review, *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470, 864 NE2d 600 (2007); *Barry v Manglass*, 55 NY2d 803, 447 NYS2d 423, 432 NE2d 125 (1981); *Berner v Little*, 137 AD3d 1675, 28 NYS3d 519 (4th Dept 2016); *Reitzel v Hale*, 128 AD3d 1045, 9 NYS3d 659 (2d Dept 2015); *Bracker v New York City Transit Authority*, 112 AD3d 520, 977 NYS2d 234 (1st Dept 2013); *Curry v Hudson Valley Hosp. Center*, 104 AD3d 898, 961 NYS2d 563 (2d Dept 2013); *Alvarez v Beth Abraham Health Services*, 101 AD3d 647, 955 NYS2d 872 (1st Dept 2012); *Schreiber v University of Rochester Medical Center*, 88 AD3d 1262, 930 NYS2d 750 (4th Dept 2011); *Arthur Glick Leasing, Inc. v William J. Petzold, Inc.*, 51 AD3d 1114, 858 NYS2d 405 (3d Dept 2008); *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997). A principal purpose of the preservation requirement is to permit the trial court to take corrective action before the jury is discharged and thereby potentially cure the alleged inconsistency, see *Barry v Manglass*, *supra*; *Berner v Little*, *supra*; *Arrieta v Shams Waterproofing, Inc.*, 76 AD3d 495, 908 NYS2d 2 (1st Dept 2010);

Preston v Young, *supra*; Strauss v Huber, 161 AD2d 629, 555 NYS2d 407 (2d Dept 1990). The Appellate Division has the discretion to address unpreserved arguments, see Brown v City of New York, 60 NY2d 893, 470 NYS2d 571, 458 NE2d 1248 (1983), and has occasionally exercised that power to direct a new trial where a verdict was inconsistent, see Bellinson Law, LLC v Iannucci, 116 AD3d 401, 983 NYS2d 21 (1st Dept 2014); Applebee v County of Cayuga, 103 AD3d 1267, 962 NYS2d 533 (4th Dept 2013); Dessasore v New York City Housing Authority, 70 AD3d 440, 895 NYS2d 44 (1st Dept 2010); Vera v Bielo-matik Corp., 199 AD2d 132, 605 NYS2d 75 (1st Dept 1993).

IV. Correction of verdict

Generally, post-verdict juror affidavits may not be used to impeach a verdict, see PJI 1:105. However, there are two limited exceptions. First, juror affidavits may be used to correct ministerial errors in reporting a verdict, Breen-Burns v Scarsdale Woods Homeowners' Ass'n Inc., 73 AD3d 661, 901 NYS2d 272 (1st Dept 2010); Moisakis v Allied Bldg. Products Corp., 265 AD2d 457, 697 NYS2d 100 (2d Dept 1999); Lustyik v Manaher, 246 AD2d 887, 668 NYS2d 410 (3d Dept 1998); see Porter v Milhorat, 26 AD3d 424, 809 NYS2d 210 (2d Dept 2006); Alkinburgh v Glessing, 240 AD2d 904, 658 NYS2d 735 (3d Dept 1997); Grant v Endy, 167 AD2d 807, 563 NYS2d 368 (3d Dept 1990); Russo v Jess R. Rifkin, D.D.S., P.C., 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985); Rose v Thau, 45 AD2d 182, 357 NYS2d 201 (3d Dept 1974). When the thought process of the jurors must be examined in order to determine their true intent, the error is not ministerial in nature, McStocker v Kolment, 160 AD2d 980, 554 NYS2d 702 (2d Dept 1990).

Several Appellate Division decisions have cautioned that a misunderstanding relating to what monetary amount is referenced by "total damages" on a jury verdict may not be corrected by post-trial juror affidavits or statements, Lustyik v Manaher, 246 AD2d 887, 668 NYS2d 410 (3d Dept 1998); Alkinburgh v Glessing, 240 AD2d 904, 658 NYS2d 735 (3d Dept 1997); Walden v Otis Elevator Co., 178 AD2d 878, 577 NYS2d 732 (3d Dept 1991); see Breen-Burns v Scarsdale Woods Homeowners' Ass'n Inc., 73 AD3d 661, 901 NYS2d 272 (1st Dept 2010); DeCrescenzo v Gonzalez, 46 AD3d 607, 847 NYS2d 236 (2d Dept 2007); Grant v Endy, 167 AD2d 807, 563 NYS2d 368 (3d Dept 1990); Labov v City of New York, 154 AD2d 348, 545 NYS2d 826 (2d Dept 1989). Some courts, however, have permitted juror affidavits to correct such misunderstandings, Butterfield v Caputo, 108 AD3d 1162, 970 NYS2d 144 (4th Dept 2013) (juror affidavits permitted to correct verdict to reflect that plaintiff would receive \$60,000 per year for a period of 30 years, not a total of \$60,000 over that period); Smith v Field, 302 AD2d 585, 756 NYS2d 83 (2d Dept 2003) (juror affidavits permitted to correct verdict to reflect that plaintiff would receive \$5,000 per year for 20 years for a total of \$100,000 for future pain and suffering, not a total of \$5,000 for that species of pain and suffering).

Under the second exception, juror affidavits may be used to show

that substantial confusion existed among the jurors, *Shumway v Kelley*, 109 AD3d 1092, 972 NYS2d 365 (4th Dept 2013); *Herbst v Marshall*, 89 AD3d 1403, 933 NYS2d 461 (4th Dept 2011); *Porter v Milhorat*, 26 AD3d 424, 809 NYS2d 210 (2d Dept 2006); see *Breen-Burns v Scarsdale Woods Homeowners' Ass'n Inc.*, 73 AD3d 661, 901 NYS2d 272 (1st Dept 2010); *Wyllder v Viccari*, 138 AD2d 482, 525 NYS2d 882 (2d Dept 1988); see also *Wright v New York*, 168 AD3d 1025, 92 NYS3d 103 (2d Dept 2019) (trial court properly set aside verdict based upon substantial jury confusion after discussing question on verdict sheet with foreperson and counsel in chambers). The confusion, however, must also be apparent from the trial record, *Moisakis v Allied Bldg. Products Corp.*, 265 AD2d 457, 697 NYS2d 100 (2d Dept 1999); see *Breen-Burns v Scarsdale Woods Homeowners' Assoc. Inc.*, *supra*; see also *Wright v New York*, *supra*; *Wyllder v Viccari*, *supra*; but see *McStocker v Kolment*, 160 AD2d 980, 554 NYS2d 702 (2d Dept 1990). Some courts have suggested that juror affidavits may be used for the broader purposes of showing that the verdict contains an inherent defect or an ambiguity, *Moisakis v Allied Bldg. Products Corp.*, *supra*; *McStocker v Kolment*, *supra*; *Wingate v Long Is. R. R.*, 92 AD2d 797 (1st Dept 1983). Where the charge to the jury and the verdict sheet were straightforward and not confusing, the court should not allow the jury to impeach its verdict after it is discharged, *Alkinburgh v Glessing*, 240 AD2d 904, 658 NYS2d 735 (3d Dept 1997); see *Laylon v Shaver*, 187 AD2d 983, 590 NYS2d 615 (4th Dept 1992).

The failure to use an interrogatory-based verdict may not be cured by attempts to reconstruct the jury's findings through post-verdict juror affidavits, *Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985); see *Luppino v Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986). To allow the use of evidence such as this could subject jurors to continuing harassment at the hands of attorneys and investigators and result in a "morass" in which hearings would be needed to resolve factual disputes and juror testimony used to attack the verdict, *Russo v Jess R. Rifkin, D.D.S., P.C.*, *supra*; see PJI 1:105.

8. SUPPLEMENTAL CHARGE

PJI 1:100. General Instruction—Supplemental Charge—To Jury Unable to Agree

It is highly desirable that you agree upon a verdict, if you reasonably can. The case is important to the parties involved, and its presentation has involved expense to both sides. If you fail to agree upon a verdict, the case will have to be tried before another jury selected in the same manner as you were chosen. There is no reason to believe that the case will ever be submitted to a jury more competent than you.

By pointing out to you the desirability of your reaching a verdict, I am not, in any way, suggesting that you surrender your conscientious convictions about the truth and about the weight and effect of all the evidence. However, in most cases, absolute certainty cannot be expected, and each of you must decide the case for yourselves by examining the questions with candor and frankness. It is your duty to give careful consideration to the opinion and reasoning of your fellow jurors, and they must give similar consideration to yours. After full deliberation and consideration of all of the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience.

Comment

Based on that portion of the charge approved in *Connors v Walsh*, 131 NY 590, 30 NE 59 (1892); *Acunto v Equitable Life Assur. Soc. of U.S.*, 270 App Div 386, 60 NYS2d 101 (1st Dept 1946). Coercive language must be avoided, *People v Pagan*, 45 NY2d 725, 408 NYS2d 473, 380 NE2d 299 (1978); *People v Fleury*, 177 AD2d 504, 575 NYS2d 713 (2d Dept 1991); see *People v Crandall*, 45 NY2d 851, 410 NYS2d 66, 382 NE2d 766 (1978); *People v Stokes*, 139 AD2d 428, 527 NYS2d 19 (1st Dept 1988); Note, 78 Yale LJ 100, 140; Annot: 41 ALR3d 1154; 41 ALR3d 845; 38 ALR3d 1281.

The court must neither single out nor threaten a single juror to compel agreement with the majority, *People v Diaz*, 66 NY2d 744, 497 NYS2d 359, 488 NE2d 105 (1985); *People v Page*, 47 NY2d 968, 419

NYS2d 958, 393 NE2d 1031 (1979); *People v Carter*, 40 NY2d 933, 389 NYS2d 835, 358 NE2d 517 (1976); *People v Faber*, 199 NY 256, 92 NE 674 (1910). Depending on the language employed, it may be error for the court to compel continued deliberation by threatening to sequester the jury if a verdict is not reached within a time limit, *People v Sharff*, 38 NY2d 751, 381 NYS2d 48, 343 NE2d 765 (1975); *People v Sheldon*, 156 NY 268, 50 NE 840 (1898); *People v Hill*, 44 AD2d 813, 355 NYS2d 612 (1st Dept 1974); *People v Riley*, 20 AD2d 599, 245 NYS2d 439 (3d Dept 1963); *People v Josey*, 19 AD2d 660, 241 NYS2d 620 (3d Dept 1963). It has been held that it is error for the court to speak to the jury in terms of wasted time, *McCarthy v Odell*, 202 App Div 784, 195 NYS 80 (4th Dept 1922).

The court's instruction must balance the importance of the jurors keeping an open mind to other jurors' arguments with the importance of not surrendering one's conscientiously-held beliefs, *People v Ali*, 65 AD2d 513, 409 NYS2d 12 (1st Dept 1978), *aff'd*, 47 NY2d 920, 419 NYS2d 487, 393 NE2d 481 (1979) (citing PJI); *People v Johnson*, 224 AD2d 635, 639 NYS2d 407 (2d Dept 1996); *People v Sheldon*, 136 AD2d 761, 523 NYS2d 220 (3d Dept 1988); *People v Ashenden*, 92 AD2d 898, 460 NYS2d 99 (2d Dept 1983); *People v Robinson*, 84 AD2d 732, 444 NYS2d 82 (1st Dept 1981); *People v Beach*, 60 AD2d 957, 401 NYS2d 889 (3d Dept 1978); *Field v Field*, 283 App Div 372, 128 NYS2d 217 (1st Dept 1954). Such a balanced charge to encourage the jury to seek agreement is known as an "Allen-type" charge and is approved for use in New York courts, *People v Graham*, 39 NY2d 775, 385 NYS2d 31, 350 NE2d 408 (1976); *People v Crawford*, 158 AD2d 706, 552 NYS2d 156 (2d Dept 1990); *People v Copeland*, 61 AD2d 1016, 402 NYS2d 620 (2d Dept 1978); see Annot: 97 ALR3d 96. Unless counsel objects to the Allen charge before the jury retires, a claim of coercion is not preserved for appellate review, *People v Tucker*, 192 AD2d 469, 597 NYS2d 21 (1st Dept 1993); *People v Battes*, 190 AD2d 625, 594 NYS2d 153 (1st Dept 1993); *People v Murphy*, 166 AD2d 805, 563 NYS2d 528 (3d Dept 1990). An Allen charge may be held coercive if the court improperly stresses the time and expense involved in trial and retrial, *People v Johnson*, 193 AD2d 695, 598 NYS2d 39 (2d Dept 1993); *People v Huarotte*, 134 AD2d 166, 520 NYS2d 756 (1st Dept 1987); see also *People v Glover*, 165 AD2d 761, 564 NYS2d 273 (1st Dept 1990). An Allen charge urging the jury to reach a verdict "is proper, provided it does not urge that (1) a dissenting juror abandon his own conviction and join in the opinion of other jurors, (2) attempt to coerce or compel the jury to agree upon a particular verdict or (3) shame the jury into reaching a verdict," *People v Hardy*, 109 AD2d 802, 486 NYS2d 314 (2d Dept 1985). It is reversible error for the trial court to state that a minority on the jury should reexamine their views in light of the opinion held by the majority, without putting a like duty on the majority respecting the opinion of the minority, *Epes v Healey*, 226 AD2d 581, 641 NYS2d 344 (2d Dept 1996).

"[I]nstead of giving a special supplemental charge to a deadlocked jury, the court in its initial charge might well instruct the jury as to the nature of its duties in the course of deliberation (see [PJI 1:30]), and

then, should the jury fail to reach a verdict, repeat the instruction (see comment 1 NY PJI 2d, 1:100, ABA, Standards Relating to Trial by Jury, § 54),” *People v Ali*, 65 AD2d 513, 409 NYS2d 12 (1st Dept 1978), *aff’d*, 47 NY2d 920, 419 NYS2d 487, 393 NE2d 481 (1979). For the form of such an initial instruction, see PJI 1:28.

The jury may be “kept together for as long as is deemed reasonable by the court,” CPLR 4113(b); see *Icenogle, The Menace of the Hung Jury*, 47 ABAJ 280; Annot: 93 ALR2d 627. The determination as to how long disagreeing jurors will be kept together and required to continue their deliberations is a matter of sound judicial discretion which, if not improvidently exercised, will not be disturbed, *People v Johnson*, 224 AD2d 635, 639 NYS2d 407; *People v Sheldon*, 136 AD2d 761, 523 NYS2d 220 (3d Dept 1988). The trial court, on its own initiative, may recall the jury and give further instructions, but it is error to give further instructions as to an issue neither pleaded nor proved nor included in requests to charge related to the main charge, *Barreto v Calderon*, 31 AD2d 896, 297 NYS2d 799 (1st Dept 1969). It was held erroneous as a matter of law to simply discharge a juror and replace her with an alternate without conducting an inquiry into her complaint that another juror had physically threatened another juror during deliberations, *Avila v New York*, 73 AD3d 444, 901 NYS2d 23 (1st Dept 2010). Such a complaint is more serious than a report of a “spirited dispute” or “belligerent conduct” and, consequently, it was incumbent upon the court to interview the juror who made the complaint and determine whether further interviews were needed, *id.* Removal of the complaining juror without further inquiry was inappropriate where the juror did not ask to be relieved or indicate that she could not deliberate fairly and one of the attorneys objected to the substitution of an alternate, *id.* (citing NY Const, art 1, § 2); see *Troutman v 957 Nassau Road, LLC*, 70 AD3d 672, 895 NYS2d 444 (2d Dept 2010) (error to replace juror, over counsel’s objection, where juror merely indicated acquaintance with witness without any further indication of inability to be fair).

Federal Annotation: In several circuits of the Federal courts, the so-called “Allen” charge, based on the holding in *Allen v U.S.*, 164 US 492, 17 SCt 154 (1896), is used, see *Lowenfield v Phelps*, 484 US 231, 108 SCt 546 (1988). For further discussion of the Allen charge, see Notes, 35 SD L Rev 461; 31 U.Chicago L Rev 386; 53 Va L Rev 123; 78 Yale LJ 100; Annot: 44 ALR Fed 468, 97 ALR3d 96; Standards Relating to Trial by Jury, ABA Project on Minimum Standards for Criminal Justice, § 5.4. The ABA standards are quoted and were approved for use in the Seventh Circuit by *U.S. v Brown*, 411 F2d 930 (7th Cir 1969), and in the District of Columbia Circuit by *U.S. v Thomas*, 449 F2d 1177 (DC Cir 1971); but cf. *U.S. v Flannery*, 451 F2d 880 (1st Cir 1971).

**PJI 1:101. General Instruction—Supplemental
Charge—To Correct Error in Charge**

**Counsel has called to my attention that the
instruction I gave you with respect to [state topic]**

(is error, conflicts with the law as I gave it to you on [second topic]). My instruction was [state in capsule form]. I ask you, therefore, to completely disregard that instruction and to be governed in your deliberations by the statement of law that I now give you.

Comment

“To obviate an erroneous instruction upon a material point, it must be withdrawn in such explicit terms as to preclude the inference that the jury might have been influenced by it,” *Smulczeski v City Center of Music & Drama, Inc.*, 3 NY2d 498, 169 NYS2d 1, 146 NE2d 769 (1957); *Chapman v Erie R. Co.*, 55 NY 579 (1874); *Safdie v New York*, 138 AD2d 361, 525 NYS2d 650 (2d Dept 1988); *Wunderlich v Hipper*, 35 AD2d 733, 316 NYS2d 130 (2d Dept 1970); see *Thrower v Smith*, 62 AD2d 907, 406 NYS2d 513 (2d Dept 1978), *aff’d* on other grounds, 46 NY2d 835, 414 NYS2d 124, 386 NE2d 1091 (1978); *Robinson v New York*, 5 AD2d 197, 170 NYS2d 734 (1st Dept 1958); 75 Am Jur 2d 788, Trial § 922.

The court may recall the jury to charge them further or correct an error in the charge, *Phillips v New York Cent. & H.R.R. Co.*, 127 NY 657, 27 NE 978 (1891); *Kromah v 2265 Davidson Realty LLC*, 169 AD3d 539, 95 NYS3d 36 (1st Dept 2019); see *Barreto v Calderon*, 31 AD2d 896, 297 NYS2d 799 (1st Dept 1969).

Where the error is in failing to advise the jury concerning evidence admissible against only one of two defendants, a perfunctory instruction that the evidence is “not binding on” the other defendant is not sufficient, see *People v Powell*, 21 AD2d 789, 250 NYS2d 592 (2d Dept 1964).

PJI 1:102. General Instruction—Supplemental Charge—To Correct Defective Verdict

Members of the jury, your verdict in this case does not (clearly, fully) decide all of the issues submitted to you. I, therefore, ask you to retire to the jury room and consider the matter further. Under the law applicable to this case, plaintiff must show that [concisely restate the basic charge, pointing out the inconsistency or lack of clarity in the answers given by the jury]. With that in mind, I ask you now to deliberate further to reconsider [the answer to questions “___” (or other problem)] and to answer those questions in accordance with my instructions.

Comment

Based upon the charge given in *Wertheim v Oriskany Street Garage*, 256 App Div 886, 9 NYS2d 19 (4th Dept 1939). "There is no doubt but that a jury after giving in a verdict may, before it is recorded, be sent back to reconsider it; not only to correct a mistake in form, or to make that plain which was obscure, but to alter it in substance if they so determine and agree," *Warner v New York Cent. R. Co.*, 52 NY 437 (1873); see *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980) (inconsistent answers to interrogatories); *Bernard v Seyopp Corp.*, 9 NY2d 676, 212 NYS2d 412, 173 NE2d 235 (1961); *Porret v New York*, 252 NY 208, 169 NE 280 (1929); *Pogo Holding Corp. v New York Property Ins. Underwriting Ass'n*, 97 AD2d 503, 467 NYS2d 872 (2d Dept 1983), *aff'd*, 62 NY2d 969, 479 NYS2d 336, 468 NE2d 291 (1984); *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 643 NYS2d 211 (2d Dept 1996); *Hernandez v New York*, 194 AD2d 377, 598 NYS2d 499 (1st Dept 1993); see also 76 Am Jur 2d 170, Trial § 1214 (power of jury to correct); 75B Am Jur 2d 625, Trial §§ 1894–1895.

The Court has the power to inquire into an "imperfect or incomplete" verdict before discharge of the jury, see *Porret v New York*, 252 NY 208, 169 NE 280 (1929), or if there was substantial confusion or ambiguity in the verdict, *Sharrow v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995); see *Panzarino v Jeffrey A. Weisberg, M.D., P.C.*, 257 AD2d 483, 684 NYS2d 208 (1st Dept 1999) (no confusion or ambiguity in verdict). When a jury's responses to submitted questions are inconsistent with one another, the remedy is to reinstruct the jury and order the jury to reconsider its responses, *Popolizio v Schenectady*, 62 AD3d 1181, 879 NYS2d 616 (3d Dept 2009); *Roberts v Westchester*, 278 AD2d 216, 717 NYS2d 276 (2d Dept 2000); *Peters v Port Authority Trans-Hudson Corp.*, 234 AD2d 205, 651 NYS2d 500 (1st Dept 1996); *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 643 NYS2d 211 (2d Dept 1996). The court should also instruct the jury that it is free to revise any of its answers on the verdict sheet, *Popolizio v Schenectady*, *supra*. Where a jury's answers to interrogatories with respect to liability are consistent with one another, but inconsistent with the damage award, the trial court has discretion to require the jury to reconsider the verdict, order a new trial, or enter judgment pursuant to the jury's answers, *Mayer v Goldberg*, 241 AD2d 309, 659 NYS2d 877 (1st Dept 1997). Where the inconsistent verdict is discovered only after the jury has been discharged, the trial court may, in the exercise of discretion, declare a mistrial, *Rivera v Majuk*, 256 AD2d 910, 681 NYS2d 843 (3d Dept 1998). The fixing by a jury of an amount for plaintiff's damages is not, in itself, inconsistent with a determination of no liability and should not be taken as an allocation of responsibility to a party, *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (1980); *Pavlou v New York*, 21 AD3d 74, 797 NYS2d 478 (1st Dept 2005), *aff'd*, 8 NY3d 961, 836 NYS2d 506, 868 NE2d 186 (2007); *Peters v Port Authority Trans-Hudson Corp.*, *supra*. On reconsideration, the jury is free to substantively alter its original

statement so as to conform to its real intention and the jury is not bound by the terms of its original verdict because that verdict has not been entered by the court, *Mateo v 83 Post Ave. Associates*, 12 AD3d 205, 784 NYS2d 520 (1st Dept 2004); *Bowes v Noone*, 298 AD2d 859, 748 NYS2d 440 (4th Dept 2002); *Ryan v Orange County Fair Speedway*, supra. Where a party fails to object to a claimed inconsistent verdict before the jury is discharged, the alleged inconsistency is not preserved for appellate review, see *Bowes v Noone*, supra; *Gribbon v Missionary Sisters of Sacred Heart*, 244 AD2d 185, 664 NYS2d 8 (1st Dept 1997).

Whether or not a verdict is inconsistent must be determined in light of the court's charge, *Rosas v Ishack*, 219 AD2d 633, 631 NYS2d 417 (2d Dept 1995); *Rubin v Pecoraro*, 141 AD2d 525, 529 NYS2d 142 (2d Dept 1988). The charge on the law and the makeup of the written interrogatories constitute the law of the case where unobjected to, *Rubin v Pecoraro*, supra. A party must register an objection to the jury's verdict on the ground of inconsistency prior to the dismissal of the jury, at which time corrective measures can be taken, *Kraus v Rotem*, 249 AD2d 371, 670 NYS2d 367 (2d Dept 1998).

An inquiry to clarify a verdict before discharging a jury must be distinguished from an attempt to impeach a jury's verdict after discharge, *Sharro v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995). None of the policies underlying the rule prohibiting an attempt to impeach a jury's verdict after discharge is compromised when the trial court itself, prior to the discharge of the jury and entry of the verdict, undertakes a limited inquiry into an inconsistency or ambiguity in the jury's verdict that is apparent from the jurors' responses during polling, *id.*

If a verdict is for an amount in excess of the court's jurisdiction, the Second Department allows the verdict to be amended either by the trial judge, *sua sponte*, *Izzi v Dolgin*, 42 AD2d 966, 347 NYS2d 971 (2d Dept 1973), or by plaintiff's stipulation, *Mundy v Levy Bros. Realty Co.*, 184 App Div 467, 170 NYS 994 (2d Dept 1918). However, the First Department holds that only the jury can cure this type of defect, *Abbey Rent A Car, Inc. v Moore*, 30 AD2d 952, 294 NYS2d 229 (1st Dept 1968).

As to other irregularities in verdict, see the following Annot: 7 ALR2d 1341; 55 ALR4th 186; 66 ALR3d 472; 47 ALR2d 803; 49 ALR2d 1328; 65 ALR2d 1331; 8 ALR3d 335; 46 ALR3d 801. With respect to inconsistency of verdict, note the comment under PJI 1:95.

PJI 1:103. General Instruction—Supplemental Charge— Note—Taking by Jurors

The question has been asked whether the jurors may take notes. The answer is yes, you may take notes if you want to. Whether you take notes or not, you should be aware that the court reporter

records everything stated in the courtroom, and any portion of the transcript, at your request, will be read back to you during your deliberations. If you do take notes during the trial, you should not allow your note-taking to become a distraction from the proceedings.

If any of you do take notes during the trial, those notes are only for your personal use and are simply an aid to your memory. Because the notes may be inaccurate or incomplete, they may not be given any greater weight than your independent recollection. Because the notes may be inaccurate or incomplete, they may not be given any greater weight or influence than the recollection of other jurors about the facts or the conclusions to be drawn from the facts in determining the outcome of this case. Those of you who do not take notes should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has taken notes. Any difference between a juror's recollection and a juror's notes should always be settled by asking to have the court reporter's transcript on that point read back to you. The court transcript should govern your determination rather than a juror's notes. A juror's notes are not a substitute for the official record or for the governing principles of law that I will give to you.

Comment

Whether to allow jurors to take notes during the trial rests in the discretion of the trial judge, *People v Hues*, 92 NY2d 413, 681 NYS2d 779, 704 NE2d 546 (1998) (citing PJI); *People v Tucker*, 77 NY2d 861, 568 NYS2d 342, 569 NE2d 1021 (1991); *People v DiLuca*, 85 AD2d 439, 448 NYS2d 730 (2d Dept 1982) (citing PJI); see 22 NYCRR 220.10(b); Annot: 14 ALR3d 831; 75 Am Jur 2d 795, § 934; 75B Am Jur 2d 391, §§ 1620–1623; see also *Bolm v Triumph Corp.*, 58 AD2d 1014, 397 NYS2d 498 (4th Dept 1977) (error to tell a single juror to take notes of the “key” portions of the charge). The Court of Appeals has held that a trial court, although not obligated to do so, has the discretion to permit note taking by jurors during a trial, *People v Hues*, *supra*. If a trial court determines that a particular case warrants note taking, the court can, *sua sponte*, instruct jurors that they are permitted to take notes during the trial, *id*. In light of the potential perils that note-taking can

present during trial, preliminary cautionary instructions should be given with respect to note-taking and these notes, *id*; *People v DiLuca*, *supra*; 22 NYCRR 220.10(c). The instructions should also be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberations, *People v Hues*, *supra*; *People v DiLuca*, *supra*.

The pattern charge is meant to be used when the issue arises during the course of the trial. If the jury has taken notes during the trial, the second paragraph of the pattern charge may be adapted for incorporation into the charge at the end of the trial.

If the court allows note-taking during its charge, the court should instruct the jury that any disagreement among them about the law or evidence, especially between a juror's recollection and another's notes, requires a readback of the charge, *People v Tucker*, 77 NY2d 861, 568 NYS2d 342, 569 NE2d 1021 (1991). Jurors may take notes during supplemental charges if cautionary instructions are given, *People v Tucker*, *supra*; *People v Brown*, 182 AD2d 563, 582 NYS2d 715 (1st Dept 1992). However, it is error for jurors to take notes on a judge's oral charge if no cautionary instructions are given, *People v Sundquist*, 175 AD2d 319, 572 NYS2d 410 (3d Dept 1991); *People v Anderson*, 151 AD2d 335, 542 NYS2d 592 (1st Dept 1989); or if the cautionary instruction failed to remind the jury that notes were only for the notetaker's personal use and that jurors had to request re-instruction if there was any disagreement, *People v Morales*, 159 AD2d 86, 559 NYS2d 869 (1st Dept 1990). It is also error to permit jurors to take notes when the requested portions of testimony are read back during deliberations where no cautionary instructions are given, *People v Stewart*, 179 AD2d 731, 578 NYS2d 638 (2d Dept 1992), *aff'd*, 81 NY2d 877, 597 NYS2d 634, 613 NE2d 540 (1993).

For the appropriate procedure regarding note-taking by jurors, see 22 NYCRR 220.10.

PJI 1:104. General Instruction—Supplemental Charge— Questions by Jurors

If any of you has a question you would like to ask a witness or the court, please write the question on a piece of paper, which the court officer will deliver to me. In my discretion I will decide whether and how the question may be asked, and what procedure to follow.

Comment

Caveat: This charge should only be given if a juror seeks to ask a question, see PJI 1:13D.

“To what extent under the circumstances peculiar to the trial of each cause questions should be permitted by jurors is a matter that should be left to the discretion of the trial court,” *People v Knapper*, 230 App Div 487, 245 NYS 245 (1st Dept 1930); see *People v Riley*, 92 AD2d 576, 459 NYS2d 332 (2d Dept 1983). If the trial judge decides to allow jurors to propound questions, the best practice is to have the jurors write out the question and to have the court or counsel ask it of the witness, subject to applicable evidentiary rules, *People v Wilds*, 141 AD2d 395, 529 NYS2d 325 (1st Dept 1988).

Federal Annotation: The Federal Rules of Evidence are silent on the question of jurors interrogating witnesses, see *DeBenedetto* by *DeBenedetto v Goodyear Tire & Rubber Co.*, 754 F2d 512 (4th Cir 1985); see also Annot: 80 ALR Fed 892; 44 Vand. L.Rev. 117; 58 UMK L.Rev. 445. However, federal courts conclude that allowing jurors to question witnesses is within the discretion of the trial judge, *U.S. v Lewin*, 900 F2d 145, 59 Ed Law Rep 702 (8th Cir 1990); *U.S. v Land*, 877 F2d 17 (8th Cir 1989); *DeBenedetto* by *DeBenedetto v Goodyear Tire & Rubber Co.*, supra; *U.S. v Callahan*, 588 F2d 1078 (5th Cir 1979); *U.S. v Witt*, 215 F2d 580 (2d Cir 1954). When allowing juror questioning of witnesses, it is preferable that the court require jurors to submit questions in writing and without disclosing the questions to other jurors, *U.S. v Polowichak*, 783 F2d 410 (4th Cir 1986).

PJI 1:104A. General Instruction—Supplemental Charge—Jury View of the Scene

Members of the jury, I have decided that you should see the place where the accident happened. We shall leave from the courtroom [*state time and means of transportation*]. The sole purpose of this inspection is to allow you to visually observe the scene. While at the scene or while traveling to and from the scene, do not discuss the case or the scene. When you deliberate on this case, you may, then, consider your view of the scene in the same way you consider all the other evidence.

Comment

Based on CPLR 4110(c), which, with minor modifications, duplicates CPL § 270.50. Both the CPLR and the CPL sections provide that the parties may waive the right to be present at the viewing. A jury view may also be directed by the court in actions for waste, RPAPL § 821.

As a general rule, the jury should be instructed to avoid the scene of the events involved in the litigation, see PJI 1:10. An unauthorized visit to the scene by a juror is deemed inherently prejudicial in a criminal case, see *People v Crimmins*, 26 NY2d 319, 310 NYS2d 300, 258

NE2d 708 (1970) (not harmless error); *People v De Lucia*, 20 NY2d 275, 282 NYS2d 526, 229 NE2d 211 (1967); *People v Redd*, 164 AD2d 34, 561 NYS2d 439 (1st Dept 1990). In civil cases, prejudice must be shown, *Alford v Sventek*, 53 NY2d 743, 439 NYS2d 339, 421 NE2d 831 (1981); *Thorp v Makuen*, 73 AD2d 617, 422 NYS2d 456 (2d Dept 1979); Annot: 11 ALR3d 918; see *Antinelli v Toner*, 74 AD2d 996, 427 NYS2d 99 (4th Dept 1980) (in non-jury trial propriety of court's visit to scene not preserved for review because no objection raised at trial with regard to manner of observation).

Whether to permit the jury to visit the scene is within the discretion of the court, *Tubular Products, Inc. v Jacobson*, 138 AD2d 371, 525 NYS2d 655 (2d Dept 1988); see *Roberts v Westchester*, 278 AD2d 216, 717 NYS2d 276 (2d Dept 2000). Before allowing the jury to visit the scene, the trial judge should make some preliminary determinations: (1) whether the conditions at the scene at the time of the jury view are substantially similar to the conditions at the time of the accident, see *People v Robinson*, 133 AD2d 473, 519 NYS2d 571 (2d Dept 1987); *People v Hamilton*, 112 AD2d 951, 492 NYS2d 632 (2d Dept 1985); *People v Rao*, 107 AD2d 720, 484 NYS2d 76 (2d Dept 1985); *People v McCurdy*, 86 AD2d 493, 450 NYS2d 507 (2d Dept 1982); *Antinelli v Toner*, 74 AD2d 996, 427 NYS2d 99 (4th Dept 1980); *Prince, Richardson on Evidence* (11th Ed Farrell) §§ 4-215, 4-216; (2) whether viewing the scene would help the jury in deciding any material issue of fact, *People v Basora*, 151 AD2d 588, 542 NYS2d 691 (2d Dept 1989), *aff'd*, 75 NY2d 992, 557 NYS2d 263, 556 NE2d 1070 (1990); *People v Zocchi*, 133 AD2d 478, 519 NYS2d 690 (2d Dept 1987); *People v Cassidy*, 115 AD2d 487, 496 NYS2d 365 (2d Dept 1985); (3) whether the area is sufficiently uncommon or unique so that a view would be helpful to the jurors, *People v Kaufman*, 156 AD2d 718, 549 NYS2d 471 (2d Dept 1989); *People v Purcell*, 103 AD2d 938, 479 NYS2d 768 (3d Dept 1984); *People v Hamel*, 96 AD2d 644, 466 NYS2d 748 (3d Dept 1983).

D. CHARGE AFTER VERDICT

PJI 1:105. General Instruction—Charge After Verdict

Members of the jury, your verdict completes your service in this case. On behalf of the judicial system of this state, I thank you for that service. Before you leave the courtroom, however, I want to inform you that you do not have to answer questions about the case asked by anyone other than me. The public interest requires that jurors have the utmost freedom of debate in the jury room, and that each of you be free to express your views without fear of what others may think. Although you are not required to maintain secrecy about what occurred in the jury room, you should keep in mind your own best interests as jurors before discussing the case with anyone or answering any questions about it. In sum, you are free to discuss the case with anyone and you are also free to decline to discuss the case.

Comment

Based on Civil Rights Law § 14, which provides, “A juror shall not be questioned, and is not subject to an action, or other liability civil or criminal, for a verdict rendered by him, in an action in a court of record, or not of record, or in a special proceeding before an officer, except by indictment, for corrupt conduct, in a case prescribed by law,” and *Matter of Cochran*, 237 NY 336, 143 NE 212 (1924); see *Clark v U.S.*, 289 US 1, 53 SCt 465 (1933). Civil Rights Law § 14 is generally interpreted as a protection against subjecting a juror to civil or criminal liability for his or her conduct during deliberations or in rendering a verdict, see *Sharrow v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995). Ordinarily, the practice of post-trial investigations of jurors is condemned, *Gamell v Mt. Sinai Hospital*, 40 AD2d 1010, 339 NYS2d 31 (2d Dept 1972).

The law is well settled that jurors may not ordinarily impeach their own verdict, *Shumway v Kelley*, 109 AD3d 1092, 972 NYS2d 365 (4th Dept 2013); *Selzer v New York City Transit Authority*, 100 AD3d 157, 952 NYS2d 26 (1st Dept 2012); *Capital Medical Systems Inc. v Fuji Medical Systems, U.S.A., Inc.*, 270 AD2d 728, 705 NYS2d 122 (3d Dept 2000); *Moisakis v Allied Bldg. Products Corp.*, 265 AD2d 457, 697 NYS2d 100 (2d Dept 1999). New York has a policy against impeachment of verdicts and thus will not permit “post-trial harassment of jurors for statements which might render their verdicts questionable,” *People v De Lucia*, 20 NY2d 275, 282 NYS2d 526, 229 NE2d 211 (1967);

see *Best v Swan Group Ltd. Partnership*, 81 AD3d 1344, 915 NYS2d 782 (4th Dept 2011); *Hoffman v Domenico Bus Service, Inc.*, 183 AD2d 807, 584 NYS2d 122 (2d Dept 1992); *Glanton v New York Hosp.*, 175 AD2d 58, 572 NYS2d 314 (1st Dept 1991). Therefore, post-trial depositions of jurors to establish that the verdict was a compromise verdict will not be allowed, *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 492 NYS2d 584, 482 NE2d 63 (1985); see *Gamell v Mt. Sinai Hospital*, 40 AD2d 1010, 339 NYS2d 31 (2d Dept 1972).

Certain limited, narrowly-construed exceptions exist to the general rule proscribing the use of juror affidavits to attack a jury's verdict. First, juror affidavits may be used to correct ministerial errors in reporting a verdict, *Breen-Burns v Scarsdale Woods Homeowners' Ass'n Inc.*, 73 AD3d 661, 901 NYS2d 272 (1st Dept 2010); *Moisakis v Allied Bldg. Products Corp.*, 265 AD2d 457, 697 NYS2d 100 (2d Dept 1999); *Lustyik v Manaher*, 246 AD2d 887, 668 NYS2d 410 (3d Dept 1998); see *Porter v Milhorat*, 26 AD3d 424, 809 NYS2d 210 (2d Dept 2006); *Alkinburgh v Glessing*, 240 AD2d 904, 658 NYS2d 735 (3d Dept 1997); *Grant v Endy*, 167 AD2d 807, 563 NYS2d 368 (3d Dept 1990); *Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985); *Rose v Thau*, 45 AD2d 182, 357 NYS2d 201 (3d Dept 1974). Several Appellate Division decisions have cautioned that a misunderstanding relating to what monetary amount is referenced by "total damages" on a jury verdict may not be corrected by post-trial juror affidavits or statements, *Lustyik v Manaher*, *supra*; *Alkinburgh v Glessing*, *supra*; *Walden v Otis Elevator Co.*, 178 AD2d 878, 577 NYS2d 732 (3d Dept 1991); see *Breen-Burns v Scarsdale Woods Homeowners' Ass'n Inc.*, *supra*; *DeCrescenzo v Gonzalez*, 46 AD3d 607, 847 NYS2d 236 (2d Dept 2007); *Grant v Endy*, 167 AD2d 807, 563 NYS2d 368 (3d Dept 1990); *Labov v New York*, 154 AD2d 348, 545 NYS2d 826 (2d Dept 1989); but see *Butterfield v Caputo*, 108 AD3d 1162, 970 NYS2d 144 (4th Dept 2013) (juror affidavits permitted to correct verdict to reflect that plaintiff would receive \$60,000 per year for a period of 30 years, not a total of \$60,000 over that period); *Smith v Field*, 302 AD2d 585, 756 NYS2d 83 (2d Dept 2003) (juror affidavits permitted to correct verdict to reflect that plaintiff would receive \$5,000 per year for 20 years for a total of \$100,000 for future pain and suffering, not a total of \$5,000 for that species of pain and suffering).

Second, juror affidavits may be used to demonstrate that the verdict contains an inherent defect or ambiguity, or was the product of juror confusion, *Moisakis v Allied Bldg. Products Corp.*, 265 AD2d 457, 697 NYS2d 100 (2d Dept 1999); see *Porter v Milhorat*, 26 AD3d 424, 809 NYS2d 210 (2d Dept 2006); *McStocker v Kolment*, 160 AD2d 980, 554 NYS2d 702 (2d Dept 1990); see also *Selzer v New York City Transit Authority*, 100 AD3d 157, 952 NYS2d 26 (1st Dept 2012) (court may take into account juror affidavits only to clarify errors in deliberation, such as when juror confusion is apparent from nonsensical verdict or there are obvious errors such as omissions or confusion on special verdict). The inherent defect, ambiguity or confusion in the verdict must be apparent from the trial record, *Moisakis v Allied Bldg. Products Corp.*, *supra*; see *Breen-Burns v Scarsdale Woods Homeowners' Ass'n*

Inc., 73 AD3d 661, 901 NYS2d 272 (1st Dept 2010); *Wylder v Viccari*, 138 AD2d 482, 525 NYS2d 882 (2d Dept 1988); see also *Wright v New York*, 168 AD3d 1025, 92 NYS3d 103 (2d Dept 2019); but see *McStocker v Kolment*, *supra*. Where the charge to the jury and the verdict sheet were straightforward and not confusing, the court should not have allowed the jury to impeach its verdict after it was discharged, *Alkinburgh v Glessing*, 240 AD2d 904, 658 NYS2d 735 (3d Dept 1997); see *Laylon v Shaver*, 187 AD2d 983, 590 NYS2d 615 (4th Dept 1992).

Third, juror affidavits may be used to show that the jury was subjected to an improper influence during the course of the trial, see *People v Maragh*, 94 NY2d 569, 708 NYS2d 44, 729 NE2d 701 (2000). Improper influence includes even well intentioned jury conduct that tends to put the jury in possession of evidence not introduced at trial, *id*; *People v Brown*, 48 NY2d 388, 423 NYS2d 461, 399 NE2d 51 (1979). In *People v Maragh*, *supra*, the Court held that inquiry was proper where there was evidence that a juror communicated with other jurors' professional opinions that contradicted material professional opinions of witnesses in the case and which affected the jury deliberations, see PJI 1:25A. Not every irregularity in the conduct of jurors requires a new trial; rather, the misconduct must be such as to prejudice a party in his or her substantial rights, *Russo v Mignola*, 142 AD3d 1064, 38 NYS3d 209 (2d Dept 2016); *Wiener v Davidson*, 61 AD2d 1030, 403 NYS2d 99 (2d Dept 1978). In each case the facts must be examined to determine the nature of the improper influence and the likelihood that prejudice would be engendered, *Alford v Sventek*, 53 NY2d 743, 439 NYS2d 339, 421 NE2d 831 (1981).

A juror's affidavit cannot be used to show that another juror was dishonest during voir dire if the information imparted in the affidavit was disclosed during the jury's deliberations, see *McHugh v Jones*, 258 App Div 111, 16 NYS2d 332 (2d Dept 1939), *aff'd*, 283 NY 534, 29 NE2d 76 (1940); *People v Morales*, 121 AD2d 240, 503 NYS2d 374 (1st Dept 1986); *People v Pauley*, 281 App Div 223, 119 NYS2d 152 (4th Dept 1953); *Anthony v Schofield*, 266 App Div 905, 42 NYS2d 784 (4th Dept 1943); see also *People v Leonti*, 262 NY 256, 186 NE 693 (1933); but see *Payne v Burke*, 236 App Div 527, 260 NYS 259 (4th Dept 1932); see generally *Warger v Shauers*, 135 SCt 521 (2014) (construing Federal Rule of Evidence 606(b) and concluding that it precludes a party from seeking a new trial on the basis of a juror's affidavit stating what another juror said during deliberations that indicated that the other juror was dishonest during voir dire).

Similarly, post-trial juror affidavits may not be used to reconstruct the conclusions purportedly reached by a jury in rendering a general verdict, *Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985); see *Luppino by Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986). "To allow the use of evidence such as this could subject jurors to continuing harassment at the hands of attorneys and investigators" and result in a "morass" in which hearings would be needed to resolve factual disputes and juror testimony used to

attack the verdict, *Russo v Jess R. Rifkin, D.D.S., P.C.*, supra; see *Gamell v Mt. Sinai Hospital*, 40 AD2d 1010, 339 NYS2d 31 (2d Dept 1972); see also Rules of Professional Conduct (22 NYCRR 1200.0 et seq.) Rule 3:5(a)(5) (rule of professional conduct governing lawyer's communication with discharged juror).

The policy against impeachment of verdicts is not compromised, however, when the trial court itself, prior to discharge of the jury and entry of the verdict, undertakes a limited inquiry into an inconsistency or ambiguity in the jury's verdict that is apparent from the juror's responses during polling, *Sharrow v Dick Corp.*, 86 NY2d 54, 629 NYS2d 980, 653 NE2d 1150 (1995).

DIVISION 2. NEGLIGENCE ACTIONS

A. COMMON LAW STANDARD OF CARE

1. NEGLIGENCE DEFINED

PJI 2:10. Common Law Standard of Care—Negligence Defined—Generally

Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

Comment

Caveat: Because a court decides in the first instance whether a defendant owes a duty to a plaintiff, the instructions on whether and to what extent a duty exists have a limited impact on the outcome of the trial, see *Matter of New York City Asbestos Litigation* (Dummitt), 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016). But any reference to duty may have a bearing on the jury's task, *id.* For instance, the court's instructions on the source and nature of the duty may impact the jury's deliberations on the issue of whether the defendant committed a breach within the scope of the relevant duty, *id.* As a result, a trial court can commit a significant error in issuing an incorrect or confusing instruction on the issue of duty, *id.*

Based on *Caldwell v Island Park*, 304 NY 268, 107 NE2d 441 (1952); *Sadowski v Long Island R. Co.*, 292 NY 448, 55 NE2d 497 (1944); see *Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 977 NYS2d 676, 999 NE2d 1121 (2013); *Borrerro v Haks Group, Inc.*, 165 AD3d 1216, 87 NYS3d 618 (2d Dept 2018) (citing PJI); *Cooper v Burt's Reliable, Inc.*, 105 AD3d 886, 964 NYS2d 195 (2d Dept 2013) (citing PJI); *Bello v Transit Authority of New York City*, 12 AD3d 58, 783 NYS2d 648 (2d Dept 2004) (citing PJI); *Gray v Gouz, Inc.*, 204 AD2d 390, 611 NYS2d 637 (2d Dept 1994) (citing PJI); see generally *Abrams v Bute*, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016) (citing PJI).

I. Generally

Negligence is not a thing, but a relation. It cannot exist in a

vacuum. It is relative to time, place, circumstances and persons, and what may be negligence as to one person may not be negligence as to another, *Levine v New York*, 309 NY 88, 127 NE2d 825 (1955); *Sadowski v Long Island R. Co.*, 292 NY 448, 55 NE2d 497 (1944). Because a finding of negligence must be based on the breach of a duty, a threshold question in negligence cases is whether the alleged tortfeasor owed a duty of care to the injured party, *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); see *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358, 71 NE3d 946 (2017); *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 977 NYS2d 676, 999 NE2d 1121 (2013); *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002); *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004).

Negligence arises from a breach of a legal duty, *Strauss v Belle Realty Co.*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 34 (1985); *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976); *Levine v New York*, 309 NY 88, 127 NE2d 825 (1955); *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928), not a moral one, *Daily v Tops Markets, LLC*, 134 AD3d 1332, 20 NYS3d 487 (3d Dept 2015), and is not actionable unless it results in damage to a person to whom the legal duty is owed, *Levine v New York*, supra; *Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 200 NE 824 (1936); *Larmore v Crown Point Iron Co.*, 101 NY 391, 4 NE 752 (1886). As stated by the Court of Appeals, a “finding of negligence may be based only upon the breach of a duty,” *Darby v Compagnie National Air France*, 96 NY2d 343, 728 NYS2d 731, 753 NE2d 160 (2001); see *Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 37 NYS3d 750, 59 NE3d 485 (2016). The only relevant question is whether defendant breached a duty to plaintiff; a breach of duty to others is not material, *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001) and *Strauss v Belle Realty Co.*, supra (extent of duty should be limited on policy grounds); *Jenks v McGranaghan*, 30 NY2d 475, 334 NYS2d 641, 285 NE2d 876 (1972) (no duty on part of golfer to warn player not in line of play); *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928); *Beck v FMC Corp.*, 53 AD2d 118, 385 NYS2d 956 (4th Dept 1976), aff’d, 42 NY2d 1027, 398 NYS2d 1011, 369 NE2d 10 (1977) (power company owed no duty to employees for failing to furnish electricity to employer); *Igbara v Verizon Communications, Inc.*, 2 AD3d 330, 770 NYS2d 29 (1st Dept 2003) (telephone company had no duty to safeguard its truck for benefit of woman whose husband was murdered by individual who stole truck and gained entrance to home by representing himself as telephone company employee); *Ocera v Zito*, 212 AD2d 681, 622 NYS2d 800 (2d Dept 1995); *Jackson v Livingston Country Club, Inc.*, 55 AD2d 1045, 391 NYS2d 234 (4th Dept 1977) (question of fact as to whether defendant golfer was negligent in not warning player); *Dunlop Tire & Rubber Corp. v FMC Corp.*, 53 AD2d 150, 385 NYS2d 971 (4th Dept 1976) (tire plant owner could recover from chemical plant

owner where explosion at chemical plant caused interruption in supply of electrical power causing shutdown of tire plant); see 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001) and Roundabout Theatre Co., Inc. v Tishman Realty & Const. Co., Inc., 302 AD2d 272, 756 NYS2d 12 (1st Dept 2003) (landowner who engages in activities that may cause injury to persons on adjoining premises owes no duty to protect neighborhood against purely economic losses in absence of personal injuries or property damages); see also Williams v State, 308 NY 548, 127 NE2d 545 (1955) and Wasserstein v State, 32 AD2d 119, 300 NYS2d 263 (3d Dept 1969), *aff'd*, 27 NY2d 627, 313 NYS2d 759, 261 NE2d 665 (1970) (for a discussion of duty to the community at large as opposed to the individual.)

An independent contractor hired to correct a specific problem in an elevator has no duty to warn the building owner of defects unrelated to the problem it was hired to correct, McMurray v P.S. Elevator, Inc., 224 AD2d 668, 638 NYS2d 720 (2d Dept 1996); see Vergara v Scripps Howard, Inc., 261 AD2d 302, 691 NYS2d 392 (1st Dept 1999). Likewise, in the absence of a contract requiring a defendant repair company to provide routine or systematic maintenance of a product, a repairer has no duty, as an independent contractor, to warn the plaintiff's employer of any purported design defects, see Dauernheim v Lendlease Cars, Inc., 238 AD2d 462, 656 NYS2d 671 (2d Dept 1997).

"In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'." Pasternack v Laboratory Corp. of America Holdings, 27 NY3d 817, 37 NYS3d 750, 59 NE3d 485 (2016) citing Solomon by Solomon v City of New York, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (1985); Colucci v Stuyvesant Plaza, Inc., 157 AD3d 1095, 69 NYS3d 410 (3d Dept 2018).

II. Elements of Negligence

A. Duty

Whether defendant owes a duty of care to plaintiff "is entirely one of law to be determined by the courts," Donohue v Copiague Union Free School District, 64 AD2d 29, 407 NYS2d 874 (2d Dept 1978), *aff'd*, 47 NY2d 440, 418 NYS2d 375, 391 NE2d 1352 (1979); Cardenas v Rochester Regional Health, 192 AD3d 1543, 144 NYS3d 774 (4th Dept 2021); Gerdowsky v Crain's New York Business, 188 AD2d 93, 593 NYS2d 514 (1st Dept 1993); see Abrams v Bute, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016) (existence and scope of alleged tortfeasor's duty is, in first instance, legal question for court); Ohlhausen v New York, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010); Matthews v Scotia-Glenville School System, 94 AD2d 912, 463 NYS2d 629 (3d Dept 1983); Crosby v Bethlehem, 90 AD2d 134, 457 NYS2d 618 (3d Dept 1982) (town owed no duty to pedestrian for failure to arrest intoxicated motorcyclist); Conte v Aeolian Corp., 80 AD2d 990, 437 NYS2d 473 (4th Dept 1981). Although

juries determine whether and to what extent a particular duty was breached, it is for the courts first to determine whether any duty exists, *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); *Darby v Compagnie National Air France*, 96 NY2d 343, 728 NYS2d 731, 753 NE2d 160 (2001); *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001); see *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358, 71 NE3d 946 (2017). Thus, the definition and scope of an alleged tortfeasor's duty to a plaintiff is a question of law, *Pink v Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016); *Paster-nack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 37 NYS3d 750, 59 NE3d 485 (2016); *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994). The court must decide whether there is any proof in the record that might support the recognition of a duty, see *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016). In determining whether any duty exists, courts identify what people may reasonably expect of one another, *Darby v Compagnie National Air France*, *supra*. Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *Cardenas v Rochester Regional Health*, *supra*; *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019); *On v BKO Exp. LLC*, 148 AD3d 50, 45 NYS3d 68 (1st Dept 2017). In discerning whether a duty exists, a court must settle on the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty, *Matter of New York City Asbestos Litigation (Dummitt)*, *supra*; see *Darby v Compagnie National Air France*, *supra*; *Cardenas v Rochester Regional Health*, *supra*; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 23 NYS3d 183 (1st Dept 2016); *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004). While the existence of a duty is a question of law to be determined by the courts, the jury must be instructed on the nature and scope of the duty so it can ascertain any breach thereof, *Martuscello v Jensen*, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015); see Comment to PJI 2:12.

The proper formula for analyzing the element of duty has long been a subject of debate, *Ohlhausen v New York*, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010). The general outlines of the debate are derived from the majority and dissenting opinions in *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928). The majority opinion in *Palsgraf*, which was authored by Judge Cardozo, stated that “[t]he risk reasonably to be perceived defines the duty to be obeyed” and, further, that “duty” is to be assessed not in the abstract but “in relation to the plaintiff,” *id.* The dissenting opinion in *Palsgraf*, which was written by Judge Andrews,

argued that “[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others” and the duty extends to all those who are “in fact injured, even if [the injured] be outside what would generally be thought the danger zone,” *id.* (Andrews, J.). Additionally, Judge Andrews opined that where a duty “owe[d] to the world” has been breached, the breacher should be liable if the breach was a “substantial factor” in producing the result, *id.* Thus, the Andrews position was that the scope of foreseeable harm is not the proper touchstone for determining the limits of “duty” and that, instead, the element of foreseeability is a factor in resolving the “problem of proximate cause,” *id.*

The debate regarding the proper analytical role of foreseeability is also evident in modern case law, see *Pink v Rome Youth Hockey Ass’n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016) (“Foreseeability merely determines the scope of the duty once the duty is determined to exist”); *Matter of New York City Asbestos Litigation* (Dummitt), 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016) (“the court cannot recognize a duty based entirely on the foreseeability of the harm at issue, though foreseeability defines the scope of a duty once it has been recognized”); 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001) (“foreseeability of harm does not define duty”); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000) (“[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm”); *Eiseman v State*, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987) (“[f]oreseeability of injury does not determine the existence of duty”); *Bonomonte v New York*, 79 AD3d 515, 914 NYS2d 19 (1st Dept 2010), *aff’d*, 17 NY3d 866, 932 NYS2d 421, 956 NE2d 1266 (2011), and *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004) (foreseeability “does not determine the existence of duty, but rather, the scope of that duty once it is determined to exist”); *On v BKO Exp. LLC*, 148 AD3d 50, 45 NYS3d 68 (1st Dept 2017) (where defendant owes some duty and question is breadth of duty, foreseeability of injury to plaintiff is relevant); *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015) (“In determining duty, a court must determine whether the injured party was a foreseeable plaintiff. . .”); see also *Mayorga v Berkshire Farm Center and Services for Youth*, 136 AD3d 1262, 26 NYS3d 390 (3d Dept 2016). At least one court has observed in light of the foregoing cases that the Cardozo position in *Palsgraf* “may have undergone some adjustment,” *Ohlhausen v New York*, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010).

The Court of Appeals has emphasized an approach that balances a number of policy considerations and factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation and public policies affecting the expansion or limitation of new channels of liability, *Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 37 NYS3d 750, 59 NE3d 485 (2016);

Gilson v Metropolitan Opera, 5 NY3d 574, 807 NYS2d 588, 841 NE2d 747 (2005); *Matter of New York City Asbestos Litigation* [Holdampf v A.C. & S., Inc.], 5 NY3d 486, 806 NYS2d 146, 840 NE2d 115 (2005); *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001); *532 Madison Avenue Gourmet Foods, Inc. v Finlandia Center, Inc.*, 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001); *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994); *On v BKO Exp. LLC*, 148 AD3d 50, 45 NYS3d 68 (1st Dept 2017); *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 23 NYS3d 183 (1st Dept 2016); see *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015) (courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of social consequences of imposing duty); *Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 990 NYS2d 605 (2d Dept 2014) (in determining whether one party owes another a duty, court may consider logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility); see also *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358, 71 NE3d 946 (2017) (limitless duty and liability, undermining of public policy militate against imposing duty); *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015) (existence of duty is question of policy to be determined with reference to legal precedent, statutes, and other legal principles). A critical consideration in determining whether a duty exists is whether the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm, *Davis v South Nassau Communities Hosp.*, supra; *Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009, 129 NYS3d 570 (4th Dept 2020); *Fitzsimons v Brennan*, 169 AD3d 873, 95 NYS3d 112 (2d Dept 2019). That is to say, a court may assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost, *Davis v South Nassau Communities Hosp.*, supra; *Stephanie L. v House of the Good Shepherd*, supra.

In *Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 977 NYS2d 676, 999 NE2d 1121 (2013), the Court of Appeals held that a laboratory that conducted drug tests for a probation department had a duty to an individual probationer who faced profound, potentially life-altering consequences as a result of a reported false positive result. The *Landon* Court held that, as in *Dombrowski v Bulson*, 19 NY3d 347, 948 NYS2d 208, 971 NE2d 338 (2012), there were no overriding policy considerations militating against recognizing the probationer's loss of freedom as a legally cognizable form of harm. In *Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 37 NYS3d 750, 59 NE3d 485 (2016), the Court observed that its holding in *Landon* regarding the duty of care owed by a laboratory was limited to the circumstances therein—namely, a drug laboratory's failure to adhere to professionally accepted scientific testing standards in the testing of the biological sample. Thus, the *Pasternack* Court declined to extend *Landon*'s reasoning to impose a duty on a laboratory to test subjects to adhere to aspects of ministerial governmental regulations and guidelines that do

not implicate the scientific integrity of the testing process, especially since the relied-upon regulations and guidelines were created to protect the public, not the test subjects, *id.* In *Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 990 NYS2d 605 (2d Dept 2014), the Second Department declined to expand the duty set forth in *Landon*, concluding that neither a drug testing laboratory nor a drug treatment center owed a duty to an individual who was subject to drug testing to provide a disclaimer indicating that the results were only to be used for clinical, not forensic, purposes.

In *Tenuto v Lederle Laboratories, Div. of American Cyanamid Co.*, 90 NY2d 606, 665 NYS2d 17, 687 NE2d 1300 (1997), the Court imposed a duty on a doctor treating an infant patient with an oral polio vaccine to warn the infant's parents to take precautions against the dangers of contracting polio from exposure to the infant's feces or saliva, see *Doe v Lai-Yet Lam*, 268 AD2d 206, 701 NYS2d 347 (1st Dept 2000). The Court recognized a special relationship based on the parents' reliance on the doctor, both directly and indirectly, given their status as the infant patient's primary caretakers, a duty heightened by the reality that a necessary part of the "comprehensive services" provided by pediatricians is the provision of advice to the parents who engage them, *Tenuto v Lederle Laboratories, Div. of American Cyanamid Co.*, *supra*. However, a doctor does not owe a duty of care to a friend of a patient treated for infectious meningitis based on the doctor's negative answer to the friend's question whether she needed treatment after being in close contact with the patient, *McNulty v New York*, 100 NY2d 227, 762 NYS2d 12, 792 NE2d 162 (2003). In *McNulty*, there was no allegation that plaintiff's injury arose from the doctors' treatment of the primary patient, *id.* A doctor who treated the infant plaintiff's older sibling for a genetic condition owed no duty to the infant plaintiff before he was conceived or born, *John v De Vivo*, 179 AD3d 597, 117 NYS3d 230 (1st Dept 2020). Where a medical provider has administered medication that impairs or could impair the patient's ability to operate an automobile, the medical provider has a duty to third parties to warn the patient of that danger, *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015). The imposition of such a duty in *Davis* was appropriate because the medical provider administered the medication without warning the patient about the effects of it, thereby creating a peril affecting every motorist in the vicinity of the automobile operated by the patient; the medical provider was the only one who could have provided a proper warning; and the cost imposed on the medical provider by the obligation to warn the patient was small, *id.* Ordinarily, an insurance company has no duty to disclose to a prospective insured medical conditions discovered during a pre-insurance physical examination, *Petrosky v Brasner*, 279 AD2d 75, 718 NYS2d 340 (1st Dept 2001).

Applying a balancing test, the Court of Appeals held in *Gilson v Metropolitan Opera*, 5 NY3d 574, 807 NYS2d 588, 841 NE2d 747 (2005), that a theater operator has no duty to escort obviously infirm patrons to their seats to protect other patrons from injury, since imposing such a duty would place undue burdens beyond the limits of the duty to maintain the premises in reasonably safe condition.

In *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440, 418 NYS2d 375, 391 NE2d 1352 (1979), the Court refused, on public policy grounds, to recognize a claim sounding in “educational malpractice,” holding that statutes designed to confer a benefit upon the general public do not give rise to an individual cause of action, see *Torres v Little Flower Children’s Services*, 64 NY2d 119, 485 NYS2d 15, 474 NE2d 223 (1984); *James v Board of Ed. of City of New York*, 42 NY2d 357, 397 NYS2d 934, 366 NE2d 1291 (1977); *Paladino v Adelphi University*, 89 AD2d 85, 454 NYS2d 868 (2d Dept 1982); *Washington v New York*, 83 AD2d 866, 442 NYS2d 20 (2d Dept 1981) (extending principle to private schools). For a discussion of educational institutions’ liability under contract principles, see PJI 4:1, Introductory Comment.

Other cases in which no duty was found include: *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358, 71 NE3d 946 (2017) (mental health and substance abuse treatment facility that provided alternative-to-incarceration services to criminal defendants owed no duty to individual assaulted off facility grounds by discharged resident, who had been expelled from program for violating its policies); *Kowalski v St. Francis Hosp. and Health Centers*, 21 NY3d 480, 972 NYS2d 186, 995 NE2d 148 (2013) (where intoxicated person voluntarily went to hospital for treatment, neither hospital nor physician owed duty to person to prevent him from leaving hospital as Mental Hygiene Law did not afford hospital or physician the right to retain person involuntarily); *Matter of New York City Asbestos Litigation [Holdampf v A.C. & S., Inc.]*, 5 NY3d 486, 806 NYS2d 146, 840 NE2d 115 (employer/landowner owed no duty to employee’s spouse allegedly injured because of her laundering of employee’s clothes containing asbestos dust); *Cohen v Cabrini Medical Center*, 94 NY2d 639, 709 NYS2d 151, 730 NE2d 949 (2000) (doctor owed no duty of care to patient’s spouse who contended that she could be impregnated only through in vitro fertilization after doctor performed unsuccessful surgery on patient); *Di Ponzio v Riordan*, 89 NY2d 578, 657 NYS2d 377, 679 NE2d 616 (1997) (defendant filling station owner had no duty to protect plaintiff customer from another customer’s runaway car); *Parks v Hutchins*, 162 AD2d 666, 557 NYS2d 389 (2d Dept 1990), *aff’d*, 78 NY2d 1049, 576 NYS2d 84, 581 NE2d 1339 (1991) (no duty on railroad to erect barrier capable of stopping automobile that left roadway and traversed 11 1/2-foot wide adjacent sidewalk); *Bonomonte v New York*, 79 AD3d 515, 914 NYS2d 19 (1st Dept 2010), *aff’d*, 17 NY3d 866, 932 NYS2d 421, 956 NE2d 1266 (2011) (plaintiff’s employer owed no duty of care to plaintiff who was injured as a result of a slip and fall accident outside of his home on his way to an employer-mandated doctor’s appointment at the employer’s medical clinic); *Cardenas v Rochester Regional Health*, 192 AD3d 1543, 144 NYS3d 774 (4th Dept 2021) (in the absence of specific threat, mental health care providers did not owe duty to patient’s son, who was killed by patient after she was discharged from in-patient facility and was being treated on an outpatient basis); *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 115 NYS3d 368 (2d Dept 2019) (where decedent was discharged by residential health care facility with certain care instructions, her adult daughter did not owe decedent duty of care with regard

to following those instructions); *Fitzsimons v Brennan*, 169 AD3d 873, 95 NYS3d 112 (2d Dept 2019) (college did not owe duty to students killed in fire in off-campus house, where house was merely on list of off-campus housing distributed by college); *Kraft v Loso*, 154 AD3d 1265, 63 NYS3d 566 (3d Dept 2017) (no duty to third person for out-of-possession co-owner who did not exercise possession or control over property by agreement); *On v BKO Exp. LLC*, 148 AD3d 50, 45 NYS3d 68 (1st Dept 2017) (owner of livery cab owed no duty to members of public to install partition in cab meant to protect driver); *Mayorga v Berkshire Farm Center and Services for Youth*, 136 AD3d 1262, 26 NYS3d 390 (3d Dept 2016) (non-secure facility that accepted court-ordered juvenile delinquent placements owed no duty to motorist, whose vehicle was struck by stolen vehicle operated by juvenile placed in facility, to prevent juvenile from leaving facility); *Guevara v Ortega*, 136 AD3d 508, 26 NYS3d 12 (1st Dept 2016) (customer of commercial car wash has no duty to investigate driving qualifications of employees who may operate vehicle during cleaning process); *Daily v Tops Markets, LLC*, 134 AD3d 1332, 20 NYS3d 487 (3d Dept 2015) (grocery store owed no duty to unconscious individual in car in store's parking lot to summon assistance for individual; although store employees were notified of individual's presence in parking lot, individual was not customer, was not on premises for activity related to store's business, and store's employees did not see or have contact with individual); *Malone v Suffolk*, 128 AD3d 651, 8 NYS3d 408 (2d Dept 2015) (physician owed no duty of care to decedent who was murdered by person to whom physician had prescribed narcotics; decedent was member of general public, not part of determinate class, and physician did not have authority or ability to control murderer); *Leichter v Cambridge Development, LLC*, 90 AD3d 557, 935 NYS2d 291 (1st Dept 2011) (independent senior living facility owed no duty to resident, who suffered from Alzheimer's disease, to protect resident from his own risky behavior; facility was not assisted living facility and contract between parties did not require facility to monitor and supervise resident); *Avins v Federation Employment and Guidance Service, Inc.*, 52 AD3d 30, 857 NYS2d 550 (1st Dept 2008) (residential facility that provided non-medical, non-psychiatric support services to voluntary residents receiving out-patient psychiatric care owed no duty to third party injured by resident, particularly since there was no indication of the resident's violent tendencies or noncompliance with medication regime); *Lee v New York City Housing Authority*, 25 AD3d 214, 803 NYS2d 538 (1st Dept 2005) (no duty on housing authority to construct and maintain fence that would prevent softball from leaving field and rolling on to adjacent street); *Pingtella v Jones*, 305 AD2d 38, 758 NYS2d 717 (4th Dept 2003) (psychiatrist owed no duty of care to child of his patient, who was stabbed by patient during psychotic episode); *Mongello v Davos Ski Resort*, 224 AD2d 502, 638 NYS2d 166 (2d Dept 1996) (sponsor of ski trip that neither controlled nor maintained operation of ski slope where accident occurred owed no duty to injured skier); *Johnson v Robert Bruce McLane Associates, Inc.*, 201 AD2d 436, 608 NYS2d 165 (1st Dept 1994) (night manager for supermarket failed to establish that he was intended third party beneficiary of supermarket's agreement with security company, that security

company had assumed common law duty to protect night manager, and that security company's negligence was proximate cause of his injuries sustained when shot by armed robbers); *Abdur-Rashid by Abdur-Rashid v Consolidated Rail Corp.*, 135 AD2d 208, 524 NYS2d 716 (1st Dept 1988) (no contribution allowed railroad from municipal landlord for injuries sustained by child who climbed over playground fence to retrieve a ball and was struck by train); *Blatt v New York City Housing Authority*, 123 AD2d 591, 506 NYS2d 877 (2d Dept 1986) (municipal landlord owed no duty to prevent a criminal assault by a tenant it did not control upon another tenant); see also *Hall v United Parcel Service of America, Inc.*, 76 NY2d 27, 556 NYS2d 21, 555 NE2d 273 (1990) (plaintiff-employee who sustained no physical injury has no distinct cause of action against a polygraph company for negligent administration of a polygraph test administered at behest of plaintiff's employer). In *Waters v New York City Housing Authority*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987), the court refused, on policy grounds, to permit the imposition of liability upon a landowner for injuries inflicted on a passerby by a criminal who utilized the landowner's premises to commit the crimes, see *Florman v New York*, 293 AD2d 120, 741 NYS2d 233 (1st Dept 2002) (absent showing that incident was foreseeable, permittee with contractual obligation to provide security at outdoor concert not responsible for criminal act of somebody who, recklessly or intentionally, at high speed, drove vehicle into plaintiff standing in parking lot); *Leyva v Riverbay Corp.*, 206 AD2d 150, 620 NYS2d 333 (1st Dept 1994) (absent evidence of recurring criminal activity at the particular location, landowner not liable for injuries sustained by plaintiff criminally assaulted on obscure secondary outdoor walkway of large residential complex); compare *Staveris v 125 Holding Co.*, 272 AD2d 185, 709 NYS2d 507 (1st Dept 2000) (landowner owed duty to plaintiff, who sustained injuries as a result of an assault, to secure parking lot that was cordoned off by chain link fence); *Audrey B. v New York City Housing Authority*, 202 AD2d 532, 609 NYS2d 87 (2d Dept 1994); *Kulier by Kulier v Harran Transp. Co., Inc.*, 189 AD2d 803, 592 NYS2d 433 (2d Dept 1993) (landowner not liable for injuries sustained by plaintiff where there is no relationship between the landowner and the perpetrator of the crime, and there is no connection between the plaintiff and the subject premises independent of the crime itself); *Amarante v Rothschild*, 171 AD2d 633, 566 NYS2d 657 (2d Dept 1991) (shopkeeper and landlord not liable for injuries sustained by store patron during course of armed robbery).

In *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003), the Court held that landowners have a duty to maintain their property in a reasonably safe condition whether the property is open to the public or not. The use to which one's property is put, and the frequency of that use by others, weigh heavily in determining the likelihood of injury, the seriousness of the injury and the burden of avoiding the risk. Therefore, a private landowner who knows, or should know, that someone will visit the property and confront a hazard that would be reasonably avoided by illumination may be required to provide outside lighting to the property, *id.*

The Court of Appeals is generally reluctant to impose liability upon

a defendant to control the conduct of others, *Matter of New York City Asbestos Litigation* [Holdampf v A.C. & S., Inc.], 5 NY3d 486, 806 NYS2d 146, 840 NE2d 115. A duty to control the conduct of others may arise “only where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant’s actual control of the third-person’s actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others,” *Matter of New York City Asbestos Litigation* [Holdampf v A.C. & S. Inc.], *supra*, quoting *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001); see *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358, 71 NE3d 946 (2017); *Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009, 129 NYS3d 570 (4th Dept 2020); *Wynn v Little Flower Children’s Services*, 106 AD3d 64, 963 NYS2d 6 (1st Dept 2013); *Williams v Beemiller, Inc.*, 103 AD3d 1191, 962 NYS2d 834 (4th Dept 2013); *Arango v Vasquez*, 89 AD3d 875, 933 NYS2d 82 (2d Dept 2011). Thus, absent these circumstances, defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where, as a practical matter, the defendant can exercise such control, *Oddo v Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.*, *supra*; *Hamilton v Beretta U.S.A. Corp.*, *supra*; *D’Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987); *Hanna v St. Lawrence*, 34 AD3d 1146, 825 NYS2d 798 (3d Dept 2006); *Ramsammy v New York*, 216 AD2d 234, 628 NYS2d 693 (1st Dept 1995); *Zane v Corbett*, 82 AD3d 1603, 919 NYS2d 625 (4th Dept 2011); see *Pink v Rome Youth Hockey Ass’n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016); *Martino v Stolzman*, 18 NY3d 905, 941 NYS2d 28, 964 NE2d 399 (2012); *Malone v Suffolk*, 128 AD3d 651, 8 NYS3d 408 (2d Dept 2015); but see *Castillo v Kittatinny Canoes Corp.*, 27 AD3d 238, 811 NYS2d 27 (1st Dept 2006). The duty to control the conduct of third persons, where it exists, should not be confused or conflated with the duty to supervise minors over whom defendant assumed temporary control and who themselves might be harmed due to their own ingestion of alcohol, *Parslow v Leake*, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014) (disapproving *Struebel v Fladd*, 75 AD3d 1164, 905 NYS2d 732 (4th Dept 2010)); see *Aquino v Higgins*, 15 NY3d 903, 912 NYS2d 571, 938 NE2d 1006 (2010). The latter duty does not extend to cases in which an adult seeks recovery for injuries resulting, in part, from his or her own voluntary intoxication, *Parslow v Leake*, *supra*.

In *Fantuzzo v Attridge*, 291 AD2d 871, 737 NYS2d 192 (4th Dept 2002), plaintiffs raised an issue of fact on their negligence claim relating to whether defendant mother knew that a party was going to take place at her home when she and her husband were out of town and thus whether defendant parents failed to exercise due care in permitting their daughter to host an unsupervised party at their home in their absence. A parent who merely consents to the hosting of a party at his home by his adult children in his absence may not be held liable, based on an alleged agency relationship between the parent and his children, for the negligent failure of the children to control the conduct of third persons at the party absent evidence that the parent requested or

directed that the children host the party, that the party was for his benefit, or that the parent was involved with the planning of the party, *Dynas v Nagowski*, 307 AD2d 144, 762 NYS2d 745 (4th Dept 2003); see *McGlynn v St. Andrew the Apostle Church*, 304 AD2d 372, 761 NYS2d 151 (1st Dept 2003). However, in *Aquino v Higgins*, 15 NY3d 903, 912 NYS2d 571, 938 NE2d 1006 (2010), rev'g 68 AD3d 1650, 891 NYS2d 853, the Court of Appeals held that parents, who permitted their daughter to host a supervised party at the parents' home, owed a duty to supervise the departure from the premises of a minor guest who became intoxicated at the party. Aquino should be contrasted with *Martino v Stolzman*, 18 NY3d 905, 941 NYS2d 28, 964 NE2d 399 (2012), in which the Court held that social hosts who hosted a New Year's Eve party at their home did not owe a duty to third-parties to prevent their intoxicated guests from leaving the hosts' property. The Court in *Martino* reasoned that the social hosts were no longer in a position to control the intoxicated driver when he entered his vehicle, which was parked in the social hosts' driveway, and drove away. The Court also observed that imposing a duty on the social hosts would inappropriately expand the concept of duty.

Unless an involuntary retention is authorized under Mental Hygiene Law § 22.09, neither a hospital nor a physician owes an intoxicated patient who went to the hospital voluntarily a duty to prevent the patient from leaving a hospital, *Kowalski v St. Francis Hosp. and Health Centers*, 21 NY3d 480, 972 NYS2d 186, 995 NE2d 148 (2013). That principle applies even where the patient has been admitted to the hospital, *Ingutti v Rochester General Hosp.*, 114 AD3d 1302, 980 NYS2d 692 (4th Dept 2014).

A child care agency that retains legal authority over a child owes the foster parents a duty to take steps to remove the child where the agency is placed on sufficient notice by the foster parents that the child is a danger to their household and is asked to remove the child, *Wynn v Little Flower Children's Services*, 106 AD3d 64, 963 NYS2d 6 (1st Dept 2013). The *Wynn* court acknowledged that, generally, a defendant will not be liable for the conduct of a third person who causes harm to another, *id.* However, the court determined that a child care agency, acting in loco parentis, has a duty to exercise reasonable care to prevent a foster child under its supervision and control from harming a foster parent once the agency has notice that the child has a dangerous propensity and receives a request from the foster parent to remove the child from the foster home, *id.*

A corporation administering a foster care program owes a duty to warn prospective adoptive parents, on behalf of those parents' biological child, of the complete behavioral history of the foster child, *Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009, 129 NYS3d 570 (4th Dept 2020). The *Stephanie* court noted that the defendant was in the best position to protect the biological child from the risk of harm of being sexually abused by the foster child by warning the prospective adoptive parents about the foster child's history of sexually inappropriate behavior, *Stephanie L. v House of the Good Shepherd*, *supra*.

There is no duty on the part of a publisher to investigate an advertiser absent a special relationship between the parties, *Stoianoff v Gahona*, 248 AD2d 525, 670 NYS2d 204 (2d Dept 1998); see *Coakley v VV Pub. Corp.*, 254 AD2d 135, 679 NYS2d 20 (1st Dept 1998). Additionally, no such legal duty rests upon a newspaper unless it undertakes to guarantee, warrant, or endorse a particular product, *Stoianoff v Gahona*, *supra*. A police officer has a duty to safeguard a person in custody from foreseeable danger, including the foreseeable danger that an agitated member of a crowd following a street fight might attack the individual in custody, *Mays v Middletown*, 70 AD3d 900, 895 NYS2d 179 (2d Dept 2010).

A business's internal guidelines that go beyond the standard of ordinary care cannot serve as a basis for imposing liability in negligence, *Pink v Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016); *Gilson v Metropolitan Opera*, 5 NY3d 574, 807 NYS2d 588, 841 NE2d 747 (2005); *Ziman-Scheuer v Golden Touch Transp. of NY, Inc.*, 149 AD3d 635, 52 NYS3d 360 (1st Dept 2017); *Rahimi v Manhattan and Bronx Surface Transit Operating Authority*, 43 AD3d 802, 843 NYS2d 557 (1st Dept 2007); see *Asantewaa v New York*, 90 AD3d 537, 935 NYS2d 18 (1st Dept 2011). In common law negligence cases, the standards and theories applicable to criminal prosecutions for the use of deadly physical force are generally not applicable, *Lubecki v New York*, 304 AD2d 224, 758 NYS2d 610 (1st Dept 2003). For a discussion of the duty owed to a person who voluntarily participates in certain inherently risky athletic and recreational activities, see comment to PJI 2:55.

B. Breach of Duty

The standard of care, that is, due care under the circumstances, is inflexible, but the degree of caution required to be exercised in specific situations to comply with such standard of care varies with the time, place and conditions involved, and with the risk reasonably to be apprehended, *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981); *Havas v Victory Paper Stock Co., Inc.*, 49 NY2d 381, 426 NYS2d 233, 402 NE2d 1136 (1980); *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Nicholson v Board of Educ. of City of New York*, 36 NY2d 798, 369 NYS2d 703, 330 NE2d 651 (1975); *Caldwell v Island Park*, 304 NY 268, 107 NE2d 441 (1952); *Martinez v Lazaroff*, 66 AD2d 874, 411 NYS2d 955 (2d Dept 1978), *aff'd*, 48 NY2d 819, 424 NYS2d 126, 399 NE2d 1148 (1979). Unusual precautions must be taken against unusual dangers, but where mere potentiality of injury exists, only such foresight as appears to be commensurate with its reasonably probable occurrence need be employed, *Van Leet v Kilmer*, 252 NY 454, 169 NE 644 (1930). The care exercised must be commensurate with the known or ascertainable dangers, *Pike v Consolidated Edison Co. of New York*, 303 NY 1, 99 NE2d 885 (1951); *Wasserstein v State*, 32 AD2d 119, 300 NYS2d 263 (3d Dept 1969), *aff'd*, 27 NY2d 627, 313 NYS2d 759, 261 NE2d 665 (1970); *Tenczar v Milligan*, 47 AD2d 773, 365 NYS2d 272 (3d Dept

1975) (driver bound to see what should have been seen). In *Akins v Glens Falls City School Dist.*, supra; *Hoffman v Lehman*, 2 NY2d 824, 159 NYS2d 839, 140 NE2d 749 (1957); *Martinez v Lazaroff*, supra; *Van Leet v Kilmer*, supra; and *Wasserstein v State*, supra, the court dismissed the complaint against one or all parties finding no negligence a matter of law, whereas in the other cases the degree of caution required under the circumstances was a jury question.

The reasonable care, i.e., due care, standard applies to most negligence-based actions, see *Abrams v Bute*, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016). However, where such an action sounds in professional malpractice, the defendant is held to a different standard: the level of skill and care used by others in the community who practice the same profession, *Reis v Volvo Cars of North America*, 24 NY3d 35, 993 NYS2d 672, 18 NE3d 383 (2014); *Abrams v Bute*, supra. For a charge and comment relating to the duty owed by a professional malpractice defendant, see PJI 2:15.

A variant of the reasonable care standard applies with respect to common law negligence claims for injuries relating to items in food served at commercial establishments, where the “reasonable expectation doctrine,” primarily related to implied warranty cases, requires that ordinary care be used to remove from the food any harmful substances that the consumer would not ordinarily anticipate be present, *Schmidt v Fourth Wall Restaurants, LLC*, 155 AD3d 986, 63 NYS3d 893 (2d Dept 2017) (pit inside a whole olive not harmful substance); *Amiano v Greenwich Village Fish Co., Inc.*, 151 AD3d 484, 53 NYS3d 531 (1st Dept 2017) (one-inch fish bone on which plaintiff choked not harmful substance); *Vitiello v Captain Bill’s Restaurant*, 191 AD2d 429, 594 NYS2d 295 (2d Dept 1993) (bone in fileted fish not actionable) (citing *Stark v Chock Full O’Nuts*, 77 Misc2d 553, 356 NYS2d 403 (AppT 1974)); see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995).

Direct or circumstantial evidence from which the defendant’s negligence may be reasonably inferred requires that the issue be submitted to the jury, *Archie v Todd Shipyards Corp.*, 65 AD2d 699, 410 NYS2d 69 (1st Dept 1978); *Goldberg v Springer*, 61 AD2d 806, 402 NYS2d 35 (2d Dept 1978); see *Kraft v Loso*, 154 AD3d 1265, 63 NYS3d 566 (3d Dept 2017). Where reasonable minds differ concerning inferences to be deduced from circumstances, the issue of negligence must be submitted to the jury, *Archie v Todd Shipyards Corp.*, supra. The court may set aside a jury verdict for defendant where evidence of negligence preponderated so heavily in plaintiff’s favor that a jury could not have fairly found for defendant, *Cooper v Burt’s Reliable, Inc.*, 105 AD3d 886, 964 NYS2d 195 (2d Dept 2013); *Walsh v Morris*, 88 AD2d 673, 450 NYS2d 920 (3d Dept 1982).

Unavoidable accident may be charged on appropriate facts, *MacFarland v Reed*, 257 AD2d 802, 683 NYS2d 658 (3d Dept 1999); *Mikula v Duliba*, 94 AD2d 503, 464 NYS2d 910 (4th Dept 1983); see *Edwards v*

Manhattan & Bronx Surface Transit Operating Authority, 252 AD2d 410, 676 NYS2d 87 (1st Dept 1998) (no evidence to support unavoidable accident charge). “An unavoidable accident is an occurrence which was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions. That is, an accident is considered unavoidable or inevitable at law if it was not proximately caused by the negligence of any party to the action or to the accident,” Prosser and Keeton, Torts, (5th Ed) § 29. The court may properly charge the emergency doctrine and the doctrine of unavoidable accident in the same case where it clearly differentiates between these theories and explains each to the jury, MacFarland v Reed, *supra*.

Where the offensive contact is intentional, the actor is liable for assault and not negligence, Johnson v New York, 148 AD3d 1126, 50 NYS3d 461 (2d Dept 2017); Sanchez by Hernandez v Wallkill Cent. School Dist., 221 AD2d 857, 633 NYS2d 871 (3d Dept 1995); Ferran v Williams, 194 AD2d 962, 598 NYS2d 866 (3d Dept 1993). Where a defendant hurled a glass object at a third person, that hit the third person, and fragments of that broken glass injured plaintiff, plaintiff properly pleaded a negligence cause of action, Rubino v Ramos, 226 AD2d 912, 641 NYS2d 409 (3d Dept 1996). The evidence established that the touching of plaintiff, an innocent bystander, was not intentional, but rather inadvertent and accidental, *id*.

C. Causation

The issue of whether a defendant’s negligence was a proximate cause of an accident is separate and distinct from the negligence determination, Ohdan v New York, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000). A defendant may act negligently without that negligence constituting a proximate cause of the accident, *id*. In order to find that defendant’s negligence was a proximate cause of the harm caused to plaintiff, the jury must find that the negligence was a substantial factor in bringing about the injury, *id* (citing PJI). For a discussion of the issue of proximate cause, see PJI 2:70.

PJI 2:10A. Common Law Standard of Care—Gross Negligence or Wilful Misconduct

In this case, you must decide whether defendant was guilty of (gross negligence, wilful misconduct). Negligence is a failure to exercise ordinary care. (Gross negligence, wilful misconduct) is more than the failure to exercise reasonable care.

([Use whichever of the following definitions applies])

Gross negligence means a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others.

Wilful misconduct occurs when a person intentionally acts or fails to act knowing that (his, her) conduct will probably result in injury or damage. Wilful misconduct also occurs when a person acts in so reckless a manner or fails to act in circumstances where an act is clearly required, so as to indicate disregard of the consequence of (his, her) action or inaction.

Comment

The definition of “gross negligence” is based on *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); *Food Pageant, Inc. v Consolidated Edison Co., Inc.*, 54 NY2d 167, 445 NYS2d 60, 429 NE2d 738 (1981); *Almgren v Fletcher*, 304 NY 547, 110 NE2d 396 (1953); *Dalton v Hamilton Hotel Operating Co.*, 242 NY 481, 152 NE 268 (1926); *Weld v Postal Tel. Cable Co.*, 210 NY 59, 103 NE 957 (1913); *Jenson v Fletcher*, 277 App Div 454, 101 NYS2d 75 (4th Dept 1950), *aff’d*, 303 NY 639, 101 NE2d 759 (1951); see *Abacus Federal Savings Bank v ADT Sec. Services, Inc.*, 18 NY3d 675, 944 NYS2d 443, 967 NE2d 666 (2012); *Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 595 NYS2d 381, 611 NE2d 282 (1993); see also *Gentile v Garden City Alarm Co., Inc.*, 147 AD2d 124, 541 NYS2d 505 (2d Dept 1989) (citing PJI); *Rand & Paseka Mfg. Co., Inc. v Holmes Protection Inc.*, 130 AD2d 429, 515 NYS2d 468 (1st Dept 1987) (citing PJI); *Kleartone Transparent Products Co., Inc. v Dun & Bradstreet, Inc.*, 88 AD2d 353, 453 NYS2d 433 (2d Dept 1982); *Coniber v Hults*, 15 AD2d 252, 222 NYS2d 773 (4th Dept 1962); *O’Malley v Jegabbi*, 12 AD2d 389, 211 NYS2d 547 (3d Dept 1961); *Sharick v Marvin*, 1 AD2d 284, 150 NYS2d 891 (3d Dept 1956); *Prosser & Keeton, Torts* (5th Ed) 211–212, § 34.

The definition of “wilful” is adapted from PJI 2:171 and the cases cited in the Comment thereunder; see also *Prosser & Keeton, Torts* (5th Ed.) 213–214, § 34. The definition of “wilful” set forth in the pattern charge was cited with approval in *Hummel v Vicaretti*, 152 AD2d 779, 543 NYS2d 560 (3d Dept 1989).

The pattern charge may be used in cases involving a defense based on an exculpatory agreement. Such agreements, e.g.: “[plaintiff] assumes full responsibility for any injuries which might occur to [plaintiff] in or about defendant’s premises including but without limitation, any claims for personal injuries resulting from or arising out of the negligence of the defendant,” are usually enforceable, *Ciofalo v Vic*

Tanney Gyms, Inc., 10 NY2d 294, 220 NYS2d 962, 177 NE2d 925 (1961), provided that “the intention of the parties is expressed in unmistakable language,” *Gross v Sweet*, 49 NY2d 102, 424 NYS2d 365, 400 NE2d 306 (1979); see *Lago v Krollage*, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107 (1991); *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); *I.C.C. Metals, Inc. v Municipal Warehouse Co.*, 50 NY2d 657, 431 NYS2d 372, 409 NE2d 849 (1980); *Jo Hsu v Krav Maga NYC, LLC*, 138 AD3d 463, 29 NYS3d 307 (1st Dept 2016); *Alexander v Kendall Cent. School Dist.*, 221 AD2d 898, 634 NYS2d 318 (4th Dept 1995). Whether the intention of the parties is so expressed is a question for the court, see *Peluso v Tauscher Cronacher Professional Engineers, P.C.*, 270 AD2d 325, 704 NYS2d 289 (2d Dept 2000); see also *Sivaslian v Rawlins*, 88 AD2d 703, 451 NYS2d 307 (3d Dept 1982). If it is and if plaintiff seeks recovery only for negligence, then the action must be dismissed, *Ciofalo v Vic Tanney Gyms, Inc.*, *supra*; see *Gross v Sweet*, *supra* (language used by parties did not express the exculpatory intent clearly and unequivocally); see also *Sivaslian v Rawlins*, *supra*.

However, exculpatory agreements may be unenforceable where contrary to public policy, *Creed v United Hosp.*, 190 AD2d 489, 600 NYS2d 151 (2d Dept 1993); *Ash v New York University Dental Center*, 164 AD2d 366, 564 NYS2d 308 (1st Dept 1990) (covenant not to sue a dental clinic which was given by a prospective patient in advance of surgery in consideration of reduced rates held unenforceable). Note also that an enforceable exculpatory agreement may not insulate the defendant from claims for gross negligence, or wilful misconduct, *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992); *I.C.C. Metals, Inc. v Municipal Warehouse Co.*, 50 NY2d 657, 431 NYS2d 372, 409 NE2d 849 (1980); *Gross v Sweet*, 49 NY2d 102, 424 NYS2d 365, 400 NE2d 306 (1979); *Federal Ins. Co. v Honeywell, Inc.*, 243 AD2d 605, 663 NYS2d 247 (2d Dept 1997); *Kleartone Transparent Products Co., Inc. v Dun & Bradstreet, Inc.*, 88 AD2d 353, 453 NYS2d 433 (2d Dept 1982); see *Abacus Federal Savings Bank v ADT Sec. Services, Inc.*, 18 NY3d 675, 944 NYS2d 443, 967 NE2d 666 (2012); *Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 595 NYS2d 381, 611 NE2d 282 (1993); *Consumers Distributing Co., Ltd. v Baker Protective Services, Inc.*, 202 AD2d 327, 609 NYS2d 213 (1st Dept 1994); see also *Gentile v Garden City Alarm Co., Inc.*, 147 AD2d 124, 541 NYS2d 505 (2d Dept 1989) and *Arell's Fine Jewelers, Inc. v Honeywell, Inc.*, 147 AD2d 922, 537 NYS2d 365 (4th Dept 1989) (an agreement limiting liability to a nominal sum is similarly contrary to public policy). Plaintiff, however, must plead and prove the defendant's “gross negligence” or “wilful misconduct” to avoid the effect of such agreement, see *Sommer v Federal Signal Corp.*, *supra*; *Gross v Sweet*, *supra*; see also *Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, *supra*; *David Gutter Furs v Jewelers Protection Services, Ltd.*, 79 NY2d 1027, 584 NYS2d 430, 594 NE2d 924 (1992); *Corinno Civetta Const. Corp. v New York*, 67 NY2d 297, 502 NYS2d 681, 493 NE2d 905 (1986); *Kalisch-Jarcho, Inc. v New York*, 58 NY2d 377, 461 NYS2d 746, 448 NE2d 413 (1983).

A distinction must be drawn between contractual provisions that seek to exempt a party from liability and contractual provisions that in effect simply require one of the parties to the contract to provide insurance for all of the parties, *Abacus Federal Savings Bank v ADT Sec. Services, Inc.*, 18 NY3d 675, 944 NYS2d 443, 967 NE2d 666 (2012). An exculpatory provision does not insulate a defendant from claims for gross negligence or wilful misconduct, but a provision requiring a party to provide insurance for all of the parties acts as a total defense to an action, *id.*

Intentional breach of contract did not constitute willful misconduct under the terms of the contract absent an intention to harm, *Metropolitan Life Ins. Co. v Noble Lowndes Intern., Inc.*, 84 NY2d 430, 618 NYS2d 882, 643 NE2d 504 (1994). In *Peluso v Tauscher Cronacher Professional Engineers, P.C.*, 270 AD2d 325, 704 NYS2d 289 (2d Dept 2000), the court held that, under the circumstances, an engineering company's alleged failure to properly conduct a home inspection did not rise to the level of gross negligence; see *Master Craft Jewelry Co., Inc. v Holmes Protection of New York, Inc.*, 277 AD2d 56, 717 NYS2d 4 (1st Dept 2000). Where the plaintiff claims the defendant was guilty of gross negligence or wilful misconduct, the pattern charge may be used. The jury should not be told that there is an exculpatory agreement between the parties, and it is suggested that the jury be required to render a special verdict, as to which see PJI 1:97. Parties to a contract may agree to be bound by a shortened statute of limitations for all claims, including those involving gross negligence, *Par Fait Originals v ADT Sec. Systems, Northeast, Inc.*, 184 AD2d 472, 586 NYS2d 2 (1st Dept 1992).

An exculpatory agreement is a special defense which insulates a defendant from liability for ordinary negligence. While direct liability to plaintiff is triggered only by gross negligence, defendant may be liable for contribution based on ordinary negligence only, *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 1365 (1992).

General Obligations Law § 5-301, et seq.

Agreements exempting certain owners and operators of certain establishments from liability for negligence are void.

General Obligations Law § 5-321 provides that every agreement in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor (or its agents or employees), in the operation or maintenance of the demised premises or the real property containing the demised premises is void as against public policy and wholly unenforceable. For a discussion of GOL § 5-321, see Comment to PJI 2:275.

General Obligations Law § 5-323 contains a similar provision directed at contractors. It provides that every agreement in or in connection with or collateral to any contract or agreement affecting real

property made or entered into, whereby a contractor exempts itself from liability for injuries to person or property caused by or resulting from the negligence of the contractor (or its agents or employees), as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances, is void as against public policy and wholly unenforceable, see *Board of Ed., Union Free School Dist. No. 3, Town of Brookhaven v Valden Associates, Inc.*, 46 NY2d 653, 416 NYS2d 202, 389 NE2d 798 (1979) (limitation of liability to proceeds of insurance is valid and not contrary to statute); *Fisher v Biderman*, 154 AD2d 155, 552 NYS2d 221 (1st Dept 1990) (statute does not void indemnification agreement between municipality as real property owner and contractor as part of self-insurance program); *Dubovsky & Sons, Inc. v Honeywell, Inc.*, 89 AD2d 993, 454 NYS2d 329 (2d Dept 1982) (statute inapplicable to burglar alarm agreement); *Antical Chemicals, Inc. v Westinghouse Sec. Systems, Inc.*, 86 AD2d 768, 448 NYS2d 279 (4th Dept 1982) (statute inapplicable to fire alarm agreement).

General Obligations Law § 5-326, aimed at agreements exempting owners and operators of pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence, states that every agreement in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, which exempts the owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, is void as against public policy and wholly unenforceable, see *Lago v Krollage*, 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107 (1991) (statute inapplicable to release given to racing car association and its beneficiaries in application to be licensed mechanic); *Howell v Dundee Fair Ass'n*, 73 NY2d 804, 537 NYS2d 27, 533 NE2d 1056 (1988) (member of volunteer fire and rescue squad present to work at raceway not "user" of facility and not protected by statute); *Fazzinga v Westchester Track Club*, 48 AD3d 410, 851 NYS2d 278 (2d Dept 2008) (GOL § 5-326 inapplicable to waiver and release signed by participant in foot race organized by defendants; injured person not within class of general members of public patronizing a proprietary recreational or amusement facility who may not appreciate risks of activity); *Perelman v Snowbird Ski Shop, Inc.*, 215 AD2d 809, 626 NYS2d 304 (3d Dept 1995) (statute inapplicable to retail establishment that rents and sells equipment and accessories; it is not place of amusement or similar establishment); *Kazmierczak v Lancaster Motor Sports, Inc.*, 214 AD2d 1039, 626 NYS2d 633 (4th Dept 1995) (member of volunteer tow truck crew present to work at raceway not "user" of facility and not protected by statute); *Rogowicki v Troser Management Inc.*, 212 AD2d 1035, 623 NYS2d 47 (4th Dept 1995) (statute barred disclaimer language on back of ski lift ticket and ski school lesson coupon book); *Brancati v Bar-U-Farm, Inc.*, 183 AD2d 1027, 583 NYS2d 660 (3d Dept 1992) (statute barred release given by horseman to riding stable); *Green v WLS Promotions, Inc.*, 132 AD2d 521, 517 NYS2d 537 (2d Dept 1987)

(automobile race track); *Meier v Ma-Do Bars, Inc.*, 106 AD2d 143, 484 NYS2d 719 (3d Dept 1985) (mechanical bull is amusement device covered by statute); *Blanc v Windham Mountain Club, Inc.*, 92 AD2d 529, 459 NYS2d 447 (1st Dept 1983) (by-law of club providing that each member agreed to hold club harmless for claims arising out of use of club facilities by members and their families unenforceable as against family member who was not member of club).

General Obligations Law § 5-326 applies to “owners and operators” of places of amusement or recreation and will apply in situations where the defendant did not own the land upon which plaintiff was injured, *Filson v Cold River Trail Rides Inc.*, 242 AD2d 775, 661 NYS2d 841 (3d Dept 1997).

General Obligations Law § 5-326 does not apply to facilities used for purely instructional purposes, *Lemoine v Cornell University*, 2 AD3d 1017, 769 NYS2d 313 (3d Dept 2003); *Bacciocchi v Ranch Parachute Club, Ltd.*, 273 AD2d 173, 710 NYS2d 54 (1st Dept 2000); see *Jo Hsu v Krav Maga NYC, LLC*, 138 AD3d 463, 29 NYS3d 307 (1st Dept 2016); *Baschuk v Diver’s Way Scuba, Inc.*, 209 AD2d 369, 618 NYS2d 428 (2d Dept 1994).

In determining whether a facility is recreational or instructional in nature, relevant factors include the certificate of incorporation, the statement of purpose contained therein, the typical method of payment, and the manner in which the activity is promoted, *Fusco v Now & Zen, Inc.*, 294 AD2d 466, 742 NYS2d 650 (2d Dept 2002); *Bacciocchi v Ranch Parachute Club, Ltd.*, 273 AD2d 173, 710 NYS2d 54 (1st Dept 2000). In cases involving “mixed use” facilities, GOL § 5-326 applies where instruction is only an “ancillary” function, *Bacchiocchi v Ranch Parachute Club, Ltd.*, *supra*; *Wurzer v Seneca Sport Parachute Club*, 66 AD2d 1002, 411 NYS2d 763 (4th Dept 1978).

To void a release of liability executed by a user of a recreational facility under General Obligations Law § 5-326, the owner or operator must have been paid a fee or other compensation for use of the facility, *Owen v R.J.S. Safety Equipment, Inc.*, 79 NY2d 967, 582 NYS2d 998, 591 NE2d 1184 (1992) (where decedent paid fee for admission to pit area of automobile race track, statute rendered release void); see *Rogowicki v Troser Management Inc.*, 212 AD2d 1035, 623 NYS2d 47 (4th Dept 1995); *Gaskey v Vollertsen*, 110 AD2d 1066, 488 NYS2d 922 (4th Dept 1985). The Third Department has determined that GOL § 5-326 is not limited in application to the person or entity who actually pays the fee but, rather, is applicable to an owner or operator of a recreational facility who receives a fee, *Williams v Albany*, 271 AD2d 855, 706 NYS2d 240 (3d Dept 2000). The Second Department has concluded that, to void a release of liability executed by a user of a recreational facility pursuant to GOL § 5-326, the individual must have paid a fee for use of the facility, *Stuhlweissenburg v Orangetown*, 223 AD2d 633, 636 NYS2d 853 (2d Dept 1996); *Stone v Bridgehampton Race Circuit*, 217 AD2d 541, 629 NYS2d 80 (2d Dept 1995).

As to a contractual limitation of a warehouse's liability, see UCC § 7-204; *I.C.C. Metals, Inc. v Municipal Warehouse Co.*, 50 NY2d 657, 431 NYS2d 372, 409 NE2d 849 (1980).

To be distinguished from exculpatory agreements are indemnification agreements, see *Austro v Niagara Mohawk Power Corp.*, 66 NY2d 674, 496 NYS2d 410, 487 NE2d 267 (1985); *La Vack v National Shoes, Inc.*, 124 AD2d 352, 507 NYS2d 293 (3d Dept 1986); PJI 2:275.

PJI 2:11. Common Law Standard of Care—Negligence Defined—Where Plaintiff Under Disability

There is evidence in this case that [state nature of plaintiff's disability]. If you find that plaintiff was under a disability that limited (her, his) ability to protect (herself, himself) from injury and that defendant knew, or by the use of reasonable care, should have known of that disability, then reasonable care on defendant's part required that (she, he) use such care as would be required for plaintiff's safety, in view of plaintiff's disability. Bear in mind, however, that until defendant knew of plaintiff's disability or, by the use of reasonable care, should have known of it, defendant was entitled to assume that plaintiff was not disabled and would be able to use due care for (her, his) own safety and would do so.

Comment

The charge is an application of the rule that the care to be exercised must be commensurate with the risk reasonably to be perceived, *Sadowski v Long Island R. Co.*, 292 NY 448, 55 NE2d 497 (1944); *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928). Some of the cases speak of "greater caution" than would be required with respect to a person not under disability, *Stein v Palisi*, 308 NY 293, 125 NE2d 575 (1955); *Schwartz v Petfield*, 283 App Div 845, 128 NYS2d 338 (4th Dept 1954), or "more consideration," *Sheridan v Brooklyn City & N.R. Co.*, 36 NY 39, 34 How Pr 217 (1867), but including such language in the charge may be confusing to the jury, see *Grant v Metropolitan Transp. Authority*, 67 AD2d 611, 412 NYS2d 7 (1st Dept 1979) (use of term "additional care" required adequate explanation to avoid misleading the jury). In any event, it is error to charge that the rule imposes on defendant a duty of "extreme care or caution," *Quarcini v Blackwell*, 10 NY2d 843, 221 NYS2d 730, 178 NE2d 432 (1961). The duty owed is commensurate with the perceived ability of the disabled person to care for his or her own safety, *Killeen v State*, 66 NY2d 850, 498 NYS2d 358, 489 NE2d 245 (1985) (citing PJI); see *N.X. v Cabrini Medical Center*, 97 NY2d

247, 739 NYS2d 348, 765 NE2d 844 (2002) (duty of hospital to safeguard welfare of its patients); see *McClellan v National Center for Disability Services*, 30 AD3d 383, 816 NYS2d 551 (2d Dept 2006).

Defendant is not liable for failure to act on behalf of a disabled person with whom there is no legal relationship and for whom (she, he) has not undertaken to act. If, however, one has undertaken to act, (she, he) must exercise due care under the circumstances, *Zalak v Carroll*, 15 NY2d 753, 257 NYS2d 177, 205 NE2d 313 (1965); *Dunham v Canisteo*, 303 NY 498, 104 NE2d 872 (1952); *Clark v State*, 195 Misc 581, 89 NYS2d 132 (Ct Cl 1949), *aff'd*, 276 App Div 10, 93 NYS2d 28 (3d Dept 1949), *aff'd*, 302 NY 795, 99 NE2d 300 (1951); *Thibault v Franzese*, 24 AD2d 903, 264 NYS2d 783 (2d Dept 1965); Restatement, 2d, Torts § 324. The degree of care required will depend upon the extent of plaintiff's incapacity and a finding that defendant knew or, in the exercise of reasonable care, should have known it, see Comment to PJI 2:10. The rule is the same whether the disability is physical or mental, temporary or permanent, and has been applied to the following disabilities:

Infancy: *Stein v Palisi*, 308 NY 293, 125 NE2d 575 (1955) (children playing in the street); *Avram v Haddad*, 88 AD2d 942, 451 NYS2d 178 (2d Dept 1982) (five-year-old child crossing street); *Mulberg v State*, 35 AD2d 856, 315 NYS2d 176 (3d Dept 1970), *aff'd*, 29 NY2d 916, 329 NYS2d 97, 279 NE2d 854 (1972); *Gonzalez v Mackler*, 19 AD2d 229, 241 NYS2d 254 (1st Dept 1963); see *DeJesus v Alba*, 63 AD3d 460, 882 NYS2d 12 (1st Dept 2009), *aff'd*, 14 NY3d 860, 902 NYS2d 27, 928 NE2d 409 (2010) (driver in area where children are playing need not exercise extreme care or caution; instead, driver must exercise same degree of care that reasonably prudent person would exercise in same circumstances). As to children in parks, schools or other public places, see PJI 2:225, PJI 2:227.

The precept is that “children, wherever they go must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly,” *Union Pac. Ry. Co. v McDonald*, 152 US 262, 14 SCt 619 (1894); *Day v Johnson*, 265 App Div 383, 39 NYS2d 203 (4th Dept 1943); see *Tenebruso v Toys R Us—NYTEX, Inc.*, 256 AD2d 1236, 682 NYS2d 785 (4th Dept 1998) (four-year-old's capacity to exercise care is question of fact for jury). A person, other than a parent, who undertakes to control, care for, or supervise an infant, is required to use reasonable care to protect the infant over whom he or she has assumed custody or control, *Zalak v Carroll*, 15 NY2d 753, 257 NYS2d 177, 205 NE2d 313 (1965); *Lisa I. v Manikas*, 188 AD3d 1392, 135 NYS3d 510 (3d Dept 2020); *Appell v Mandel*, 296 AD2d 514, 745 NYS2d 491 (2d Dept 2002) (same duty applies to those assuming temporary custody and control of children). Those entrusted with the care of children are required to “exercise more vigilance than would be required for adults,” *Willis v Young Men's Christian Ass'n of Amsterdam*, 28 NY2d 375, 321 NYS2d 895, 270 NE2d 717 (1971); *Lisa I. v Manikas*, *supra*; *Gloria X v Gibbs*, 241 AD2d 579, 659 NYS2d 349 (3d Dept 1997).

Whether such vigilance has been exercised will usually present a question for the jury, *Pluckrose v Abalene Pest Control Service, Inc.*, 31 AD2d 587, 295 NYS2d 86 (3d Dept 1968).

The duty to exercise reasonable care in the supervision of a child applies only to those who undertake the duty to supervise, *Justin M. v Beadle*, 191 AD3d 1132, 142 NYS3d 213 (3d Dept 2021). Thus, an adult defendant present in the same home where a child was injured, who was not requested to care for or supervise him, and who never voluntarily undertook control or supervision, owed him no duty, *id.*

Intoxication: *Jones v New York Cent. R. Co.*, 4 NY2d 963, 177 NYS2d 492, 152 NE2d 519 (1958); *Elliott v New York Rapid Transit Corporation*, 293 NY 145, 56 NE2d 86 (1944); *Fagan v Atlantic Coast Line R. Co.*, 220 NY 301, 115 NE 704 (1917); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993), 3 Warren's Negligence, Chap. 14, *Intoxicated Persons*, § 14.01, p. 242 (4th Ed). For application of the rule of care to a common carrier, see PJI 2:162. Concerning intoxication as comparative negligence, see PJI 2:45.

Illness: *Dunham v Canisteo*, 303 NY 498, 104 NE2d 872 (1952); *Middleton v Whitridge*, 213 NY 499, 108 NE 192 (1915); same case after second trial, *Middleton v Third Ave. Ry. Co.*, 192 App Div 172, 182 NYS 598 (1st Dept 1920).

Mental incapacity: *Killeen v State*, 66 NY2d 850, 498 NYS2d 358, 489 NE2d 245 (1985) (citing PJI); *Gonzalez v Mackler*, 19 AD2d 229, 241 NYS2d 254 (1st Dept 1963); *Murray v St. Mary's Hospital*, 280 App Div 803, 113 NYS2d 104 (2d Dept 1952); see *Padula v State*, 48 NY2d 366, 422 NYS2d 943, 398 NE2d 548 (1979) (drug addict in narcotic rehabilitation center drinking methyl alcohol); *Splawnik v Di Caprio*, 146 AD2d 333, 540 NYS2d 615 (3d Dept 1989) (duty not to furnish dangerous chattel [a gun] to someone inexperienced or unable to understand or appreciate the danger or known to have suicidal tendencies); *Mochen v State*, 43 AD2d 484, 352 NYS2d 290 (4th Dept 1974); *Zophy v State*, 27 AD2d 414, 279 NYS2d 918 (4th Dept 1967), *aff'd*, 22 NY2d 921, 295 NYS2d 50, 242 NE2d 86 (1968) (safeguarding chronic alcoholic in institution); *Gioia v State*, 22 AD2d 181, 254 NYS2d 384 (4th Dept 1964) (suicide of inmate of mental institution).

A closely related area of law is negligent entrustment, see PJI 2:260. New York caselaw recognizes the tort of negligent entrustment where defendant has some special knowledge concerning a characteristic or condition peculiar to the user which is likely to render that person's use of a chattel unreasonably dangerous or has some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous in view of the age, experience or physical condition of the user, *Snyder v Kramer*, 94 AD2d 860, 463 NYS2d 591 (3d Dept 1983), *aff'd*, 61 NY2d 961, 475 NYS2d 279, 463 NE2d 620 (1984) (horse known by defendant to be dangerous given to inexperienced rider without a saddle; court held "the general rules of negligence with respect to suppliers of chattels applied"); *Carbone by Carbone v Alagna by*

Alagna, 239 AD2d 454, 658 NYS2d 48 (2d Dept 1997) (sale of slingshot to adolescent is not actionable absent further evidence of unsuitability of user and seller's knowledge thereof); Earsing v Nelson, 212 AD2d 66, 629 NYS2d 563 (4th Dept 1995) (gun store owner may be held liable for providing a BB gun to a child, but manufacturer of gun may not be held liable on negligent entrustment theory); Splawnik v Di Caprio, 146 AD2d 333, 540 NYS2d 615 (3d Dept 1989) (gun store owner provided a loaded pistol for a woman he knew to be severely depressed); see also Wright v O'Leary, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019) (defendants' 14-year-old son's use of utility vehicle); Zara v Perzan, 185 AD2d 236, 586 NYS2d 139 (2d Dept 1992) (evidence that defendants gave plaintiff lawnmower without explaining how to operate it did not establish tort of negligent entrustment where lawnmower was not defective and plaintiff did not possess any characteristics which rendered her use of it unreasonably dangerous); Restatement, 2d, Torts § 390. The Court of Appeals has refused to impose a duty of care on handgun manufacturers based on a negligent entrustment theory in the absence of evidence that the manufacturer knows or has reason to know that distributors are engaging in substantial sales of guns into gun-trafficking markets on a consistent basis, Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001).

2. FORESEEABILITY

PJI 2:12. Common Law Standard of Care—Foreseeability—Generally

Negligence requires both a reasonably foreseeable danger of injury to another and conduct that is unreasonable in proportion to that danger. A person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable. The exact occurrence or exact injury does not have to be foreseeable; but injury as a result of negligent conduct must be not merely possible, but probable.

There is negligence if a reasonably prudent person could foresee injury as a result of his or her conduct, and acted unreasonably in the light of what could be foreseen. On the other hand, there is no negligence if a reasonably prudent person could not have foreseen any injury as a result of his or her conduct, or acted reasonably in the light of what could have been foreseen.

[The charge should be related to the particular facts of the case. It is recommended that this charge follow PJI 2:10 where appropriate.]

Comment

Based on *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928), except for the last clause of the first paragraph, which is based, in part, on *MacPherson v Buick Motor Co.*, 217 NY 382, 111 NE 1050 (1916); see also *Nussbaum v Lacopo*, 27 NY2d 311, 317 NYS2d 347, 265 NE2d 762 (1970); *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921); *Ohdan v New York*, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000) (citing PJI).

Liability has historically been determined by what is probable, not what is possible. Many things are possible, but in order to recover for injuries suffered as the result of an event, that injury must be shown to have been reasonably foreseeable, or probable, or a probable natural or proximate result. To say that an injury is probable is equivalent to saying that it is “reasonably foreseeable” or, stated another way, that the harm suffered is the “natural and probable” consequence of the defendant’s act. “‘Probable’ . . . must refer to consequences which were to be anticipated at the time of the defendant’s conduct. The phrase

therefore appears . . . as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance,” Prosser and Keeton, Torts, p. 282 [5th ed.]. The language of the charge, “injury as a result of negligent conduct must be not merely possible, but be probable,” was essentially that of *Velez v New York*, 157 AD2d 370, 556 NYS2d 537 (1st Dept 1990); see *The Mars*, 9 F2d 183 (SDNY 1914) (Hand, Learned J.); *Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251, 743 NYS2d 21 (1st Dept 2002), *aff’d*, 99 NY2d 541, 753 NYS2d 805, 783 NE2d 895 (2002); *Moncion v Infra-Metals Corp.*, 20 AD3d 310, 800 NYS2d 381 (1st Dept 2005).

The pattern charge deals with the basic question of foreseeability of danger that gives rise to a duty to use care. In regard to the special problems of the foreseeability of danger to a particular person, or the foreseeability of a particular consequence of negligent conduct, see this Comment, *infra*. The issue of foreseeability is determined under a more relaxed standard in cases arising under the Federal Employers’ Liability Act (FELA), 45 USC § 51 *et seq.*, see *Robinson v CSX Transp.*, 40 AD3d 1384, 838 NYS2d 203 (3d Dept 2007). For a discussion of principles of liability under the FELA, see PJI 2:180.

Foreseeability as It Relates to Duty

Foreseeability as used in the pattern charge relates to duty. “The risk reasonably to be perceived defines the duty to be obeyed . . .,” *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928), but this principle “is applicable to determine the scope of duty only after it has been determined that there is a duty,” *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976); see *Matter of New York City Asbestos Litigation [Holdampf v A.C. & S., Inc.]*, 5 NY3d 486, 806 NYS2d 146, 840 NE2d 115; *Gordon v New York*, 70 NY2d 839, 523 NYS2d 445, 517 NE2d 1331 (1987); *Eiseman v State*, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987); *Home Mut. Ins. Co. v Broadway Bank and Trust Co.*, 53 NY2d 568, 444 NYS2d 436, 428 NE2d 842 (1981); *Waters v New York City Housing Authority*, 116 AD2d 384, 501 NYS2d 385 (2d Dept 1986), *aff’d*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987); *Bonomonte v New York*, 79 AD3d 515, 914 NYS2d 19 (1st Dept 2010), *aff’d*, 17 NY3d 866, 932 NYS2d 421, 956 NE2d 1266 (2011); *On v BKO Exp. LLC*, 148 AD3d 50, 45 NYS3d 68 (1st Dept 2017); *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004); *Blye v Manhattan and Bronx Surface Transit Operating Authority*, 124 AD2d 106, 511 NYS2d 612 (1st Dept 1987), (Note: Decisions combined in N.Y.S.2d) and amended, 132 AD2d 478 (1st Dept 1987), (Note: Decisions combined in N.Y.S.2d) and *aff’d*, 72 NY2d 888, 532 NYS2d 752, 528 NE2d 1225 (1988). In *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015), the court, applying *Palsgraf*, suggested that foreseeability relates to whether a duty exists, stating that, in determining duty, a court must determine whether the injured party was a foreseeable plaintiff.

“[A] determination of negligence—i.e., breach of duty—must begin

with consideration of the duty owed, which is a matter of policy, rather than with the issue of foreseeability . . .,” *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986). That an event was foreseeable does not mean that defendant owed a duty to prevent it, *Haymon v Pettit*, 9 NY3d 324, 849 NYS2d 872, 880 NE2d 416 (2007); *D’Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987); *Waters v New York City Housing Authority*, 116 AD2d 384, 501 NYS2d 385 (2d Dept 1986), *aff’d*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987); *Gonzalez by Gonzalez v Pius*, 138 AD2d 453, 525 NYS2d 868 (2d Dept 1988); see 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001) (“foreseeability of harm does not define duty”); *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001). “Duty is essentially a legal term by which we express our conclusion that there can be liability. It tells us whether the risk to which one person exposes another is within the protection of the law. In fixing the bounds of that duty, not only logic and science, but policy play an important role.” *DeAngelis v Lutheran Medical Center*, 84 AD2d 17, 445 NYS2d 188 (2d Dept 1981), *aff’d*, 58 NY2d 1053, 462 NYS2d 626, 449 NE2d 406 (1983); see *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 26 NYS3d 231, 46 NE3d 614 (2015); *Martino v Stolzman*, 18 NY3d 905, 941 NYS2d 28, 964 NE2d 399 (2012); 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., *supra*; *Hamilton v Beretta U.S.A. Corp.*, *supra*; *Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 990 NYS2d 605 (2d Dept 2014). “When a duty exists, nonliability in a particular case may be justified on the basis that an injury is not foreseeable,” *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976). Although the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent, *Sanchez v State*, 99 NY2d 247, 754 NYS2d 621, 784 NE2d 675 (2002). Unlike foreseeability and causation, the existence and scope of an alleged tortfeasor’s duty is, in the first instance, a legal question for determination by the courts, *Sanchez v State*, 99 NY2d 247, 754 NYS2d 621, 784 NE2d 675 (2002); *Di Ponzio v Riordan*, 89 NY2d 578, 657 NYS2d 377, 679 NE2d 616 (1997); *Purdy v Public Adm’r of Westchester County*, 72 NY2d 1, 530 NYS2d 513, 526 NE2d 4 (1988); *Eiseman v State*, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987); *Donohue v Copiague Union Free School District*, 64 AD2d 29, 407 NYS2d 874 (2d Dept 1978), *aff’d*, 47 NY2d 440, 418 NYS2d 375, 391 NE2d 1352 (1979); *Petrosky v Brasner*, 279 AD2d 75, 718 NYS2d 340 (1st Dept 2001); see *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84, 996 NYS2d 210, 20 NE3d 990 (2014); see also *Gonzalez v New York*, 133 AD3d 65, 17 NYS3d 12 (1st Dept 2015) (existence of duty is question of policy to be determined with reference to legal precedent, statutes, and other legal principles). For a further discussion of the element of duty, see Comment to PJI 2:10(II)(A).

A. Contractual Privity

The principle of nonliability may also apply even if the conduct

complained of involved gross negligence, *Strauss v Belle Realty Co.*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 34 (1985) (absent contractual relationship, utility owes no duty to apartment house tenant injured in common area because of power blackout); *Goldstein v Consolidated Edison Co. of New York, Inc.*, 115 AD2d 34, 499 NYS2d 47 (1st Dept 1986) (utility owes no duty to cooperative apartment tenant where utility had contract only with cooperative corporation; no contribution allowed landlord from utility company for injuries plaintiff sustained during power blackout). Policy considerations may foreclose an extension of liability to persons not in privity with the defendant, *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 848 NYS2d 585, 878 NE2d 1001 (2007) (vehicle inspection shop has no duty to drivers who collide with negligently inspected vehicle); even if the conduct complained of involved gross negligence, *Milliken & Co. v Consolidated Edison Co. of New York, Inc.*, 84 NY2d 469, 619 NYS2d 686, 644 NE2d 268 (1994) (utility does not owe duty to commercial tenants who lack contractual arrangement with it); *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986) (no duty owed by occasional seller to remote purchaser for failure to warn of absence of safety devices); see *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002) (subcontractor who had agreed to install guiderail along Thruway pursuant to subcontract with general contractor not liable to plaintiff injured due to alleged failure to install guiderail properly); *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286, 556 NE2d 1093 (1990) (fire alarm companies providing services to building owners not liable to building tenants because of lack of privity); *Crane v New York*, 65 NY2d 859, 493 NYS2d 292, 482 NE2d 1208 (1985) (municipality not entitled to contribution from utility for damages of plaintiff who fell on irregular cobblestones in street during power blackout); *Pitkin v McMahon*, 243 AD2d 958, 663 NYS2d 678 (3d Dept 1997) (plaintiff not entitled to recovery against defendant based on breach of duty of care allegedly owed by virtue of agreement between defendant and third party); *Koeppel v New York*, 200 AD2d 477, 606 NYS2d 231 (1st Dept 1994) (engineering firm that certified sidewalk to be constructed in accordance with rules and regulations of Department of Highways not liable to plaintiff who fell on sidewalk 17 years after certificate was issued); *Einhorn v Seeley*, 136 AD2d 122, 525 NYS2d 212 (1st Dept 1988) (locksmith who negligently installed lock on front door of apartment house not liable to tenant or to guest assaulted by intruder in absence of privity). In *Rahim v Sottile Sec. Co.*, 32 AD3d 77, 817 NYS2d 33 (1st Dept 2006), the court noted that this principle has been applied in numerous actions against security companies, see *Anokye v 240 East 175th Street Housing Development Fund Corp.*, 16 AD3d 287, 792 NYS2d 417 (1st Dept 2005); *Dabbs v Aron Security, Inc.*, 12 AD3d 396, 784 NYS2d 601 (2d Dept 2004); *Four Aces Jewelry Corp. v Smith*, 257 AD2d 510, 684 NYS2d 224 (1st Dept 1999); *Gonzalez v National Corp. for Housing Partnerships*, 255 AD2d 151, 679 NYS2d 395 (1st Dept 1998).

A breach of a contractual obligation will give rise to tort liability to injured third parties only in limited circumstances, see *Palka v Service-*

master Management Services Corp., 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994); *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286, 556 NE2d 1093 (1990). The boundaries of duty are not contracted or expanded by foreseeability alone, *Palka v Servicemaster Management Services Corp.*, *supra*; *Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 990 NYS2d 605 (2d Dept 2014). Thus, a showing greater than mere negligence is needed to establish tort liability stemming from breach of contract, *Wyant v Professional Furnishing and Equipment, Inc.*, 31 AD3d 952, 819 NYS2d 792 (3d Dept 2006).

In *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002), the Court of Appeals identified three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons outside the contract.

First, where the contracting party, in failing to exercise reasonable care in the performance of its contractual duties, “launches a force or instrument of harm,” *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928), thereby creating an unreasonable risk of harm to others, or increasing that risk, *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 850 NYS2d 359, 880 NE2d 845 (2007); *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002); *Nachamie v Nassau*, 147 AD3d 770, 47 NYS3d 58 (2d Dept 2017); *Vega v S.S.A. Properties, Inc.*, 13 AD3d 298, 788 NYS2d 28 (1st Dept 2004); see *Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 977 NYS2d 676, 999 NE2d 1121 (2013) (laboratory that contracts with probation department to conduct drug tests on probationers had duty to individual probationer who faced profound, potentially life-altering consequences as a result of an allegedly negligently reported false positive result); *XX v Dunwell Elevator Electrical Industries, Inc.*, 188 AD3d 443, 135 NYS3d 372 (1st Dept 2020) (issue of fact as to whether defendant building management company’s provision of “drop key” to freight elevator, which key enabled residents to manually open elevator door, launched force of harm that allegedly caused infant plaintiff to fall down shaft); *Morales v Digesare Mechanical, Inc.*, 176 AD3d 1442, 111 NYS3d 737 (3d Dept 2019) (issue of fact as to whether contractor’s equipment created depression that allegedly caused plaintiff to trip); *Janiya W.-G. v Smith*, 160 AD3d 502, 74 NYS3d 530 (1st Dept 2018) (distributor, having agreed to restrict sales of sulfuric acid drain opener to plumbing and/or building professionals, may be held liable for launching force of harm in negligent discharge of contractual obligation for selling product to retail outlet; however, retail outlet, who had not agreed to manufacturer’s restriction, could not be held liable under that theory); *Santos v Deanco Services, Inc.*, 142 AD3d 137, 35 NYS3d 686 (2d Dept 2016) (no duty owed by snow removal contractor for passive failure to apply salt that did not create or exacerbate dangerous condition); *Vassenelli v Syracuse*, 138 AD3d 1471, 31 NYS3d 320 (4th Dept 2016) (third party under contract to manage plaintiff’s health care owed duty to plaintiff not to increase risk of harm to him by virtue of manner

in which it performed contractual duties); *Hannigan v Staples, Inc.*, 137 AD3d 1546, 29 NYS3d 575 (3d Dept 2016) (duty owed by snow removal contractor whose affirmative negligence in snow and ice removal created dangerous condition); *Braverman v Bendiner & Schlesinger, Inc.*, 121 AD3d 353, 990 NYS2d 605 (2d Dept 2014) (neither drug testing laboratory nor drug treatment center owed a duty to individual who was subject to drug testing to provide disclaimer indicating that results were only to be used for clinical, not forensic, purposes); *LaMoy v MH Contractors, LLC*, 78 AD3d 1311, 911 NYS2d 203 (3d Dept 2010) (failure to use particular type or number of fasteners or ledgers to attach handrail to building does not constitute the creation or exacerbation of dangerous condition); *George v Marshalls of MA, Inc.*, 61 AD3d 925, 878 NYS2d 143 (2d Dept 2009) (negligent floor cleaning); *Grant v Caprice Management Corp.*, 43 AD3d 708, 841 NYS2d 555 (1st Dept 2007) (negligent installation of windows); *Dennebaum v Rotterdam Square, L.P.*, 6 AD3d 1045, 776 NYS2d 136 (3d Dept 2004) (failure to use particular joint in constructing sidewalk did not launch force or instrument of harm). In *Santos v Deanco Services, Inc.*, supra, the court, stressing that the launch of a force or instrument of harm requires that the contracting party create or exacerbate a dangerous condition, stated that there must be evidence that the party affirmatively left the premises in a more dangerous condition than it was found. The court commented that, “in the abstract, a party’s passive omissions might also conceivably create or exacerbate a dangerous condition just as active omissions, particularly in light of New York’s general elimination of the distinction between active and passive negligence.” However, the Fourth Department has held that a defendant’s failure to detect the lack of functioning safety devices, which were rendered inoperable years before defendant was hired to perform repairs, merely continued the status quo and thus did not launch an instrument of harm, *Ketch v Ridge Overhead Door, Inc.*, 173 AD3d 1627, 102 NYS3d 363 (4th Dept 2019).

Second, where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties, *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286, 556 NE2d 1093 (1990); *XX v Dunwell Elevator Electrical Industries, Inc.*, 188 AD3d 443, 135 NYS3d 372 (1st Dept 2020).

Third, where the contracting party has entirely displaced the other party’s duty to safely maintain the premises, *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994); see *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002) (discussing application of three elements to claim against subcontractor who was not in privity with plaintiff); *Timmins v Tishman Const. Corp.*, 9 AD3d 62, 777 NYS2d 458 (1st Dept 2004). Whether the contracting party was qualified to do the work it contracted to do is irrelevant to the issue of whether it owed a duty of care to a stranger to the contract, *XX v Dunwell Elevator Electrical Industries, Inc.*, 188 AD3d 443, 135 NYS3d 372 (1st Dept 2020).

The Espinal analysis was applied to deny summary judgment to a company that was retained by plaintiff's employer to service darkroom equipment and had allegedly produced chemical spills, causing noxious fumes in plaintiff's work area, *Cabrera v Picker Intern., Inc.*, 2 AD3d 308, 770 NYS2d 302 (1st Dept 2003). In rejecting defendant's contention that it owed plaintiff no duty of care, the court stressed that the chemical odors were especially intense after defendant had serviced the equipment and that plaintiff had repeatedly complained to defendant about the presence of chemical odors. Such evidence, the court held, could support liability either because defendant had created or exacerbated a dangerous condition or because plaintiff, a known user of the premises, had detrimentally relied on defendant's performance of its contractual obligations to her employer, *id.* On the other hand, a company that has merely plowed snow in a parking lot as required by its contract with the owner could not be said to have created or exacerbated a dangerous icy condition where there was no evidence that it had been requested to salt or sand the parking lot, *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 850 NYS2d 359, 880 NE2d 845 (2007). Similarly, in *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 848 NYS2d 585, 878 NE2d 1001 (2007), the Court held that a vehicle inspection shop did not launch an instrument of harm or create or exacerbate a dangerous condition when it conducted an allegedly negligent inspection of a passenger vehicle. In *Dinero v Aspen Athletic Club, LLC*, 173 AD3d 1789, 104 NYS3d 808 (4th Dept 2019), the court held that two contractors who serviced a health club did not launch a dangerous instrument or exacerbate a dangerous condition because the owner's failure to have an operable defibrillator on site, which was the dangerous condition at issue, was entirely independent of any action performed, or not performed, by either of the two contractors. In *George v Marshalls of MA, Inc.*, 61 AD3d 925, 878 NYS2d 143 (2d Dept 2009), the court rejected the notion that, where liability is premised on the defendant's having launched a force or instrument of harm in connection with floor cleaning, the plaintiff must have directly been injured by a piece of equipment such as a mop or buffer. The George court held that it is sufficient if the use of the instrument creates a dangerous condition.

The reliance element of the Espinal analysis exists to avoid potentially limitless liability arising out of contractual breaches, *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 557 NYS2d 286, 556 NE2d 1093 (1990). To establish this element, injured non-contracting parties must show that performance of contractual obligations has induced their detrimental reliance on continued performance by the contracting parties and inaction would result not merely in withholding a benefit, but in positively or actively working an injury, *id.* The nexus between the defendant's contractual obligation and the non-contracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral, before a tort duty arises, *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994); see *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50

(2002) (applying second exception listed above, court observes that driver could not have detrimentally relied on continued performance of subcontractors' contractual duties to install guiderail when she failed to remain awake while driving). Therefore, a party who was contractually required to perform cleaning and security services, and not fire fighting or prevention duties, is not liable to plaintiffs' tenants for economic damages sustained as a result of a fire, including business interruption losses, *Cresvale Intern. Inc. v Reuters America, Inc.*, 257 AD2d 502, 684 NYS2d 219 (1st Dept 1999). Likewise, a motorist who collided with another driver's vehicle after its drive train failed had no cause of action against the vehicle inspection shop that had certified the vehicle as safe, since the injured motorist did not rely on the certification, *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 848 NYS2d 585, 878 NE2d 1001 (2007). In *Kuti v Sera Security Services*, 182 AD3d 401, 121 NYS3d 263 (1st Dept 2020), the court found an issue of fact as to whether a security services contractor had promised to respond to a nurse's call for assistance with an aggressive patient, but failed to do so in a timely manner.

Although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party, in *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994), liability was extended to a person who was not in privity with the defendant. A hospital nurse sued a maintenance contractor to recover for injuries suffered when a wall-mounted fan fell and struck her. The Court held that when a party contracts to inspect and repair premises and possesses the exclusive management and control of real or personal property which negligently inflicts injury, it assumes a duty to warn non-contracting individuals reasonably within the zone and contemplation of the intended safety services, *id.* The Court noted that the functions to be performed were not directed to an unlimited universe of persons, but to a known and identifiable group, which was within the reasonable expectation of all the parties, see *Currier v Wiltrom Associates Inc.*, 250 AD2d 956, 672 NYS2d 940 (3d Dept 1998) (where plaintiffs failed to show that a comprehensive and exclusive property maintenance plan was entered into by absentee owner, the owner could not be held liable to plaintiff who fell on its premises).

In *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002), the Court applied the rationale of *Palka v Servicemaster Management Services Corp.*, 83 NY2d 579, 611 NYS2d 817, 634 NE2d 189 (1994), and concluded that defendant's snow removal contract was not a "comprehensive and exclusive" maintenance agreement. Under the agreement, the contractor was obligated to clear snow from vehicular roadways, parking and loading areas, entrances and exits of the landowner's property when snow accumulations exceeded three inches. In addition, the contractor agreed that upon the owner's request, it would spread a mixture of salt and sand on certain areas of the property. The contractor agreed to plow during the late evening and early morning hours, and not until all accumulations had

ceased, on a one time plowing per snowfall basis. The Court held that this contractual undertaking was not the type of “comprehensive and exclusive” property maintenance obligation contemplated by Palka because the contractor did not entirely absorb the landowner’s duty to maintain the premises safely. Although the contractor undertook to provide snow removal services under specific circumstances, the landowner at all times retained its duty to inspect and safely maintain the premises, *id*; see *Lehman v North Greenwich Landscaping, LLC*, 16 NY3d 747, 917 NYS2d 621, 942 NE2d 1046 (2011); *Wyant v Professional Furnishing and Equipment, Inc.*, 31 AD3d 952, 819 NYS2d 792 (3d Dept 2006) (construction manager retained in connection with removal and replacement of school auditorium seats did not entirely displace school’s responsibility, since construction manager did not have control over contractors, was not responsible for safety precautions and school reserved right to retain other contractors); *Seymour v David W. Mapes, Inc.*, 22 AD3d 1012, 803 NYS2d 250 (3d Dept 2005) (auctioneer retained to auction estate’s assets on estate’s premises did not entirely displace estate’s duty to maintain premises in reasonably safe condition); *Perkins v Cosmopolitan Care Corp.*, 308 AD2d 437, 764 NYS2d 276 (2d Dept 2003) (provider of superintendent/janitorial services did not have “comprehensive and exclusive” maintenance obligation where owner received complaints about conditions on premises and regularly arranged for other workers to correct such conditions); *Kampf v Bank of New York*, 259 AD2d 439, 687 NYS2d 348 (1st Dept 1999) (snow removal contract was not a “comprehensive and exclusive” maintenance agreement); see also *Kuti v Sera Security Services*, 182 AD3d 401, 121 NYS3d 263 (1st Dept 2020) (issue of fact as to whether security services contractor displaced medical facility’s safety function to protect plaintiff nurse); *XX v Dunwell Elevator Electrical Industries, Inc.*, 188 AD3d 443, 135 NYS3d 372 (1st Dept 2020) (issue of fact as to whether defendant entirely displaced owner’s duty to maintain property in reasonably safe condition; comprehensive management agreement between owner and defendant obligated defendant to maintain property, ensure that needed repairs were made, and remedy any violations); *Karac v Elmira*, 14 AD3d 842, 788 NYS2d 456 (3d Dept 2005) (duty owed to third-party where private, day-to-day operator of municipal parking garage had comprehensive contractual maintenance obligation; operator coordinated and supervised staff, accounted for revenues and was responsible for physical, mechanical and electrical maintenance of premises). Similarly, although defendants had contracted to use their “best judgment” in providing snow plowing services, the contract was not deemed so “comprehensive or exclusive” as to create a duty to third parties, since the property owner retained the right to request additional services and the property owner’s employees monitored the contract’s performance, *Torella v Benderson Development Co., Inc.*, 307 AD2d 727, 763 NYS2d 876 (4th Dept 2003).

Tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation, *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002). In *Church*, the Court noted

that the subcontractor who had agreed to install a guiderail along the New York State Thruway did not comprehensively contract to assume all of the Thruway Authority's safety-related obligations with respect to the guiderail system. The Thruway Authority retained a separate project engineer to provide inspection and supervision of all aspects of the project, including contract compliance with respect to the stipulated length of the guiderail system. Therefore, the subcontractor never assumed the Thruway Authority's common law tort duty to oversee and insure the installation of an adequately safe length of guiderailing at the site of the accident. In addition, inspection responsibilities as to the proper length of guiderail were never contractually shifted to the subcontractor. Rather, the Thruway Authority either retained those safety responsibilities or delegated them under contracts with others.

Although a third party's contractual undertaking to remove snow from subject premises, without more, may not be considered a comprehensive and exclusive property maintenance obligation, see *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002), the party agreeing to perform the work may be required to indemnify the landowner if the plaintiff is successful in an action against the landowner, *Coyle v Long Island Sav. Bank*, 248 AD2d 350, 669 NYS2d 628 (2d Dept 1998). The landowner will not be permitted to seek contribution from the party retained to remove snow from the subject premises unless the landowner can demonstrate that the party owed a duty of care to it independent of the party's contractual duty or that the party owed the plaintiff, as an injured party, a duty of care, *Malcolm v Kapur*, 278 AD2d 926, 718 NYS2d 562 (4th Dept 2000). In *Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 690 NYS2d 213 (1st Dept 1999), the First Department held that the party agreeing to undertake snow removal is obligated to exercise reasonable care in doing so and can be held liable to a plaintiff in negligence where its acts create or increase the snow-related hazard. For a discussion of issues related to an owner's claim for indemnification against a snow removal contractor, see *Salisbury v Wal-Mart Stores Inc.*, 255 AD2d 95, 690 NYS2d 156 (3d Dept 1999).

In determining whether a builder or a contractor is liable to a third person outside of a contract, the general rule is that a builder or contractor is justified in relying on the plans and specifications that he or she has contracted to follow unless they are so apparently defective that an ordinary builder or contractor of ordinary prudence would be on notice that the work was dangerous and likely to cause injury, *Nachamie v Nassau*, 147 AD3d 770, 47 NYS3d 58 (2d Dept 2017); *Dunham v Ketco, Inc.*, 135 AD3d 1032, 24 NYS3d 417 (3d Dept 2016).

B. Evaluating Foreseeability

Foreseeability depends on foresight, *Cleveland v New Jersey Steamboat Co.*, 125 NY 299, 26 NE 327 (1891), but it is not necessary that the defendant should have had notice of the particular manner in which an accident would occur, or the precise injury which would result,

if the likelihood of an accident was clear to a prudent person, *Kriz v Schum*, 75 NY2d 25, 550 NYS2d 584, 549 NE2d 1155 (1989); *Ziecker v Orchard Park*, 75 NY2d 761, 551 NYS2d 898, 551 NE2d 99 (1989); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Havas v Victory Paper Stock Co., Inc.*, 49 NY2d 381, 426 NYS2d 233, 402 NE2d 1136 (1980); *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928); *MacPherson v Buick Motor Co.*, 217 NY 382, 111 NE 1050 (1916); *Fonzi v Beishline*, 270 AD2d 912, 705 NYS2d 470 (4th Dept 2000); see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016). Stated differently, although the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent, *Sanchez v State*, 99 NY2d 247, 754 NYS2d 621, 784 NE2d 675 (2002); see *Tiede v Frontier Skydivers, Inc.*, 129 AD3d 1585, 12 NYS3d 419 (4th Dept 2015) (plane crash due to hatch door unexpectedly opening and response of pro-rated skydiver in attempting to close hatch not within class of foreseeable hazards associated with skydiving instructor's alleged failure to provide proper training to pilot, instructors and skydivers).

However, only reasonable foresight is required, not prophetic vision, *Morris v Troy Sav. Bank*, 32 AD2d 237, 302 NYS2d 51 (3d Dept 1969), *aff'd*, 28 NY2d 619, 320 NYS2d 78, 268 NE2d 805 (1971); *Gattner v Coliseum Exhibition Corp.*, 17 AD2d 44, 230 NYS2d 340 (3d Dept 1962), *aff'd*, 12 NY2d 933, 238 NYS2d 316, 188 NE2d 527 (1963); *Cartee v Saks Fifth Ave.*, 277 App Div 606, 101 NYS2d 761 (1st Dept 1951), *aff'd*, 303 NY 832, 104 NE2d 375 (1952), and failure to guard against a remote possibility of accident which could not be foreseen in the exercise of ordinary care is not negligence, *Hubbell v Yonkers*, 104 NY 434, 10 NE 858 (1887); *Pinero v Rite Aid of New York, Inc.*, 294 AD2d 251, 743 NYS2d 21 (1st Dept 2002), *aff'd*, 99 NY2d 541, 753 NYS2d 805, 783 NE2d 895 (2002); *Polemenakos v Cohn*, 234 App Div 563, 256 NYS 5 (4th Dept 1932), *aff'd*, 260 NY 524, 184 NE 77 (1932). There must be foreseeability of danger that is not merely possible but probable, *MacPherson v Buick Motor Co.*, 217 NY 382, 111 NE 1050 (1916); *Dressler v Merkel, Inc.*, 247 App Div 300, 284 NYS 697 (2d Dept 1936), *aff'd*, 272 NY 574, 4 NE2d 744 (1936); see *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Parvi v Kingston*, 41 NY2d 553, 394 NYS2d 161, 362 NE2d 960 (1977); *Moncion v Infra-Metals Corp.*, 20 AD3d 310, 800 NYS2d 381 (1st Dept 2005); *Greggo v Albany*, 58 AD2d 678, 395 NYS2d 735 (3d Dept 1977).

The question of foreseeability is for the court when the facts are undisputed and only one inference may be drawn; it is for the jury when varying inferences may be drawn, *Rivera v New York City Transit Authority*, 77 NY2d 322, 567 NYS2d 629, 569 NE2d 432 (1991); *Kriz v Schum*, 75 NY2d 25, 550 NYS2d 584, 549 NE2d 1155 (1989); *Ziecker v Orchard Park*, 75 NY2d 761, 551 NYS2d 898, 551 NE2d 99 (1989); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928).

The court determines whether foreseeability is a matter of law or a jury issue, *Carradine v New York*, 16 AD2d 928, 229 NYS2d 328 (2d Dept 1962), rev'd on other grounds, 13 NY2d 291, 246 NYS2d 620, 196 NE2d 259 (1963); see *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84, 996 NYS2d 210, 20 NE3d 990 (2014); *Florio v Baierlein*, 225 AD2d 584, 638 NYS2d 783 (2d Dept 1996); *Koch v Levenson*, 225 AD2d 592, 638 NYS2d 785 (2d Dept 1996). Thus it was determined as a matter of law that no foreseeable danger was created by the existence of a three-inch space between a railroad platform and a train, *McKinney v New York Consol. R. Co.*, 230 NY 194, 129 NE 652 (1920); or by a trivial defect in a step or other walking surface, *Mascaro v State*, 46 AD2d 941, 362 NYS2d 78 (3d Dept 1974), aff'd, 38 NY2d 870, 382 NYS2d 742, 346 NE2d 543 (1976); *Scally v State*, 26 AD2d 606, 271 NYS2d 386 (3d Dept 1966), aff'd, 24 NY2d 747, 299 NYS2d 624, 247 NE2d 497 (1969); *Fleming v Fifth Ave. Coach Lines, Inc.*, 23 AD2d 726, 257 NYS2d 666 (1st Dept 1965); *Levine v R. H. Macy & Co.*, 20 AD2d 761, 247 NYS2d 486 (1st Dept 1964). Also, as a matter of law, it was not foreseeable that a bank patron would fall over the leash of a seeing-eye dog of another patron, *Morris v Troy Sav. Bank*, 32 AD2d 237, 302 NYS2d 51 (3d Dept 1969), aff'd, 28 NY2d 619, 320 NYS2d 78, 268 NE2d 805 (1971); nor, in an action against the state, that a member of the public would be assaulted by a prisoner who had no previous record of violence and who escaped from a minimum security work detail, *Williams v State*, 308 NY 548, 127 NE2d 545 (1955); nor that a parolee would assault a third person, *Wasserstein v State*, 32 AD2d 119, 300 NYS2d 263 (3d Dept 1969), aff'd, 27 NY2d 627, 313 NYS2d 759, 261 NE2d 665 (1970); *Welch v State*, 74 AD2d 661, 424 NYS2d 774 (3d Dept 1980); *Hawley v State*, 16 NY2d 809, 263 NYS2d 6, 210 NE2d 358 (1965) (State not liable for negligent care by custodian); nor that decedent, an adult, would seek to use a dumbwaiter as a passenger elevator by attempting to board the ascending lift while it was already occupied by another adult, *Fellis v Old Oaks Country Club, Inc.*, 163 AD2d 509, 558 NYS2d 183 (2d Dept 1990); nor that an adult, in attempting to cross a train platform, would climb over a stationary train rather than using the stairways provided for that purpose, *Eackles v National R.R. Passenger Corp.*, 207 AD2d 691, 616 NYS2d 374 (1st Dept 1994); nor that plaintiff, driving a car being followed by defendant, would respond to defendant's actions by driving off the road, *Bixby v Eddy*, 167 AD2d 51, 571 NYS2d 339 (3d Dept 1991); nor that plaintiff would run off the end of a retaining wall while chasing cows late at night on farm property, *Persons v Cross*, 146 AD2d 892, 536 NYS2d 597 (3d Dept 1989); nor that a car driven by an inexperienced driver would jump a curb and strike a pedestrian, *Grandy v Bavaro*, 134 AD2d 957, 521 NYS2d 956 (4th Dept 1987); nor that a patron during the course of a wedding reception would engage in raucous behavior that would injure a person on the dance floor, *Lee v Durow's Restaurant, Inc.*, 238 AD2d 384, 656 NYS2d 321 (2d Dept 1997); nor that a customer involved in a fight in a bar would be injured by being pushed into shelves bearing empty glasses, *Silver v Sheraton-Smithtown Inn*, 121 AD2d 711, 504 NYS2d 56 (2d Dept 1986); nor that gasoline would overflow through unused fill pipes when defendant was or should have been aware of the possibility of such overflow, *Nodine v*

Terpening Trucking Co., Inc., 64 AD2d 808, 407 NYS2d 277 (4th Dept 1978); nor that defendant's handyman, who was undergoing some type of psychotic breakdown, would shoot defendant's chauffeur, Cooper v Loebner, 208 AD2d 585, 617 NYS2d 365 (2d Dept 1994).

Although the escape of a patient with a violent criminal past is a foreseeable hazard, the state is not liable if, after he escapes, he steals a car and injures another while driving recklessly, *Dunn v State*, 29 NY2d 313, 327 NYS2d 622, 277 NE2d 647 (1971). If the patient's release is based on the exercise of medical judgment, the state is not liable for a post-release assault and there is no duty to take "follow-up" precautions or supervise the patient after release, *Cameron v State*, 37 AD2d 46, 322 NYS2d 562 (4th Dept 1971), *aff'd*, 30 NY2d 596, 331 NYS2d 30, 282 NE2d 118 (1972).

Moreover, the requirements of Mental Hygiene Law § 29.15 mandating release upon finding that a patient is free of mental disorder necessarily limit the duty of hospital authorities, *Cameron v State*, 37 AD2d 46, 322 NYS2d 562 (4th Dept 1971), *aff'd*, 30 NY2d 596, 331 NYS2d 30, 282 NE2d 118 (1972). Nor is a municipality responsible if a self-inflicted injury by a prison inmate could not be reasonably foreseen, *Gordon v New York*, 70 NY2d 839, 523 NYS2d 445, 517 NE2d 1331 (1987); *Moore v Troy*, 179 AD2d 842, 577 NYS2d 969 (3d Dept 1992). Likewise, a municipality is not liable for the death of a police officer who committed suicide four months after his service revolver was returned to him, where there was no evidence to indicate that the officer was suicidal or that the municipality should have anticipated that he was, *Cygan v New York*, 165 AD2d 58, 566 NYS2d 232 (1st Dept 1991); see *Estate of Benitez v New York*, 193 AD3d 42, 141 NYS3d 51 (1st Dept 2021).

As a matter of law, it was foreseeable that an insecure ski lift might cause fright resulting in mental injuries with physical consequences, *Battalla v State*, 26 AD2d 203, 272 NYS2d 28 (3d Dept 1966), *aff'd*, 24 NY2d 980, 302 NYS2d 813, 250 NE2d 224 (1969), or that a mechanical device, e.g., reverse gear, might fail to hold a car in place on an incline, *Flood v Travelers Village Garage, Inc.*, 66 AD2d 726, 411 NYS2d 324 (1st Dept 1978).

On the other hand, a jury question was presented as to whether the absence of a railing or guard on a set-back roof created a foreseeable risk that a tenant or guest would access the roof and be exposed to a falling hazard, see *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84, 996 NYS2d 210, 20 NE3d 990 (2014); but see *Feuerherm v Grodinsky*, 124 AD3d 1189, 2 NYS3d 285 (3d Dept 2015); as to whether the items used in the process of unloading a truck created a foreseeable risk to those engaged in the task, *Havas v Victory Paper Stock Co., Inc.*, 49 NY2d 381, 426 NYS2d 233, 402 NE2d 1136 (1980); as to whether an HVAC technician working in a residential attic, where there was no flooring, would lose his balance when he grabbed hold of a loose roof brace for support, *Vargas v Lamberti*, 186 AD3d 1572, 131 NYS3d 66

(2d Dept 2020); as to whether driving a bus over a plastic container created a foreseeable risk that the container might burst, spraying its contents on pedestrians, *Bahan v Green Bus Lines, Inc.*, 96 AD2d 876, 465 NYS2d 784 (2d Dept 1983), *aff'd*, 61 NY2d 922, 474 NYS2d 722, 463 NE2d 38 (1984); as to whether the maintenance of identical doors in close proximity, one leading to a hazardous area, created a foreseeable risk, *Christianson v Breen*, 288 NY 435, 43 NE2d 478 (1942); *Kirk v Kiernan*, 27 AD2d 546, 275 NYS2d 462 (2d Dept 1966), *rev'd* on other grounds, 21 NY2d 770, 288 NYS2d 241, 235 NE2d 225 (1968); as to whether the nailing shut of an apartment window created a foreseeable danger of injury because of the necessity of using the window as a means of escape from fire, *Buckingham v Donarry Realty Corp.*, 25 AD2d 722, 268 NYS2d 775 (1st Dept 1966); as to whether persons in a hotel would walk down 38 flights to escape what they perceived to be a dangerous fire, *Taieb v Hilton Hotels Corp.*, 131 AD2d 257, 520 NYS2d 776 (1st Dept 1987); as to whether knowledge that an employee was carrying an unholstered pistol created a foreseeable hazard to others for which the employer was liable, *Moody v Busy Corner Retail Meat Store, Inc.*, 54 AD2d 583, 387 NYS2d 154 (2d Dept 1976).

If the defendant could have foreseen the accident, but did not have the power to control the conduct of the negligent actor, the defendant cannot be held liable for the consequences of the foreseeable accident, *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976) (garage owner not liable to pedestrian for the negligence of patrons driving out of the parking facility); see *Moss v New York Telephone Co.*, 196 AD2d 492, 600 NYS2d 759 (2d Dept 1993) (defendant telephone company did not owe duty to plaintiff to prevent the misuse of its terminal box by criminal to gain access to plaintiff's home); *Roy v Vilardo*, 197 AD2d 893, 602 NYS2d 293 (4th Dept 1993) (parent homeowners are not liable to plaintiff for negligence of son in driving vehicle out of driveway); *Matthews v Scotia-Glenville School System*, 94 AD2d 912, 463 NYS2d 629 (3d Dept 1983) (owner of premises not liable for injury caused by automobile exiting from private roadway); *Schirmer v Yost*, 60 AD2d 789, 400 NYS2d 655 (4th Dept 1977) (host not liable to pedestrian injured by car driven by guest, who had been served alcoholic beverages at host's party); see also *Conboy v Mogeloff*, 172 AD2d 912, 567 NYS2d 960 (3d Dept 1991) (doctor who prescribed sedative for a parent not liable for injuries sustained by her children when parent lost consciousness while driving automobile); *Nadeau v Stack*, 87 AD2d 943, 451 NYS2d 235 (3d Dept 1982). The rule of cases like *Schirmer v Yost*, *supra*, is subject to the provisions of General Obligation Law § 11-100 creating a cause of action in favor of one injured by the intoxication of a person under the age of 21 against another who unlawfully furnishes or assists in procuring alcoholic beverages for such person, see *Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822, 693 NE2d 1074 (1998).

1. *Prior Accidents*

Prior accidents, or the absence thereof, at the same place under substantially similar circumstances, have a bearing on the foresee-

ability of danger, *Cleveland v New Jersey Steamboat Co.*, 125 NY 299, 26 NE 327 (1891); *Lafflin v Buffalo & S.W.R. Co.*, 106 NY 136, 12 NE 599 (1887); *Hubbell v Yonkers*, 104 NY 434, 10 NE 858 (1887); *Dougan v Champlain Transp. Co.*, 56 NY 1 (1874); *Martin ex rel. Martin v Our Lady of Wisdom Regional School*, 151 AD3d 838, 54 NYS3d 692 (2d Dept 2017); *Croissant v Long Island R. Co.*, 36 AD2d 612, 318 NYS2d 857 (2d Dept 1971); see *Wozniak v 110 South Main St. Land and Development Improvement Corp.*, 61 AD2d 848, 402 NYS2d 69 (3d Dept 1978). Evidence of prior accidents, *Annino v Utica*, 276 NY 192, 11 NE2d 726 (1937); *Gastel v New York*, 194 NY 15, 86 NE 833 (1909); *Cole v New York Racing Ass'n*, 24 AD2d 993, 266 NYS2d 267 (2d Dept 1965), *aff'd*, 17 NY2d 761, 270 NYS2d 421, 217 NE2d 144 (1966); *Goldstein v C.W. Post Center of Long Island University*, 122 AD2d 196, 504 NYS2d 734 (2d Dept 1986), or evidence of the absence of prior accidents, *Orlick v Granit Hotel and Country Club*, 30 NY2d 246, 331 NYS2d 651, 282 NE2d 610 (1972); *Christoforou v Lown*, 120 AD2d 387, 502 NYS2d 184 (1st Dept 1986); *Roma v Blaustein*, 44 AD2d 576, 353 NYS2d 44 (2d Dept 1974); *Butler v State*, 27 AD2d 897, 277 NYS2d 853 (3d Dept 1967), is therefore admissible provided that circumstances on the prior occasions were similar to those prevailing at the time of the later accident, *Gilliard v Long Island R. Co.*, 45 NY2d 996, 413 NYS2d 116, 385 NE2d 1044 (1978); *Daniels v New York City Transit Authority*, 171 AD3d 601, 100 NYS3d 2 (1st Dept 2019) (evidence of prior accidents at other train stations involving substantially similar circumstances admissible); *O'Buckley v Chemung*, 149 AD3d 1232, 53 NYS3d 209 (3d Dept 2017); *Vega v Jacobs*, 84 AD2d 813, 444 NYS2d 132 (2d Dept 1981); *Tomassi v Union*, 58 AD2d 670, 395 NYS2d 747 (3d Dept 1977), *mod* on other grounds, 46 NY2d 91, 412 NYS2d 842, 385 NE2d 581 (1978); *Jasinski v New York Cent. R.R.*, 21 AD2d 456, 250 NYS2d 942 (4th Dept 1964); *Kaplan v New York*, 10 AD2d 319, 200 NYS2d 261 (1st Dept 1960); *Schabel v Onseyga Realty Co.*, 233 App Div 208, 251 NYS 280 (4th Dept 1931); *Annot*: 21 ALR4th 472. This evidence should be admitted with a limiting instruction that it is a factor for consideration by the jury and not conclusive on the issue of negligence, *Gayle v New York*, 256 AD2d 541, 682 NYS2d 426 (2d Dept 1998).

When evidence concerning the presence or absence of prior accidents is in dispute and the court can say as a matter of law that continued use for a long period of time without accident negates negligence, as when the claimed defect is one of design in construction of an appliance or structure not obviously dangerous, *De Salvo v Stanley-Mark-Strand Corporation*, 281 NY 333, 23 NE2d 457 (1939); *Cleveland v New Jersey Steamboat Co.*, 125 NY 299, 26 NE 327 (1891); *Lafflin v Buffalo & S.W.R. Co.*, 106 NY 136, 12 NE 599 (1887); *Hubbell v Yonkers*, 104 NY 434, 10 NE 858 (1887); *Roma v Blaustein*, 44 AD2d 576, 353 NYS2d 44 (2d Dept 1974); see *Alesse v Valley Stream Cent. High School Dist. No. 13*, 202 AD2d 326, 609 NYS2d 217 (1st Dept 1994), the only questions to be presented to the jury concern the prior condition and use and/or the presence or absence of prior accidents. In such a case interrogatories should be submitted to the jury concerning the issues in dispute, such as:

1. Was the allegedly defective item in continual use for [*state period of time*] before the date of the accident?

Do not answer Questions “2” and “3” unless your answer to Question “1” is “Yes.”

2. Was the allegedly defective item in substantially the same condition during that period of daily use before the date of the accident as it was at the time of the accident?

Do not answer Question “3” unless your answer to Question “2” is “Yes.”

3. Were there any prior accidents caused by the allegedly defective condition during that period of daily use?

See also Comment to PJI 2.90.2 as to Notice.

Long continued use without accident does not negate negligence as a matter of law in some cases, as where the appliance or structure is obviously dangerous, *Wood v Gilboa*, 27 NYS 586 (Gen Term 1894), *aff'd*, 146 NY 383, 42 NE 544 (1895); *Maxim v Champion*, 4 NYS 515 (Gen Term 1888), *aff'd*, 119 NY 626, 23 NE 1144 (1890); *Fox v Union Turnpike Co.*, 59 App Div 363, 69 NYS 551 (3d Dept 1901). In such cases, the questions of foreseeability, of prior condition and use, and of presence or absence of prior accidents will be for the jury, *Roy v F.W. Woolworth Co.*, 257 App Div 831, 11 NYS2d 1013 (2d Dept 1939).

2. *Unforeseeable Plaintiff/Consequences*

The unforeseeable plaintiff doctrine of the *Palsgraf* case presents a more unusual problem. Although defendant's conduct involved a foreseeable danger to another, it could breach no duty to plaintiff unless plaintiff was “within the range of apprehension,” *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928); defendant's conduct must create a “reasonable likelihood of danger” to plaintiff, *Williams v State*, 308 NY 548, 127 NE2d 545 (1955). The range of reasonable apprehension may be either a question for the court or for the jury, *Palsgraf v Long Island R. Co.*, *supra*. Where it is a jury question, it is suggested that the pattern charge be adapted by inserting the words “to a person in plaintiff's position” after the words “but injury” in the third sentence of the first paragraph and after “any injury” in the second sentence of the second paragraph of the pattern charge.

Liability for unforeseeable consequences of negligent conduct towards plaintiff involves the law of proximate cause, not the question of duty, *Palsgraf v Long Island R. Co.*, 248 NY 339, 162 NE 99 (1928). *Palsgraf* suggested, but did not hold, that negligence to the plaintiff might impose liability for any consequences, however novel or extraordinary. This seems in accord with *Ehr Gott v New York*, 96 NY

264 (1884), where personal injuries resulted from exposure to cold and rain while extricating plaintiff's carriage from a rut in a negligently maintained highway. The court held that liability was not limited to foreseeable injuries. Liability has also been imposed for extraordinary physical consequences resulting from inherent physical weaknesses of plaintiff, *McCahill v New York Transp. Co.*, 201 NY 221, 94 NE 616 (1911) (physical impact resulted in delirium tremens and death because of pre-existing alcoholic condition of intestate). See Prosser and Keeton on Torts, 5th ed § 43 at p. 291 stating that "there is almost universal agreement upon liability beyond the risk, for quite unforeseeable consequences when they follow an impact upon the person of the plaintiff." However, on the basis of public policy and avoidance of ruinous liability, New York has arbitrarily limited the liability of one who negligently causes fire damage. Liability exists only for damage to property to which the fire is directly communicated, *Homac Corporation v Sun Oil Co.*, 258 NY 462, 180 NE 172 (1932); *Ryan v New York Cent. R. Co.*, 35 NY 210 (1866); but see *Webb v Rome, W. & O.R. Co.*, 49 NY 420 (1872).

Seemingly contrary to the *Palsgraf* suggestion, some New York cases, proceeding along proximate cause lines, state that there will be liability only for foreseeable consequences, e.g., *Perry v Rochester Lime Co.*, 219 NY 60, 113 NE 529 (1916); see *Williams v State*, 308 NY 548, 127 NE2d 545 (1955). However, it seems that they are really duty cases and fit the unforeseeable plaintiff pattern of *Palsgraf*. Other cases so stating actually deal with the problem of intervening cause, see *Saugerties Bank v Delaware & Hudson Co.*, 236 NY 425, 141 NE 904 (1923); *Bolsenbroek v Tully & Di Napoli, Inc.*, 12 AD2d 376, 212 NYS2d 323 (1st Dept 1961), *aff'd*, 10 NY2d 960, 224 NYS2d 280, 180 NE2d 61 (1961); *Halloran v Kiri*, 173 AD3d 509, 102 NYS3d 579 (1st Dept 2019) (given indicia of decedent's addiction and misuse of drugs contained in her medical records, her drug overdose was not intervening cause); *Hoggard v Otis Elevator Co.*, 52 Misc2d 704, 276 NYS2d 681 (Sup 1966), *aff'd*, 28 AD2d 1207, 285 NYS2d 262 (1st Dept 1967); see also PJI 2:72.

There is little authority in New York, other than the personal injury and fire cases discussed above, dealing with the situation where defendant was negligent with respect to a particular plaintiff because of foreseeable danger to him or her, but where defendant's conduct causes unforeseeable and disastrous results. See, however, *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The "Wagon Mound" No. 1)*, 1961 AMC 962 (Privy Council 1961), where defendant negligently allowed oil to flow into a harbor. Defendant's liability was limited to the minor damage of fouling plaintiff's shipways, which was foreseeable. Because of the high flash point of the oil it could not be foreseen that it would ignite and burn the dock. The English court, overruling *Re Polemis & Furness, Withy & Co.*, 3 KB 560 (U.K. Court of Appeal 1921), limited the negligent defendant's liability to foreseeable consequences, and thus made the test of responsibility for consequences the same as the test for negligence. Compare *Overseas Tankship (U. K.) Ltd. v Miller S.S. Co. (The Wagon Mound No. 2)*, 2 All Eng 709 (Privy Council 1966), dealing with the same occurrence but involving damage to ships moored

at the dock where, upon evidence that defendant should have been aware of some slight risk of ignition of the oil, liability was found.

Wagon Mound No. 1 seems compatible with the logic of *Palsgraf*, which refused to hold defendant liable for unforeseeable consequences to one outside the range of apprehension, see and compare Prosser and Keeton, Torts 5th ed. § 43 at p. 285 with the view of Andrews, J. in the dissent in *Palsgraf* and with the statements in *Williams v State*, 308 NY 548, 127 NE2d 545 (1955). It appears that the Wagon Mound No. 1 approach was followed in *Kulaga v State*, 37 AD2d 58, 322 NYS2d 542 (4th Dept 1971), *aff'd*, 31 NY2d 756, 338 NYS2d 436, 290 NE2d 437 (1972) (see particularly the concurring opinion); see also *Mace v Ryder Truck Rental, Inc.*, 43 NY2d 814, 402 NYS2d 396, 373 NE2d 291 (1977), (where Court of Appeals held that jury could reasonably find that it was foreseeable that extreme exertion occasioned by a defective steering column could cause a heart attack). If the rule of Wagon Mound No. 1 is to be applied, it could be done by substituting the words "that the injury sustained by plaintiff might result from his, her or its conduct" in place of "any injury as the result of his or her conduct" in the second sentence of the second paragraph of the pattern charge. Such a charge must be avoided in personal injury cases; and for fire cases and for the problem of intervening causes, see PJI 2:72 and Comment thereto.

**PJI 2:13. Common Law Standard of Care—
Foreseeability—Duty to Third Party Rescuer**

There is a principle of law that danger invites rescue. That means that someone who commits an act that a reasonably prudent person should know creates a risk of injury to (himself, herself, another person, property) may be liable for injuries sustained by another person who acted in an emergency to avoid or prevent that injury, provided that the actions of the injured person were reasonable in view of the emergency situation. A person acts reasonably in view of an emergency situation if (he, she) acted as a reasonably prudent person would act in the same situation, even if it later appears that the rescuer did not make the safest choice or exercise the best judgment.

The plaintiff AB claims that the defendant CD acted in a way that (he, she) should have known created a risk of harm to EF [*state name of person exposed to risk or identify property exposed to risk*] when CD [*state plaintiff's contention, such as: operated (his, her) boat carelessly*] and that, in so doing, CD

caused AB to sustain injuries when AB [*identify plaintiff's alleged reaction, such as: dove into the lake to prevent EF from drowning*]. CD claims that [*state CD's contentions, such as: AB acted unreasonably under the apparently exigent circumstances*].

If you find that a reasonably prudent person in CD's position should have known that (his, her) actions would create a risk of injury to EF, that AB was injured because (he, she) [*identify plaintiff's alleged reaction, such as: dove into the lake to prevent EF from drowning*] and that AB acted reasonably in view of the circumstances, you will find CD liable for AB's injuries. On the other hand, if you find that a reasonably prudent person in CD's position would not have known that (his, her) actions would create a risk of injury to EF or that AB's actions in [*identify plaintiff's alleged reaction, such as: diving into the lake to prevent EF from drowning*] were not reasonable under the circumstances, you will find that CD is not liable for AB's injuries.

Comment

Based on *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968); *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921); *Gibney v State*, 137 NY 1, 33 NE 142 (1893); *Eckert v Long Island R. Co.*, 43 NY 502 (1871); *Hallett v Stanley Stores Cleaners & Dyers*, 276 App Div 386, 94 NYS2d 622 (1st Dept 1950), *aff'd*, 301 NY 698, 95 NE2d 52 (1950); *Villoch v Lindgren*, 269 AD2d 271, 703 NYS2d 131 (1st Dept 2000); *Moore v Shah*, 90 AD2d 389, 458 NYS2d 33 (3d Dept 1982); *Rucker v Andress*, 38 AD2d 684, 327 NYS2d 848 (4th Dept 1971); *Carney v Buyea*, 271 App Div 338, 65 NYS2d 902 (4th Dept 1946); see Annot: 91 ALR3d 1202, 4 ALR3d 558.

A person who creates a foreseeable risk of harm to another by his or her own culpable act is liable for injuries sustained by a third person who acts reasonably to avert or ameliorate the harm, *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921); see *Guarino v Mine Safety Appliance Co.*, 25 NY2d 460, 306 NYS2d 942, 255 NE2d 173 (1969); *Velazquez v New York City Health and Hosp. Corp.*, 65 AD3d 981, 886 NYS2d 129 (1st Dept 2009). The rescue doctrine was created to avoid a plaintiff being found contributorily negligent as a matter of law for voluntarily placing him- or herself in a peril to prevent another person's serious injury or death, *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968); *Wagner v International Ry. Co.*, *supra*. It has been held that the rescuer must have been within the "zone of danger," *Moore v Shah*, 90 AD2d 389, 458 NYS2d 33 (3d Dept

1982). Thus, a son who donated a kidney to his father and who experienced kidney failure as a result of defendant-physician's allegedly negligent medical treatment, could not recover for his own injuries under the rescue doctrine, *id.*

As long as there is an unbroken continuity between defendant's commission of the wrong and plaintiff's effort to avert its consequences, the causal relationship between the act and plaintiff's injuries is not necessarily interrupted merely because plaintiff acted after having had time to reflect, *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921). Further, the wisdom of hindsight is not determinative in assessing the availability of the rescue doctrine. Thus, if the rescuer's actions were a reasonable course of conduct, it is of no import that the danger was not as real as it appeared to be, *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968); *Hughes v Murnane Bldg. Contractors, Inc.*, 89 AD3d 1507, 932 NYS2d 782 (4th Dept 2011). The rescue doctrine is not rendered inapplicable merely because the plaintiff's rescue attempts were ineffective, *Hughes v Murnane Bldg. Contractors, Inc.*, *supra*.

Liability may also exist to one injured by the act of the rescuer, *Gardner v Fleckenstein*, 2 AD2d 870, 156 NYS2d 704 (4th Dept 1956), *aff'd*, 3 NY2d 812, 166 NYS2d 10, 144 NE2d 649 (1957); *Guille v Swan*, 19 Johns 381 (NY 1822). The rescue doctrine applies whether defendant's liability is based upon negligence or breach of warranty, *Guarino v Mine Safety Appliance Co.*, 25 NY2d 460, 306 NYS2d 942, 255 NE2d 173 (1969).

The donor of an organ has no claim against the doctor whose negligence with respect to the donee necessitated the transplant, *Moore v Shah*, 90 AD2d 389, 458 NYS2d 33 (3d Dept 1982).

As to comparative fault on the part of the rescuer, see PJI 2:41 and PJI 2:42.

3. EMERGENCY SITUATION

PJI 2:14. Common Law Standard of Care—Emergency Situation

A person faced with an emergency and who acts without opportunity to consider the alternatives is not negligent if (he, she) acts as a reasonably prudent person would act in the same emergency, even if it later appears that (he, she) did not make the safest choice or exercise the best judgment. A mistake in judgment or wrong choice of action is not negligence if the person is required to act quickly because of danger. This rule applies where a person is faced with a sudden condition, which could not have been reasonably anticipated, provided that the person did not cause or contribute to the emergency by (his, her) own negligence.

If you find that (defendant, plaintiff) was faced with an emergency and that (his, her) response to the emergency was that of a reasonably prudent person, then you will conclude that (defendant, plaintiff) was not negligent. If, however, you find that the situation facing (defendant, plaintiff) was not sudden, or should reasonably have been foreseen, or was created or contributed to by (defendant's, plaintiff's) own negligence, or that the (defendant's, plaintiff's) conduct in response to the emergency was not that of a reasonably prudent person, then you may find that (defendant, plaintiff) was negligent.

Comment

Based on *Lifson v Syracuse*, 17 NY3d 492, 934 NYS2d 38, 958 NE2d 72 (2011); *Caristo v Sanzone*, 96 NY2d 172, 726 NYS2d 334, 750 NE2d 36 (2001) (citing PJI); *Rivera v New York City Transit Authority*, 77 NY2d 322, 567 NYS2d 629, 569 NE2d 432 (1991); *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990); *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982); *Martin v Alabama 84 Truck Rental, Inc.*, 47 NY2d 721, 417 NYS2d 56, 390 NE2d 774 (1979); *Johnson v Hickson*, 43 NY2d 906, 403 NYS2d 722, 374 NE2d 616 (1978); *Amaro v New York*, 40 NY2d 30, 386 NYS2d 19, 351 NE2d 665 (1976); *Rowlands v Parks*, 2 NY2d 64, 156 NYS2d 834, 138 NE2d 217 (1956); *Ward v F. R. A. Operat-*

ing Corporation, 265 NY 303, 192 NE 585 (1934); see *Herbert v Morgan Drive-A-Way, Inc.*, 84 NY2d 835, 617 NYS2d 127, 641 NE2d 147 (1994), reversing for reasons stated in dissenting op. 202 AD2d 886, 888-889, 609 NYS2d 407, 410 (3d Dept 1994); *De Carlo v Falco*, 8 NY2d 791, 201 NYS2d 803, 168 NE2d 132 (1960); *Meyer v Whisnant*, 307 NY 369, 121 NE2d 372 (1954); *Dufur v Lavin*, 101 AD2d 319, 476 NYS2d 389 (3d Dept 1984), *aff'd*, 65 NY2d 830, 493 NYS2d 123, 482 NE2d 919 (1985); *Wolfson v Darnell*, 15 AD2d 516, 222 NYS2d 458 (2d Dept 1961), *aff'd* in part and *app dismd* in part, 12 NY2d 819, 236 NYS2d 67, 187 NE2d 133 (1962); *Gardner v Fleckenstein*, 2 AD2d 870, 156 NYS2d 704 (4th Dept 1956), *aff'd*, 3 NY2d 812, 166 NYS2d 10, 144 NE2d 649 (1957); *Donaldson v Kilgore*, 187 AD2d 1018, 590 NYS2d 364 (4th Dept 1992) (citing PJI); *Dubacs v State*, 140 AD2d 968, 529 NYS2d 643 (4th Dept 1988) (citing PJI); *Tenenbaum v Martin*, 131 AD2d 660, 516 NYS2d 741 (2d Dept 1987); *Walker v Barnwell*, 122 AD2d 605, 504 NYS2d 1001 (4th Dept 1986) (citing PJI); *Rogers v Huggins*, 106 AD2d 621, 483 NYS2d 110 (2d Dept 1984) (citing PJI); *Rodriguez v New York State Thruway Authority*, 82 AD2d 853, 440 NYS2d 49 (2d Dept 1981); *Shorr v Cohen Bros. Realty & Const. Corp.*, 81 AD2d 501, 437 NYS2d 333 (1st Dept 1981); *Gaynor v State Dept. of Public Works*, 61 AD2d 1086, 403 NYS2d 359 (3d Dept 1978); *Kolanko v Erie R. Co.*, 215 App Div 82, 212 NYS 714 (1st Dept 1925); see *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921); *Restatement, Second, Torts*, § 296, § 470; *Prosser & Keeton, Torts* (5th Ed.), § 33, pp 196-197; as to automobile cases, see *Breckir v Lewis*, 21 AD2d 546, 251 NYS2d 77 (1st Dept 1964), *aff'd*, 15 NY2d 1027, 260 NYS2d 178, 207 NE2d 865 (1965); *McGowan v Marcus*, 216 AD2d 371, 628 NYS2d 340 (2d Dept 1995); *Sonntag v Dor-Vac Corp.*, 192 AD2d 594, 596 NYS2d 162 (2d Dept 1993) (citing PJI); *Goode v Meyn*, 165 AD2d 436, 568 NYS2d 472 (3d Dept 1991) (citing PJI); *Deutsch v Horizon Leasing Corp.*, 145 AD2d 405, 535 NYS2d 383 (2d Dept 1988); *Brown v Bracht*, 132 AD2d 857, 518 NYS2d 65 (3d Dept 1987); *Voleshen v Coles*, 60 AD2d 468, 401 NYS2d 116 (4th Dept 1978) (citing PJI); *Bobbe v Camato*, 26 AD2d 627, 272 NYS2d 475 (2d Dept 1966); *Cohen v Crimenti*, 24 AD2d 587, 262 NYS2d 364 (2d Dept 1965). Whether the conduct of plaintiff or defendant is at issue, a causal relationship must be found between the conduct and plaintiff's injury. For a charge on causal relationship, see PJI 2:70. The pattern charge is referred to in *Aldrich v Madison Taxi of Buffalo, Inc.*, 49 AD2d 1012, 374 NYS2d 81 (4th Dept 1975); *Brennan v Felter*, 48 AD2d 846, 369 NYS2d 175 (2d Dept 1975); *Hart v Scribner*, 44 AD2d 59, 353 NYS2d 230 (2d Dept 1974); *Barreto v Calderon*, 31 AD2d 896, 297 NYS2d 799 (1st Dept 1969). As to pleadings issues regarding the emergency doctrine, see *Bello v Transit Authority of New York City*, 12 AD3d 58, 783 NYS2d 648 (2d Dept 2004).

A party is entitled to a charge on the emergency doctrine, which is a threshold determination to be made by the trial court, *Caristo v Sanzone*, 96 NY2d 172, 726 NYS2d 334, 750 NE2d 36 (2001); *Whiteside v New York*, 293 AD2d 743, 742 NYS2d 319 (2d Dept 2002), when, viewing the evidence in the light most favorable to that party, there is a reasonable view of the evidence that the party's conduct was the prod-

uct of a sudden and unforeseeable occurrence not of the party's own making, *Kuci v Manhattan and Bronx Surface Transit Operating Authority*, 88 NY2d 923, 646 NYS2d 788, 669 NE2d 1110 (1996); *Rivera v New York City Transit Authority*, 77 NY2d 322, 567 NYS2d 629, 569 NE2d 432 (1991); *Pelletier v Lahm*, 111 AD3d 807, 975 NYS2d 135 (2d Dept 2013), *aff'd*, 24 NY3d 966, 994 NYS2d 565, 19 NE3d 491 (2014); *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996) (citing PJI); *Donaldson v Kilgore*, 187 AD2d 1018, 590 NYS2d 364 (4th Dept 1992) (citing PJI). The emergency doctrine is not rendered unavailable by speculation concerning the possible accident avoidance measures of a defendant faced with an emergency, *Barber v Young*, 238 AD2d 822, 656 NYS2d 529 (3d Dept 1997); *Caban v Vega*, 226 AD2d 109, 640 NYS2d 58 (1st Dept 1996); *Williams v Econ*, 221 AD2d 429, 633 NYS2d 392 (2d Dept 1995).

A party's own conduct is not excused by the emergency doctrine where that party's own actions caused or contributed to the emergency, *Ford v New York City Interborough Ry. Co.*, 236 NY 346, 140 NE 720 (1923); *Unger v Belt Line Ry. Corporation*, 234 NY 86, 136 NE 303 (1922); *Schneider v Second Ave. R. Co.*, 133 NY 583, 30 NE 752 (1892); *Stryker v Conners*, 189 AD3d 2077, 138 NYS3d 765 (4th Dept 2020); *Michael v Wagner*, 151 AD3d 1574, 55 NYS3d 840 (4th Dept 2017); *Gage v Raffensperger*, 234 AD2d 751, 651 NYS2d 214 (3d Dept 1996); *Mead v Marino*, 205 AD2d 669, 613 NYS2d 650 (2d Dept 1994); *Sweeney v McCormick*, 159 AD2d 832, 552 NYS2d 707 (3d Dept 1990) (citing PJI); *Boccaccio v Longden*, 61 AD2d 851, 401 NYS2d 924 (3d Dept 1978); *Hart v Scribner*, 44 AD2d 59, 353 NYS2d 230 (2d Dept 1974) (citing PJI); *Raimondo v Harding*, 41 AD2d 62, 341 NYS2d 679 (4th Dept 1973); see *Herbert v Morgan Drive-A-Way, Inc.*, 84 NY2d 835, 617 NYS2d 127, 641 NE2d 147 (1994), reversing for reasons stated in dissenting op. 202 AD2d 886, 888-889, 609 NYS2d 407, 410 (3d Dept 1994). However, the standard governing plaintiff's conduct does not depend upon the acts of persons other than plaintiff; see *Michael v Wagner*, *supra*. Thus, there is no requirement that the emergency must be one that was created by defendant, *Johnson v Hickson*, 43 NY2d 906, 403 NYS2d 722, 374 NE2d 616 (1978); *Voleshen v Coles*, 60 AD2d 468, 401 NYS2d 116 (4th Dept 1978) (citing PJI); *Raimondo v Harding*, *supra*.

Encountering an emergency does not completely absolve one from liability; it simply requires that one's conduct be measured against that of a reasonable person confronted with similar circumstances in a similar time frame within which to react, *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982), amended, 56 NY2d 737, 451 NYS2d 740, 436 NE2d 1342 (1982); *Schlanger v Doe*, 53 AD3d 827, 861 NYS2d 499 (3d Dept 2008); *Davey v Ohler*, 188 AD2d 726, 590 NYS2d 584 (3d Dept 1992); see *Pelletier v Lahm*, 111 AD3d 807, 975 NYS2d 135 (2d Dept 2013), *aff'd*, 24 NY3d 966, 994 NYS2d 565, 19 NE3d 491 (2014); *Gilkerson v Buck*, 174 AD3d 1282, 105 NYS3d 739 (4th Dept 2019); *Davis v Pimm*, 228 AD2d 885, 644 NYS2d 401 (3d Dept 1996). Except in the most egregious circumstances, *DiGiorgio v Sil Serv Corp.*, 243 AD2d 535, 665 NYS2d 288 (2d Dept 1997) (court determined as matter of law

that driver was confronted with emergency situation not of his own making and that any error in judgment did not constitute negligence), it is normally left to the trier of fact to determine if a particular situation rises to the level of an emergency, *Michael v Wagner*, 151 AD3d 1574, 55 NYS3d 840 (4th Dept 2017); *Stevenson v Recore*, 221 AD2d 834, 633 NYS2d 863 (3d Dept 1995).

Moreover, an “emergency” charge should not be given if the emergency is one which defendant should have anticipated and been prepared to meet, *Carson v De Lorenzo*, 238 AD2d 790, 657 NYS2d 469 (3d Dept 1997); *Mead v Marino*, 205 AD2d 669, 613 NYS2d 650 (2d Dept 1994); *Felder v Carolina Freight Carriers*, 156 AD2d 540, 548 NYS2d 809 (2d Dept 1989); *Hardy v Sicuranza*, 133 AD2d 138, 518 NYS2d 812 (2d Dept 1987); see *Vasquez v Nassau*, 91 AD3d 855, 938 NYS2d 109 (2d Dept 2012). The trial judge must make a threshold determination that there is some reasonable view of the evidence supporting the occurrence of a “qualifying emergency,” *Lifson v Syracuse*, 17 NY3d 492, 934 NYS2d 38, 958 NE2d 72 (2011); *Caristo v Sanzone*, 96 NY2d 172, 726 NYS2d 334, 750 NE2d 36 (2001) (citing PJI); *Pelletier v Lahm*, 111 AD3d 807, 975 NYS2d 135 (2d Dept 2013), *aff’d*, 24 NY3d 966, 994 NYS2d 565, 19 NE3d 491 (2014); see *DiCesare v Glasgow*, 295 AD2d 1007, 743 NYS2d 646 (4th Dept 2002) (court properly charged emergency doctrine based on testimony of defendant). The term emergency should be defined for the jury, *Hart v Scribner*, 44 AD2d 59, 353 NYS2d 230 (2d Dept 1974) (citing PJI). If the court determines that there is sufficient evidence supporting the occurrence of a “qualifying emergency,” the determination of whether an emergency existed is usually a question of fact for the jury, *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982), *amended*, 56 NY2d 737, 451 NYS2d 740, 436 NE2d 1342 (1982); *Pelletier v Lahm*, *supra*; *Long v Niagara Frontier Transp. Authority*, 81 AD3d 1391, 917 NYS2d 463 (4th Dept 2011); *Stevenson v Recore*, 221 AD2d 834, 633 NYS2d 863 (3d Dept 1995); *Davey v Ohler*, 188 AD2d 726, 590 NYS2d 584 (3d Dept 1992). Likewise, whether the emergency was dissipated by a lapse of time before injury was sustained may present factual issues, *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990). However, there have been cases in which the courts applied the emergency doctrine to absolve defendant of liability as a matter of law, *Palmer v Palmer*, 31 AD2d 876, 297 NYS2d 428 (3d Dept 1969), *aff’d*, 27 NY2d 945, 318 NYS2d 317, 267 NE2d 103 (1970); *Smith v Brennan*, 245 AD2d 596, 664 NYS2d 687 (3d Dept 1997); *DiGiorgio v Sil Serv Corp.*, 243 AD2d 535, 665 NYS2d 288 (2d Dept 1997) (court determined as matter of law that driver was confronted with emergency situation not of his own making and that any error in judgment did not constitute negligence); *Davis v Pimm*, 228 AD2d 885, 644 NYS2d 401 (3d Dept 1996); *Koch v Levenson*, 225 AD2d 592, 638 NYS2d 785 (2d Dept 1996); *Wright v Morozinis*, 220 AD2d 496, 632 NYS2d 213 (2d Dept 1995); *Nieves v Manhattan and Bronx Surface Transit Operating Authority*, 31 AD2d 359, 297 NYS2d 743 (1st Dept 1969).

It was held error to give an emergency charge in a case involving a

“routine” rear-end traffic accident, *Pincus v Cohen*, 198 AD2d 405, 604 NYS2d 139 (2d Dept 1993); *McCarthy v Miller*, 139 AD2d 500, 526 NYS2d 848 (2d Dept 1988); see *Tyson v Brecher*, 212 AD2d 851, 622 NYS2d 344 (3d Dept 1995), or in a case where defendant driver, whose van struck the plaintiff’s car from behind, testified that he knew there was ice on the roadways in the area and therefore took precautions to avoid skidding, including operating his van at a rate of speed no greater than five miles an hour, *Smith v Perfectaire Co., Inc.*, 270 AD2d 410, 704 NYS2d 640 (2d Dept 2000). Similarly, an emergency charge is inappropriate where plaintiff’s theory of liability is that, before the alleged emergency situation arose, defendant driver failed to see that which he or she should have seen, and should have anticipated the situation by exercising reasonable care, *Vasquez v Nassau*, 91 AD3d 855, 938 NYS2d 109 (2d Dept 2012); see *Cahoon v Frechette*, 86 AD3d 774, 927 NYS2d 689 (3d Dept 2011). The appearance of a pedestrian at the curb in or near a crosswalk is not a sudden and unforeseeable emergency, *Hart v North Castle*, 305 AD2d 543, 759 NYS2d 185 (2d Dept 2003). Similarly, an emergency charge should not have been given where the medical “emergency” that occurred during the course of defendant physician’s delivery of a baby was an eventuality that obstetricians are generally trained and prepared for, *Amodeo v Cumella*, 41 AD3d 396, 838 NYS2d 152 (2d Dept 2007).

On the other hand, it is appropriate to charge the emergency doctrine in a case where the jury must resolve whether the accident was unavoidable, whether plaintiff’s injury was caused by defendant’s excusable error or misjudgment in an emergency situation, or whether the injury was caused by defendant’s inexcusably negligent act in contributing to the creation of the emergency, *Rivera v New York City Transit Authority*, 77 NY2d 322, 567 NYS2d 629, 569 NE2d 432 (1991) (error not to charge emergency doctrine in a case involving decedent’s fall onto subway tracks into path of oncoming train); see *Feaster v New York City Transit Authority*, 172 AD2d 284, 568 NYS2d 380 (1st Dept 1991). Moreover, a bus driver’s awareness that motorists often made sudden right turns from the left lane at a particular intersection, creating a hazard with buses leaving the bus stop there, did not preclude an emergency-doctrine charge, *Kuci v Manhattan and Bronx Surface Transit Operating Authority*, 88 NY2d 923, 646 NYS2d 788, 669 NE2d 1110 (1996); see *Pelletier v Lahm*, 111 AD3d 807, 975 NYS2d 135 (2d Dept 2013), *aff’d*, 24 NY3d 966, 994 NYS2d 565, 19 NE3d 491 (2014) (driver’s general awareness that passenger engaged in certain distracting conduct while in car did not preclude jury from reasonably concluding that driver did not anticipate that passenger would suddenly pull strings on driver’s bikini top, thereby causing top to fall and her breasts to be exposed, resulting in driver taking her hands off steering wheel to cover her breasts). The court may properly charge the emergency doctrine and the doctrine of unavoidable accident in the same case where it clearly differentiates between these theories and explains each to the jury, *MacFarland v Reed*, 257 AD2d 802, 683 NYS2d 658 (3d Dept 1999).

A driver is not required to anticipate a vehicle being driven through

a red light, *Alamo v McDaniel*, 44 AD3d 149, 841 NYS2d 477 (1st Dept 2007). A driver in the proper lane of travel is not required to anticipate that a car going in the opposite direction will cross over into that lane, *Palmer v Palmer*, 31 AD2d 876, 297 NYS2d 428 (3d Dept 1969), *aff'd*, 27 NY2d 945, 318 NYS2d 317, 267 NE2d 103 (1970); *Cruz v MTLR Corp.*, 111 AD3d 568, 975 NYS2d 657 (1st Dept 2013); *Gajjar v Shah*, 31 AD3d 377, 817 NYS2d 653 (2d Dept 2006); *Mangano v New York City Housing Authority*, 218 AD2d 787, 631 NYS2d 54 (2d Dept 1995); *Gouchie v Gill*, 198 AD2d 862, 605 NYS2d 709 (4th Dept 1993); see *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996) (citing PJI) (driver not required to anticipate that oncoming tractor's bucket would cross center of road into oncoming lane of travel). In such a scenario, the actions of the driver must be judged under the emergency doctrine, *Camas v Castellanos*, 260 AD2d 593, 688 NYS2d 656 (2d Dept 1999); *Bentley v Moore*, 251 AD2d 612, 675 NYS2d 108 (2d Dept 1998); *Mangano v New York City Housing Authority*, *supra*. Similarly, an operator of a motor vehicle who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield, *Doxtader v Janczuk*, 294 AD2d 859, 741 NYS2d 368 (4th Dept 2002); *Perez v Brux Cab Corp.*, 251 AD2d 157, 674 NYS2d 343 (1st Dept 1998); *Namismak v Martin*, 244 AD2d 258, 664 NYS2d 435 (1st Dept 1997). Thus, the failure of a driver, who is not otherwise negligent and encounters such a car, to avert the consequences of such an emergency can seldom be considered negligent, *Palmer v Palmer*, *supra*; *Breckir v Lewis*, 21 AD2d 546, 251 NYS2d 77 (1st Dept 1964), *aff'd*, 15 NY2d 1027, 260 NYS2d 178, 207 NE2d 865 (1965); *Gouchie v Gill*, *supra*. A driver faced with a vehicle crossing over the highway from the opposite direction is not liable for the failure to exercise the best judgment or for any errors of judgment, *Palmer v Palmer*, *supra*; *Velez v Diaz*, 227 AD2d 615, 643 NYS2d 614 (2d Dept 1996); *Gouchie v Gill*, *supra*; *Wolfson v Darnell*, 15 AD2d 516, 222 NYS2d 458 (2d Dept 1961), *aff'd in part and app dismd in part*, 12 NY2d 819, 236 NYS2d 67, 187 NE2d 133 (1962). The principles reviewed in this paragraph must be considered in light of a driver's duty to keep a proper lookout and see that which he or she should have seen by the proper use of his or her senses, see PJI 2:77 and 2:77.1. An emergency charge is inappropriate where plaintiff's theory of liability is that, before the alleged emergency situation arose, defendant driver failed to see that which he or she should have seen, and should have anticipated the situation by exercising reasonable care, *Vasquez v Nassau*, 91 AD3d 855, 938 NYS2d 109 (2d Dept 2012); see *Jablonski v Jakaitis*, 85 AD3d 969, 926 NYS2d 137 (2d Dept 2011); see also *Cahoon v Frechette*, 86 AD3d 774, 927 NYS2d 689 (3d Dept 2011).

Once a defendant who was not otherwise negligent establishes that a head-on collision was caused by plaintiff's crossing over into defendant's lane of travel, defendant has established a complete defense to plaintiff's action, *Pilarski v Consolidated Rail Corp.*, 269 AD2d 821, 702 NYS2d 485 (4th Dept 2000); see *Wasson v Szafarski*, 6 AD3d 1182, 776 NYS2d 423 (4th Dept 2004); see also *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996); *Eisenbach v Rogers*, 158 AD2d 792,

551 NYS2d 385 (3d Dept 1990). The burden then shifts to plaintiff to submit evidence in admissible form to create an issue of fact as to the defendant's negligence contributing to the happening of the accident, *Gouchie v Gill*, 198 AD2d 862, 605 NYS2d 709 (4th Dept 1993); see *Lester v Chmaj*, 251 AD2d 1069, 674 NYS2d 222 (4th Dept 1998); *Vatter v Gibson*, 228 AD2d 581, 644 NYS2d 545 (2d Dept 1996). A question of fact is presented as to whether a driver was confronted with an emergency when a truck pulls out from a parking lane forcing the driver into another lane, *Reid v Courtesy Bus Co.*, 234 AD2d 531, 651 NYS2d 612 (2d Dept 1996); see *Wilson v Certain Cab Corp.*, 303 AD2d 252, 756 NYS2d 202 (1st Dept 2003). A driver's action of backing up can be viewed as a reasonable attempt to remove the driver's vehicle from an obviously dangerous situation even though it proves to be the wrong decision, *Barber v Young*, 238 AD2d 822, 656 NYS2d 529 (3d Dept 1997).

Generally, whether a driver acted reasonably in the face of an emergency situation is a question to be decided by the trier of fact, *Cahoon v Frechette*, 86 AD3d 774, 927 NYS2d 689 (3d Dept 2011); *Smith v Brennan*, 245 AD2d 596, 664 NYS2d 687 (3d Dept 1997); *Davis v Pimm*, 228 AD2d 885, 644 NYS2d 401 (3d Dept 1996); see *Green v Metropolitan Transp. Authority Bus Co.*, 26 NY3d 1061, 23 NYS3d 145, 44 NE3d 220 (2015), rev'g, 127 AD3d 421, 7 NYS3d 85 (1st Dept 2015). In determining whether the actions of the driver are reasonable in light of an emergency situation, both the driver's awareness of the situation and his or her actions prior to the occurrence of the accident must be considered, *Gilkerson v Buck*, 174 AD3d 1282, 105 NYS3d 739 (4th Dept 2019); see *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982), amended 56 NY2d 737, 451 NYS2d 740, 436 NE2d 1342 (1982). However, a defendant driver may be granted summary judgment based on the emergency doctrine if the driver establishes as a matter of law that he or she did not contribute to the creation of the emergency situation, and that his or her reaction was reasonable under the circumstances such that he or she could not have done anything to avoid the collision, see *Kandel v FN; Taxi, Inc.*, 137 AD3d 980, 27 NYS3d 605 (2d Dept 2016); *Cahoon v Frechette*, *supra*. Summary resolution is possible when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue, *Gajjar v Shah*, 31 AD3d 377, 817 NYS2d 653 (2d Dept 2006) (as a matter of law, driver's staying in own lane and slamming on brakes was reasonable reaction to being confronted by vehicle that crossed over into wrong lane of traffic); *Smith v Brennan*, *supra*; *Davis v Pimm*, *supra*; see *DiGiorgio v Sil Serv Corp.*, 243 AD2d 535, 665 NYS2d 288 (2d Dept 1997) (court determined as matter of law that driver was confronted with emergency situation not of his own making and that any error in judgment did not constitute negligence).

It is error to charge the emergency doctrine with respect to all drivers and not to specify the particular driver or drivers to whom it is to be applied, *Brennan v Felter*, 48 AD2d 846, 369 NYS2d 175 (2d Dept 1975). However, there may be circumstances in which it is appropriate to ap-

ply the emergency doctrine to all drivers, see *Brown v Bracht*, 132 AD2d 857, 518 NYS2d 65 (3d Dept 1987).

In *Caristo v Sanzone*, 96 NY2d 172, 726 NYS2d 334, 750 NE2d 36 (2001), the court held as a matter of law that there was no qualifying event justifying the emergency instruction where the driver admitted knowledge of worsening weather conditions, see *Gadon v Oliva*, 294 AD2d 397, 742 NYS2d 122 (2d Dept 2002). Under such circumstances, the presence of ice on the downhill portion of the road on which defendant was driving could not be deemed a sudden and unexpected emergency because, at the time of the accident, the temperature was well below freezing and it had been snowing, raining and hailing for at least two hours, *Caristo v Sanzone*, supra; see *Shaw v Manufacturer's Hanover Trust Co.*, 95 AD2d 738, 464 NYS2d 172 (1st Dept 1983) (bank is not entitled to emergency instruction because possibility of bank robbery cannot be said to be one that is not anticipated and, furthermore, that bank employee aggravated or created the emergency). Relying on *Caristo*, the Court in *Lifson v Syracuse*, 17 NY3d 492, 934 NYS2d 38, 958 NE2d 72 (2011), concluded that sun glare, which affected the defendant-driver's vision, did not constitute a qualifying emergency because the driver, who was familiar with the general area in which the accident occurred, was turning west at an intersection at a time of day that the sun would be setting. Since it is well known that the sun can interfere with one's vision as it nears the horizon at sunset, particularly when one is heading west, the sun glare condition in *Lifson* was not a sudden and unexpected circumstance, see *Rodriguez v Beal*, 191 AD3d 617, 139 NYS3d 534 (1st Dept 2021).

The emergency doctrine precludes liability for personal injuries where a bus driver's only option was to stop short, *Edwards v New York City Transit Authority*, 37 AD3d 157, 829 NYS2d 462 (1st Dept 2007). There may also be cases where, based on the undisputed facts, defendant's conduct in an emergency may be found to be not negligent as a matter of law, *Smith v Brennan*, 245 AD2d 596, 664 NYS2d 687 (3d Dept 1997); *Davis v Pimm*, 228 AD2d 885, 644 NYS2d 401 (3d Dept 1996); *Cohen v Masten*, 203 AD2d 774, 610 NYS2d 385 (3d Dept 1994); *Rivas v Metropolitan Suburban Bus Authority*, 203 AD2d 349, 610 NYS2d 79 (2d Dept 1994); *Denicker v Denicker*, 173 AD2d 516, 570 NYS2d 118 (2d Dept 1991).

As to the law governing drivers of authorized emergency vehicles, see PJI 2:79. As to police and firefighters, expert testimony is admissible to clarify proper practice expected in a given police emergency, *Selkowitz v Nassau*, 45 NY2d 97, 408 NYS2d 10, 379 NE2d 1140 (1978); *Shaw v Manufacturer's Hanover Trust Co.*, 95 AD2d 738, 464 NYS2d 172 (1st Dept 1983) (firefighter). As to justification for the use of force in the protection of self or others, see Penal Law §§ 35:00–35:30 and discussion in Comment to 2 NYPJI 3:5.

4. DEFENDANT HAVING SPECIAL KNOWLEDGE

PJI 2:15. Common Law Standard of Care—Defendant Having Special Knowledge

A person who has special training and experience in a (trade, profession), when acting in the trade or profession on behalf of others who are relying on (his, her) special skills, has the duty to use the same degree of skill and care that others in the same (trade, profession) in the community would reasonably use in the same situation. (AB), the defendant in this case, has (or claimed to have) special skills in [*specify trade or profession*]. If you decide that defendant did use the same degree of skill and care that other [*specify trade or profession*] in the community would reasonably use in the same situation, then you must find that defendant was not negligent, no matter what resulted from defendant's conduct. On the other hand, if you decide that defendant did not use the same degree of skill and care, then you must find that defendant was negligent.

Comment

Based on *Cornbrooks v Terminal Barber Shops*, 282 NY 217, 26 NE2d 25 (1940) (barber); *Allan v State S.S. Co.*, 132 NY 91, 30 NE 482 (1892) (druggist).

The principle stated in the pattern charge is the underlying basis of malpractice actions, see PJI 2:150 to PJI 2:154. The charge has been included to call attention to the broader applications of the principle. However, although the principle may apply in cases involving skilled trades and professions not generally thought of in connection with malpractice, see *Prosser & Keeton, Torts* (5th ed) § 32, pp 185-187; *Restatements, Torts*, Second, §§ 289, 299A, , it has no application to ordinary negligence cases that are not based on a malpractice theory, *Reis v Volvo Cars of North America*, 24 NY3d 35, 993 NYS2d 672, 18 NE3d 383 (2014) (citing PJI). Thus, the charge should not have been given in a case involving a claim of an automobile design defect, since automobile manufacturers are not regarded as being in a skilled trade of profession, *Reis v Volvo Cars of North America, Inc.* *supra*. In malpractice cases, the defendant is held to the level of skill and care used by others in the community who practice the same profession; in other types of negligence cases, it is the conduct of a "reasonable person" under like circumstances that is applied, *Reis v Volvo Cars of North America, Inc.*,

supra; *Abrams v Bute*, 138 AD3d 179, 27 NYS3d 58 (2d Dept 2016). As to customary business practices, see PJI 2:16.

Even if defendant acted negligently, there must be a causal relationship between defendant's conduct and plaintiff's injury. For a charge on causal relationship, see PJI 2:70.

With respect to the statute of limitations applicable to actions based upon defendant's failure to use due care in providing services, see Introductory Statement preceding PJI 2:150.

5. CUSTOMARY BUSINESS PRACTICES

PJI 2:16. Common Law Standard of Care—Customary Business Practices

You have heard evidence of the general customs and practices of others who are in the same business or trade as that of defendant. This evidence is to be considered by you in determining whether the conduct of defendant was reasonable under the circumstances. Defendant's conduct is not to be considered unreasonable simply because someone else may have used a better [*add where appropriate: safer*] practice. On the other hand, a general custom, use, or practice by those in the same business or trade may be considered some evidence of what constitutes reasonable conduct in that trade or business. You must first decide, from the evidence presented in this case, whether there is a general custom or practice in defendant's trade or business. If you find that there is a custom or practice, you may take that general custom or practice into account in considering the care used by defendant in this case. However, a general custom or practice is not the only test; what you must decide is whether, taking all the facts and circumstances into account, defendant acted with reasonable care.

Comment

Based on *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986) (citing PJI); *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982); *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Garthe v Ruppert*, 264 NY 290, 190 NE 643 (1934); *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988); see *Prince, Richardson on Evidence* (11th Ed Farrell), §§ 4-602, 4-603; Annot: 58 ALR3d 148.

Customary safety procedures in the trade or business that bear upon the reasonableness of a party's conduct are admissible to prove negligence, *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982); *Miller v Long Island R.R.*, 212 AD2d 515, 622 NYS2d 305 (2d Dept 1995); see *Reis v Volvo Cars of North America*, 24 NY3d 35, 993 NYS2d 672, 18 NE3d 383 (2014) (citing PJI); *Vasquez v Nassau*, 91

AD3d 855, 938 NYS2d 109 (2d Dept 2012) (relevant manuals or instructions may be admissible as evidence of whether defendant exercised reasonable care). Evidence of custom and industry practice is admissible to establish a standard of care, *Phillips v McClellan Street Associates*, 262 AD2d 748, 691 NYS2d 598 (3d Dept 1999), see *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573, 842 NE2d 471 (2005) (commercial harm). Further, a course of conduct that induces reliance may implicate a duty of care, *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, supra; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980). The party offering evidence of a customary procedure or policy must establish that it is reflective of an industry standard or a generally-accepted safety practice, *Walker v Commack School Dist.*, 31 AD3d 752, 820 NYS2d 287 (2d Dept 2006); *Carlino v Triboro Coach Corp.*, 22 AD3d 624, 803 NYS2d 105 (2d Dept 2005); see *McKee v State*, 75 AD3d 893, 906 NYS2d 632 (3d Dept 2010), but is not required to prove universal application of a policy, procedure or practice for it to be admissible, *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982); *Reis v Volvo Cars of North America*, supra; see *Daniels v New York City Transit Authority*, 171 AD3d 601, 100 NYS3d 2 (1st Dept 2019) (expert's testimony that defendant did not follow non-mandatory guidelines of trade association and Public Transportation Safety Board that were generally accepted in the relevant community constituted some evidence of negligence).

Evidence of a defendant's compliance with industry standards does not establish as a matter of law that the defendant was not negligent, *Ivory v International Business Machines Corp.*, 116 AD3d 121, 983 NYS2d 110 (3d Dept 2014); *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 954 NYS2d 348 (4th Dept 2012). Compliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof, *Miner v Long Island Lighting Co.*, 40 NY2d 372, 386 NYS2d 842, 353 NE2d 805 (1976); *Hayes v Texas Roadhouse Holdings, LLC*, supra; *Tzilianos v New York City Transit Authority*, 91 AD3d 435, 936 NYS2d 159 (1st Dept 2012).

Although noncompliance with a customary practice or industry standard may be evidence of negligence, the failure to abide by guidelines or recommendations that are not generally-accepted standards in an industry will not suffice to raise an issue of fact as to a defendant's negligence, see *Walker v Commack School Dist.*, 31 AD3d 752, 820 NYS2d 287 (2d Dept 2006); *Carlino v Triboro Coach Corp.*, 22 AD3d 624, 803 NYS2d 105 (2d Dept 2005), citing *Diaz v New York Downtown Hosp.*, 287 AD2d 357, 731 NYS2d 694 (1st Dept 2001), *aff'd*, 99 NY2d 542, 754 NYS2d 195, 784 NE2d 68 (2002); see *Guldy v Pyramid Corp.*, 222 AD2d 815, 634 NYS2d 788 (3d Dept 1995). Further, a non-mandatory, governmentally-promulgated guideline or industry recommendation does not impose a heightened standard of care absent proof that it has been adopted in actual practice, *Capotosto v Roman Catholic Diocese of Rockville Centre*, 2 AD3d 384, 767 NYS2d 857 (2d Dept 2003); see *Velocci v Stop and Shop*, 188 AD3d 436, 133 NYS3d 569 (1st Dept

2020) (expert's affidavit insufficient to raise triable issue of fact where standards expert referred to were "couched in advisory terms" and that were not adopted and implemented as industry standards); *Swan v Brookhaven*, 32 AD3d 1012, 821 NYS2d 265 (2d Dept 2006); *Soldano v Bayport-Blue Point Union Free School Dist.*, 29 AD3d 891, 815 NYS2d 712 (2d Dept 2006) (standards promulgated by Consumer Product Safety Commission and embodied in its handbook inadequate to establish negligence). The guidelines of the Consumer Product Safety Commission for acceptable surfaces below playground swings do not impose a higher standard of care than does the common law and thus may be cited as a basis for an expert's opinion that defendant did not use reasonable care, *Kosicki v Spring Garden Ass'n, Inc.*, 42 AD3d 909, 839 NYS2d 660 (4th Dept 2007).

Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants, *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796 (1994); *Janiya W.-G. v Smith*, 160 AD3d 502, 74 NYS3d 530 (1st Dept 2018); *Kosicki v Spring Garden Ass'n, Inc.*, 42 AD3d 909, 839 NYS2d 660 (4th Dept 2007). Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment, *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195, 784 NE2d 68 (2002). In *Diaz*, plaintiff's expert failed to provide any factual basis for her conclusion that certain guidelines established or were reflective of a generally accepted standard or practice in hospital settings. In addition, the expert made no reference either to her own personal knowledge acquired through professional experience or to evidence that any hospitals implemented such standards. Therefore, the court held that the expert's affirmation lacked probative force and was insufficient as a matter of law to overcome the hospital's motion for summary judgment.

Custom and usage resulting from the enactment of legislation prescribing standards is irrelevant when the occurrence predated the legislation, *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982). In the *Trimarco* and *Garthe* cases, it was held proper to exclude such evidence; thus the question was decided as a matter of law. Evidence of custom and usage is not admissible where there is no similarity between the conditions at issue and those existing elsewhere in the industry, see *Schumer v Caplin*, 241 NY 346, 150 NE 139 (1925); *McKinney v New York Consol. R. Co.*, 230 NY 194, 129 NE 652 (1920).

If the jury finds that there was an established standard of care in the trade or business and that defendant did not comply with the standard, the jury must still decide, based on all the evidence, whether defendant's equipment and practices were reasonably safe and appropriate for the business in which defendant was engaged, *Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696, 493 NE2d 920 (1986); *Levine v Russell Blaine Co.*, 273 NY 386, 7 NE2d 673 (1937); *Garthe v*

Ruppert, 264 NY 290, 190 NE 643 (1934); see *Reis v Volvo Cars of North America*, 24 NY3d 35, 993 NYS2d 672, 18 NE3d 383 (2014); *Alvarez v First Nat. Supermarkets, Inc.*, 11 AD3d 572, 783 NYS2d 62 (2d Dept 2004) (plaintiff's expert improperly excluded); *Archie v Todd Shipyards Corp.*, 65 AD2d 699, 410 NYS2d 69 (1st Dept 1978); *Colon v Bridge Plaza Rental Corp.*, 46 AD2d 13, 360 NYS2d 896 (1st Dept 1974).

Internal operating rules may provide some evidence of whether reasonable care has been taken and thus some evidence of the defendant's negligence or absence thereof, *Kush by Marszalek v Buffalo*, 59 NY2d 26, 462 NYS2d 831, 449 NE2d 725 (1983). However, internal guidelines that go beyond the standard of ordinary care cannot serve as a basis for imposing liability, *Pink v Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016); *Gilson v Metropolitan Opera*, 5 NY3d 574, 807 NYS2d 588, 841 NE2d 747 (2005); *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 819 NYS2d 250 (1st Dept 2006), *aff'd*, 8 NY3d 931, 834 NYS2d 503, 866 NE2d 448 (2007); *Asantewaa v New York*, 90 AD3d 537, 935 NYS2d 18 (1st Dept 2011); *Rahimi v Manhattan and Bronx Surface Transit Operating Authority*, 43 AD3d 802, 843 NYS2d 557 (1st Dept 2007); see *Vasquez v Nassau*, 91 AD3d 855, 938 NYS2d 109 (2d Dept 2012). Moreover, such rules must be excluded, as a matter of law, if they require a standard of care that transcends the area of reasonable care, *Danbois v New York Cent. R. Co.*, 12 NY2d 234, 238 NYS2d 921, 189 NE2d 468 (1963); *Conrad v Westchester*, 259 AD2d 724, 687 NYS2d 404 (2d Dept 1999); *Lesser v Manhattan and Bronx Surface Transit Operating Authority*, 157 AD2d 352, 556 NYS2d 274 (1st Dept 1990), *amended*, 176 AD2d 463 (1st Dept 1991) and *aff'd*, 79 NY2d 1031, 584 NYS2d 439, 594 NE2d 933 (1992). Thus, a defendant's internal rule book and manual should not be admitted into evidence where it contains irrelevant material not relied upon by the party's experts or which imposed a higher standard of care on defendant than that imposed by law, *Rivera v New York City Transit Authority*, 77 NY2d 322, 567 NYS2d 629, 569 NE2d 432 (1991); *Cropper v Stewart*, 117 AD3d 417, 984 NYS2d 374 (1st Dept 2014); *Lesser v Manhattan and Bronx Surface Transit Operating Authority*, 157 AD2d 352, 556 NYS2d 274 (1st Dept 1990), *amended*, 176 AD2d 463 (1st Dept 1991) and *aff'd*, 79 NY2d 1031, 584 NYS2d 439, 594 NE2d 933 (1992); see *Merino v New York City Transit Authority*, 218 AD2d 451, 639 NYS2d 784 (1st Dept 1996), *aff'd*, 89 NY2d 824, 653 NYS2d 270, 675 NE2d 1222 (1996) (reliance on internal Transit Authority Station Planning Guide insufficient to establish standard of care). It has been held, however, that it is error to instruct the jury that it may consider a violation of defendant's own rules and regulations as some evidence of a violation of the applicable standard of care without informing the jury that it must first determine that the rules or regulations allegedly violated impose a standard of care no greater than the required standard, *Brkani v New York*, 211 AD2d 740, 621 NYS2d 696 (2d Dept 1995); *Clarke v New York City Transit Authority*, 174 AD2d 268, 580 NYS2d 221 (1st Dept 1992); *Cincotta v Johnson*, 130 AD2d 539, 515 NYS2d 115 (2d Dept 1987). A plaintiff may introduce defendant's operating procedures to demonstrate that defendant lacked any guidelines at

all with regard to the type of activity encountered, despite its recognition of the need for security in its published standards covering numerous unrelated contingencies, *Banayan v F.W. Woolworth Co.*, 211 AD2d 591, 622 NYS2d 24 (1st Dept 1995); see *Gerbino v Tinseltown USA*, 13 AD3d 1068, 788 NYS2d 538 (4th Dept 2004).

Defendant's acceptance by contract of a higher standard of performance than the common law duty of reasonable care is inadmissible as irrelevant, *Valentino v Arthur A. Johnson Corp.*, 23 AD2d 727, 257 NYS2d 732 (1st Dept 1965).

As to the effect of a failure to comply with a hospital's own rules or with a health code regulation, see Comment to PJI 2:151.

6. CARE REQUIRED OF PERSONS UNDER DISABILITY**PJI 2:20. Common Law Standard of Care—Care Required of Persons Under Disability—Intoxicated Person**

One who has disabled (himself, herself) by reason of intoxication is held to the same standard of care that is required of a sober person. An intoxicated person is one whose use of (an alcoholic beverage, drug) has impaired (his, her) judgment and ability to act. It is a question of fact for you to determine whether or not the defendant was intoxicated, or that defendant's judgment and ability to act were impaired by reason of intoxication, that fact may be considered by you in determining whether or not the defendant used the care of a reasonably prudent, sober person under the circumstances.

Comment

Based on *Kenny v Rhineland*, 28 App Div 246, 50 NYS 1088 (1st Dept 1898), *aff'd*, 163 NY 576, 57 NE 1114 (1900); *Lynch v New York*, 47 Hun 524, 15 NY St Rep 103 (NY Gen Term 1888); see *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); *Fagan v Atlantic Coast Line R. Co.*, 220 NY 301, 115 NE 704 (1917); *Roberts v Falzone*, 46 AD2d 1007, 362 NYS2d 95 (4th Dept 1974) (citing PJI); *People v Carlo*, 46 AD2d 764, 361 NYS2d 168 (1st Dept 1974); *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969) (citing PJI); *People v Fink*, 18 AD2d 220, 238 NYS2d 847 (3d Dept 1963); Annot: 26 ALR2d 308; 57 Am Jur 2d, Negligence § 196. The definition of "intoxicated person" is based on *People v Cruz*, 48 NY2d 419, 423 NYS2d 625, 399 NE2d 513 (1979) and *People v Weaver*, 188 App Div 395, 177 NYS 71 (3d Dept 1919). However, if blood alcohol tests are in evidence, the pattern charge should be enlarged to include instruction on the effect to be given such evidence under Vehicle and Traffic Law § 1195, *Van Valkenburgh v Koehler*, 164 AD2d 971, 559 NYS2d 766 (4th Dept 1990) (citing PJI). For a discussion of the effect to be given such evidence under VTL § 1195, see the remainder of this Comment.

Vehicle and Traffic Law § 1192 makes illegal the operation of a motor vehicle while (1) the operator's ability to operate is impaired by the consumption of alcohol; or (2) the operator has .10 of one per centum or more by weight of alcohol in his blood; (3) or while the operator is intoxicated; or (4) while the operator's ability to operate is impaired by

the use of drugs. A violation of VTL § 1192 constitutes negligence per se and the jury should be so instructed, see PJI 2:29.

Vehicle and Traffic Law § 1195 provides that upon the “trial of any action or proceeding” arising out of actions committed by a person arrested for violation of § 1192, test results of the amount of alcohol or drugs in defendant’s blood as shown by a properly administered test pursuant to § 1194 “shall” be admitted in evidence. Section 1195 further provides the effect to be given to such evidence: (1) .05 of one per centum or less is prima facie evidence that the subject’s ability to operate was not impaired and that he or she was not intoxicated; (2) more than .05 of one per centum but not more than .07 of one per centum is prima facie evidence that the subject was not intoxicated, but is relevant, although not prima facie, evidence as to the impairment of ability to operate; (3) more than .07 but less than .08 of one per centum is prima facie evidence that the subject was not intoxicated, but is prima facie evidence in determining whether his or her ability to operate was impaired, see *People v Blair*, 98 NY2d 722, 749 NYS2d 809, 779 NE2d 748 (2002). In *People v Blair*, supra, the Court held that VTL § 1195 established a rebuttable presumption that the People were entitled to rebut at trial in attempting to establish that defendant was intoxicated. See also as to snowmobiles, Parks and Recreation Law § 25.24; as to hunting while intoxicated, Environmental Conservation Law, §§ 11-201 to 11-211; as to boating while intoxicated, see Navigation Law § 49.

In *Van Valkenburgh v Koehler*, 164 AD2d 971, 559 NYS2d 766 (4th Dept 1990), the Fourth Department reversed a judgment for plaintiff and ordered a new trial because of the trial court’s error in refusing to instruct the jury as to the legal effect of a blood alcohol test result of .01 of one percent. However, the Second Department has held that the evidentiary presumptions set forth in VTL § 1195 as to the legal effect to be given test results need not be charged in civil cases, and in any event, are inapplicable to tests which do not involve testing of breath, blood, urine or saliva, *McCarthy v Fernandez*, 156 AD2d 544, 549 NYS2d 51 (2d Dept 1989); see also *Johnson v Plotkin*, 172 AD2d 88, 577 NYS2d 329 (3d Dept 1991) (Third Department held that blood alcohol content of .26% is some evidence of intoxication); *Senn v Scudieri*, 165 AD2d 346, 567 NYS2d 665 (1st Dept 1991) (First Department held it error to charge VTL § 1192(2) in civil case where there was no evidence to indicate a blood alcohol reading of at least .10). The above case law must be read in light of the amendments effective November 1, 2003, which lower the blood alcohol percentages in VTL §§ 1192 and 1195.

Violation of the penal provisions of § 1192 does not automatically establish civil liability. The violation would have to be causally related to the injury, and this would be so only if it resulted in defendant’s failure to use the reasonable care required of a sober person, see *Prince v McKee*, 24 AD2d 455, 260 NYS2d 386 (2d Dept 1965), where defendant had been convicted for intoxicated driving; see also *Wallace v Terrell*, 295 AD2d 840, 744 NYS2d 551 (3d Dept 2002).

Query whether Vehicle and Traffic Law § 1194(4) making refusal to

take an intoxication test admissible in “any trial . . . based upon a violation of” Vehicle and Traffic Law § 1192, permits such proof in a negligence action. If such refusal is to be admitted, there must also be proof that the person persisted in his refusal after being given “sufficient warning, in clear and unequivocal language, of the effect of such refusal,” VTL § 1194(4). However, if a test is conducted, the results are admissible even if the test was not administered in accordance with VTL § 1194(1) and even if the consent of person tested was not obtained, *Fafinski v Reliance Ins. Co.*, 106 AD2d 88, 484 NYS2d 729 (4th Dept 1985), *aff’d*, 65 NY2d 990, 494 NYS2d 92, 484 NE2d 121 (1985).

Note that County Law § 674(3)(b) was amended so as to delete the former provision making inadmissible testimony or reports concerning the results of blood and urine tests for alcohol obtained from an official autopsy.

**PJI 2:21. Common Law Standard of Care—Care
Required of Persons Under Disability—
Mentally Disabled Person**

One who is disabled by reason of (mental illness, retardation, developmental disability) and who is thus lacking in mental capacity and prudence must still observe toward others the same care which a normal and reasonably prudent person would use under the same circumstances. If the acts of a (mentally ill, mentally retarded, developmentally disabled) person would constitute negligence on the part of a normal and reasonably prudent person under the same circumstances, then the (mentally ill, mentally retarded, developmentally disabled) person must be found negligent.

Comment

Based on *Williams v Hays*, 143 NY 442, 38 NE 449 (1894); *Sforza v Green Bus Lines*, 150 Misc 180, 268 NYS 446 (Mun Ct 1934); *Elliott v Sternberg*, 61 NYS2d 73 (Sup 1946); *Shapiro v Tchernowitz*, 3 Misc2d 617, 155 NYS2d 1011 (Sup 1956); see also *Albicocco v Nicoletto*, 11 AD2d 690, 204 NYS2d 566 (2d Dept 1960), *aff’d*, 9 NY2d 920, 217 NYS2d 91, 176 NE2d 100 (1961); *Van Vooren v Cook*, 273 App Div 88, 75 NYS2d 362 (4th Dept 1947); 66 NYJur2d 320, *Infants and other Persons under Legal Disability*, § 112.

Note, however, that when *Williams v Hays* was considered by the Court of Appeals the second time (157 NY 541, 52 NE 589) it held that, if the insanity was induced by the incident in the course of which the negligence occurred, such insanity may be asserted as a defense.

Caveat: Although the above charge correctly states the existing New York law, it has been severely criticized by many legal writers, see Hornblower, *Insanity and the Law of Negligence*, 5 Col L Rev 278 (1905); Cook, *Mental Deficiency in Relation to Tort*, 21 Col L Rev 333 (1921); Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 Mich L Rev 9 (1924); and Holmes, *The Common Law* 109 (1881). The present rule is said to be founded on public policy, including the dangers of misrepresentation as to insanity.

In *Padula v State*, 48 NY2d 366, 422 NYS2d 943, 398 NE2d 548 (1979), the question was whether the party suffering from drug addiction was able to control his actions, see *Mochen v State*, 43 AD2d 484, 352 NYS2d 290 (4th Dept 1974) (citing PJI) (plaintiff should not be held to any greater standard than he is capable of achieving). It should be noted that in *Padula* and *Mochen* the courts were addressing the claim of plaintiff's contributory negligence and the *Padula* Court was at pains to limit its holding to the claimed contributory negligence of persons held by the State for treatment of a drug problem.

**PJI 2:22. Common Law Standard of Care—Care
Required of Persons Under Disability—Aged or
Physically Disabled Person**

One who is disabled by reason of physical defects is held to a standard of care measured, not by the care expected of an adult person without physical defects, but by that care which a reasonably prudent person having the same physical defects would use under the same circumstances. A person laboring under a physical disability must use caution commensurate with the increased hazard caused by such disability.

Comment

Based on *Harris v Uebelhoer*, 75 NY 169 (1878); see *Hosmer v Distler*, 150 AD2d 974, 541 NYS2d 650 (3d Dept 1989); *Marchione v McKenna*, 57 AD2d 729, 395 NYS2d 562 (4th Dept 1977) (citing PJI); see also *Thomas v Hulslander*, 233 AD2d 567, 649 NYS2d 252 (3d Dept 1996); Annot: 28 ALR2d 12. With respect to degree of caution, see Comment under PJI 2:10.

The pattern charge assumes that there is no issue of causal relationship between plaintiff's acts and the injury. If on the facts of a particular case such a question exists, the charge must be modified accordingly, see Comment to PJI 2:70.

A person who is subject to epileptic seizures, see *People v Eckert*, 2 NY2d 126, 157 NYS2d 551, 138 NE2d 794 (1956) (ovrld in part by,

People v Jennings, 69 NY2d 103, 512 NYS2d 652, 504 NE2d 1079 (1986)); People v Decina, 2 NY2d 133, 157 NYS2d 558, 138 NE2d 799 (1956); Golembe v Blumberg, 262 App Div 759, 27 NYS2d 692 (2d Dept 1941), or who has a stiff right knee that prevents use of his right leg in braking the car, see Diem v Adams, 266 App Div 307, 42 NYS2d 55 (1st Dept 1943), is negligent as a matter of law in driving an automobile.

For a charge involving a motorist who falls asleep at the wheel, see PJI 2:85A.

An operator of an automobile who experiences a sudden medical emergency will not be chargeable with negligence provided that the medical emergency was unforeseen, McGinn v New York City Transit Authority, 240 AD2d 378, 658 NYS2d 121 (2d Dept 1997); Thomas v Hulslander, 233 AD2d 567, 649 NYS2d 252 (3d Dept 1996).

See also PJI 2:47, which is the comparable charge with respect to comparative fault.

PJI 2:23. Common Law Standard of Care—Care Required of Persons Under Disability—Infant

With respect to the conduct of an infant toward other persons on their property, the infant is held to a standard of care measured not by the care expected of an adult person, but by that care which a reasonably prudent child of (his, her) years, experience, intelligence and degree of development would exercise under the same circumstances.

Comment

Based on Gonzalez v Medina, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979) (citing PJI); Scinta v Connelly, 54 AD2d 616, 387 NYS2d 504 (4th Dept 1976); Eagle v Janoff, 12 AD2d 638, 208 NYS2d 579 (2d Dept 1960); see Carmen P. by Maria P. v PS & S Realty Corp., 259 AD2d 386, 687 NYS2d 96 (1st Dept 1999); Morales v Quinones, 72 AD2d 519, 420 NYS2d 899 (1st Dept 1979); Carrillo v Kreckel, 43 AD2d 499, 352 NYS2d 730 (4th Dept 1974); Mann v Cook, 346 Mass 174, 190 NE2d 676 (1963); see also McDonald v Central School Dist. No. 3, Town of Romulus, 289 NY 800, 47 NE2d 50 (1943); Camardo v New York State Rys., 247 NY 111, 159 NE 879 (1928); 65 CJS 785, Negligence, § 145.

An infant under four years of age is incapable as a matter of law of understanding danger, and hence he or she neither can be found negligent nor be held responsible for his or her acts, Verni v Johnson, 295 NY 436, 68 NE2d 431 (1946); Beekman Estate v Midonick, 44 Misc2d 11, 252 NYS2d 885 (Sup 1964); see Smedley v Piazzolla, 59 AD2d 940, 399 NYS2d 460 (2d Dept 1977). Above the age of four years,

however, if the infant is of sufficient maturity to appreciate danger and take steps to avoid it, he or she may be chargeable with negligence, *Camardo v New York State Rys.*, 247 NY 111, 159 NE 879 (1928); *Bruenn v Pawlowski*, 292 AD2d 856, 738 NYS2d 805 (4th Dept 2002) (eight-year-old); *Tenebruso v Toys R Us—NYTEX, Inc.*, 256 AD2d 1236, 682 NYS2d 785 (4th Dept 1998) (four-year-old's capacity to exercise care is question of fact for jury); *Scinta v Connelly*, 54 AD2d 616, 387 NYS2d 504 (4th Dept 1976); *Chandler v Keene*, 5 AD2d 42, 168 NYS2d 788 (3d Dept 1957); *Weidenfeld v Surface Transp. Corp. of N.Y.*, 269 App Div 341, 55 NYS2d 780 (1st Dept 1945); Restatement, 2nd Torts, § 283-A; but see *Branch v Stehr*, 93 AD2d 849, 461 NYS2d 346 (2d Dept 1983) (child of six years not to be charged with a knowledge and understanding of traffic regulations); *Avram v Haddad*, 88 AD2d 942, 451 NYS2d 178 (2d Dept 1982) (five-year-old cannot be charged with understanding "cross-walk rule"). Evidence of the instructions given to a child by a parent in regard to the proper method of crossing streets is inadmissible, *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982).

The standard of care for an infant is the degree of care expected of a reasonably prudent child of the same age, experience, intelligence and degree of development, *Bruenn v Pawlowski*, 292 AD2d 856, 738 NYS2d 805 (4th Dept 2002); *Sorto v Flores*, 241 AD2d 446, 660 NYS2d 60 (2d Dept 1997); *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979). Whether the standard of care is different with respect to an infant defendant of tender years who has violated a statute has not yet been decided in New York. In *Steinberg v Cauchois*, 249 App Div 518, 293 NYS 147 (2d Dept 1937), an infant who rode a bicycle on a sidewalk in violation of an ordinance was held liable, but the question of his ability to understand the ordinance was not raised. In *Blitstein v Capital District Transportation Authority*, 81 AD2d 981, 439 NYS2d 768 (3d Dept 1981), and in *Finn v New York State Dept. of Mental Hygiene*, 49 AD2d 995, 374 NYS2d 394 (3d Dept 1975), the failure of an infant to obey the statutory requirements (Vehicle and Traffic Law) was held to be at least a prima facie showing of plaintiff's negligence; but see *Schaffner v Rockmacher*, 38 AD2d 835, 329 NYS2d 630 (2d Dept 1972) and *Rubin v O'Donnell*, 37 AD2d 858, 326 NYS2d 25 (2d Dept 1971) (error to charge Vehicle and Traffic Law provisions on question of whether infant plaintiffs [five-year-old and five years, ten months, respectively] were negligent). Restatement, Torts, Second, § 283-A, Comment c, recognizes an exception to the rule as to the care required of an infant "where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required." Thus, where one enters "upon a professional activity which requires special skill (see § 299A), he may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity." That rule has been applied to an eleven-year-old infant engaging in an adult activity (playing golf with three adults), *Neumann v Shlansky*, 58 Misc2d 128, 294 NYS2d 628 (Co Ct 1968), *aff'd*, 63 Misc2d 587, 312 NYS2d 951 (AppT 1970), *aff'd*, 36 AD2d 540, 318 NYS2d 925 (2d Dept 1971); see also *Shulman*, *The Standard of Care Required of Children*, 37 Yale LJ 618, 619, (1927); 3 *Harper & James*, *The Law of Torts* 2d, § 16.8. p. 462; Annot: 32 ALR4th 56; 27 ALR4th 15.

In this connection, licensing statutes may be important in determining the qualifications and the standard of care required of anyone, including an infant, engaging in the activity governed by such statute, see Annot: 97 ALR2d 872. Thus, in *Reiszel v Fontana*, 35 AD2d 74, 312 NYS2d 988 (2d Dept 1970) (citing PJI), a seventeen-year-old defendant licensed to operate an automobile was held to the same standard of care as an adult motorist. In *Dellwo v Pearson*, 259 Minn 452, 107 NW2d 859 (1961), a twelve-year-old infant operating a motorboat was held to the same standard of care as an adult. In *Costa v Hicks*, 98 AD2d 137, 470 NYS2d 627 (2d Dept 1983), (citing PJI), a fourteen-year-old operating a motorcycle on a dirt and gravel street was held to the same standard of care as an adult. In *Betzold v Erickson*, 35 Ill App 2d 203, 182 NE2d 342 (3d Dist 1962), a thirteen-year-old infant operating a motor vehicle on a highway was held to the standard of an adult; accord, *Dawson v Hoffmann*, 43 Ill App 2d 17, 192 NE2d 695 (2d Dist 1963). In *Carano v Cardina*, 115 Ohio App 30, 20 Ohio Ops 2d 178, 184 NE2d 430 (9th Dist Summit Co 1961), a seventeen-year-old operating a motor vehicle was held to the standard of care of an adult, as were infants operating motor scooters in *Medina v McAllister*, 202 So 2d 755 (Fla 1967) and *Powell v Hartford Acc. & Indem. Co.*, 217 Tenn 503, 398 SW2d 727 (1966); see *Smedley v Piazzolla*, 59 AD2d 940, 399 NYS2d 460 (2d Dept 1977) (citing PJI); Note: 33 Tenn L Rev 533.

With respect to comparative negligence, a similar exception has been recognized outside New York, but no New York case squarely in point has been found, see Comment to PJI 2:49.

PJI 2:24. Common Law Standard of Care—Voluntarily Assumed Duty

Defendant AB had no duty to come to CD's assistance. But once AB voluntarily came to the assistance of CD, the law imposed on AB the duty of using reasonable care in giving assistance and the duty to continue to do so if it would appear to a reasonable person that discontinuing assistance would expose CD to a new danger or a return to the same or a similar danger.

Reasonable care means the care that a reasonably prudent person would have used under the same circumstances.

If you find that AB acted reasonably in giving assistance, or that discontinuing the assistance under the circumstances of this case did not expose CD to a new danger or return CD to the same or a similar danger you must find AB free from

fault. If you find that AB did not act reasonably in giving assistance, or that discontinuing assistance exposed CD to a new danger, or the same or a similar danger, you must find AB at fault, provided that you also find that AB's acts were a substantial factor in bringing about the injury to CD.

Comment

The pattern charge uses the facts of *Parvi v Kingston*, 41 NY2d 553, 394 NYS2d 161, 362 NE2d 960 (1977), as its source. In addition to that case, the charge is supported by *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); *Florence v Goldberg*, 44 NY2d 189, 404 NYS2d 583, 375 NE2d 763 (1978); *Pratt v Robinson*, 39 NY2d 554, 384 NYS2d 749, 349 NE2d 849 (1976); *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928); *Marks v Nambil Realty Co.*, 245 NY 256, 157 NE 129 (1927); *Siegel v Spear & Co.*, 234 NY 479, 138 NE 414 (1923); *Glanzer v Shepard*, 233 NY 236, 135 NE 275 (1922); *Thorne v Deas*, 4 Johns 84 (NY Sup 1809); see generally *Prosser & Keeton, Torts* (5th Ed) § 56; *Restatement, Torts* 2d, §§ 320, 321-324A.

Proximate cause must be charged unless causation is undisputed, see PJI 2:70. The duty owed by the volunteer is that of reasonable care; thus, it is error to charge that he owes plaintiff "only a slight degree of care," *Sky v Kahan-Frankl*, 47 AD2d 939, 367 NYS2d 84 (2d Dept 1975). Whether defendant assumed a duty and whether defendant was negligent are generally jury questions, *Paul v Staten Island Edison Corp.*, 2 AD2d 311, 155 NYS2d 427 (2d Dept 1956); see *Walsh v Cheek-towaga*, 237 AD2d 947, 654 NYS2d 912 (4th Dept 1997).

Defendant is not liable for failure to act on behalf of a disabled person with whom he or she has no legal relationship and for whom he or she has not undertaken to act, *Salvati v Salvati*, 123 NYS2d 678 (Sup 1953); *Plutner v Silver Associates*, 186 Misc 1025, 61 NYS2d 594 (Mun Ct 1946); see Annot: 33 ALR3d 301.

The principle stated in the charge applies in at least three separate situations: (i) aid voluntarily rendered to one in distress; (ii) special duties assumed toward a specific class of persons; and (iii) nonperformance of a promise gratuitously made for the benefit of the plaintiff. These three kinds of cases are all subject to the general rule that "[O]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all," *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928); see *Nowlin v New York*, 81 NY2d 81, 595 NYS2d 927, 612 NE2d 285 (1993); *Marks v Nambil Realty Co.*, 245 NY 256, 157 NE 129 (1927); *Glanzer v Shepard*, 233 NY 236, 135 NE 275 (1922); *Capretto v Buffalo*, 124 AD3d 1304, 1 NYS3d 615 (4th Dept 2015) (gratuitous conduct may give rise to liability only when defendant's affirmative action, upon which plaintiff

relied, adversely affected plaintiff, and defendant failed to act reasonably). Where it is claimed that a municipality assumed a special duty toward a specific class of persons, liability may arise only if the duty was ministerial rather than discretionary, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009); see also *Matter of World Trade Center Bombing Litigation*, 17 NY3d 428, 933 NYS2d 164, 957, 957 NE2d 733 (2011); *Lauer v New York*, 95 NY2d 95, 711 NYS2d 112, 733 NE2d 184 (2000). For a more detailed discussion of this principle, see Comment, *infra*; see also Comment to PJI 2:225 and PJI 2:229.

An assumed duty, or a duty to go forward may arise once a person undertakes a certain course of conduct upon which another relies, *Heard v New York*, 82 NY2d 66, 603 NYS2d 414, 623 NE2d 541 (1993); *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); *Malpeli v Yenna*, 81 AD3d 607, 915 NYS2d 628 (2d Dept 2011). In determining whether a cause of action lies in such instances, “the query is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or, rather, whether he or she has merely stopped where inaction is at most a refusal to become an instrument of good,” *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928); see *Heard v New York*, *supra*; *Malpeli v Yenna*, *supra*. Put differently, the question is whether defendant’s conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing, *Heard v New York*, *supra*; see *Nallan v Helmsley-Spear, Inc.*, *supra*; *Malpeli v Yenna*, *supra*; see *Fitzsimons v Brennan*, 169 AD3d 873, 95 NYS3d 112 (2d Dept 2019) (college did not gratuitously assume duty to ensure properties on list of off-campus housing complied with all relevant fire safety standards).

The principle of the pattern charge does not apply to one who undertakes some conduct meant to protect some interest of his or her own, *Jansen v Fidelity and Cas. Co. of New York*, 79 NY2d 867, 581 NYS2d 156, 589 NE2d 379 (1992) (workers’ compensation and liability carrier not liable to employee of insured for conducting a negligent safety inspection since inspections were to assist insured in program to reduce insurer’s exposure to claims); *Home Mut. Ins. Co. v Broadway Bank and Trust Co.*, 53 NY2d 568, 444 NYS2d 436, 428 NE2d 842 (1981); *Petrosky v Brasner*, 279 AD2d 75, 718 NYS2d 340 (1st Dept 2001) (insurance carrier and its agents owed no duty to prospective insured to disclose medical conditions discovered during pre-insurance physical exam); see *James v State*, 90 AD2d 342, 457 NYS2d 148 (4th Dept 1982), *aff’d*, 60 NY2d 737, 469 NYS2d 695, 457 NE2d 802 (1983) (insurance contract specifically stated that insurer’s inspection was solely for its own benefit); *Cassell v Babcock & Wilcox Co.*, 186 AD2d 1000, 588 NYS2d 459 (4th Dept 1992); *Kingsland v Factory Mut. System*, 145 AD2d 965, 536 NYS2d 336 (4th Dept 1988) (purpose of defendant’s inspection of owner’s premises and equipment was to supply information to owner’s insurer in order to reduce possible hazards on premises and defendant assumed no duty toward owner’s employees).

A tour operator has no duty to warn group members of a possible hazardous condition on property it neither owns nor occupies, *Maraia v Church of Our Lady of Mount Carmel*, 36 AD3d 766, 828 NYS2d 525 (2d Dept 2007); *Cohen v Heritage Motor Tours, Inc.*, 205 AD2d 105, 618 NYS2d 387 (2d Dept 1994). Independent travel or booking agents who package tours are, likewise, not liable for accidents that occur on such a tour as a result of the negligent conduct of hotels that were booked by the agent, *id.* Where tour participants are transported by an independent contractor, the tour operator is not responsible for an accident that occurs due to the negligence of the independent contractor, *id.*; see *Smith v West Rochelle Travel Agency, Inc.*, 238 AD2d 398, 656 NYS2d 340 (2d Dept 1997). Where, however, the tour was lead by an employee of the tour operator who allegedly directed the participants to proceed in a particular manner, thereby causing injury, the tour operator may be held liable for its employee's negligent acts under the doctrine of respondeat superior, *Cohen v Heritage Motor Tours, Inc.*, *supra*; see *Maraia v Church of Our Lady of Mount Carmel*, *supra*.

Aid Voluntarily Rendered

One who, being under no duty to do so, takes charge of a person in a position of peril is subject to liability to that person for any bodily harm caused by the failure of the actor to exercise reasonable care to secure the safety of that person, see *Mirza v Metropolitan Life Ins. Co.*, 2 AD3d 808, 770 NYS2d 384 (2d Dept 2003); *Thrane v Haney*, 264 AD2d 926, 695 NYS2d 628 (3d Dept 1999). In addition, the actor is subject to liability for discontinuing assistance and thereby exposing the helpless person to the same, similar or worse peril, see *Thomas v State*, 46 NY2d 1043, 416 NYS2d 546, 389 NE2d 1068 (1979) (police officer who arrests intoxicated driver assumes duty of due care to assure safety of one in that condition); *Parvi v Kingston*, 41 NY2d 553, 394 NYS2d 161, 362 NE2d 960 (1977) (liability under principles of Restatement 2d Torts, § 324 when police officers assumed custody of two inebriates but subsequently left them in an isolated spot near a superhighway onto which the drunks wandered); *O'Grady v Fulton*, 4 NY2d 717, 171 NYS2d 108, 148 NE2d 317 (1958) (deceased collapsed in restaurant and was taken to police station where he was left in cell for approximately five hours without any attempt having been made to get medical help until decedent was found dead); *Dunham v Canisteo*, 303 NY 498, 104 NE2d 872 (1952) (village policeman helped aged man, put him in warm jail cell, but disregarded his request for doctor); *Walsh v Cheektowaga*, 237 AD2d 947, 654 NYS2d 912 (4th Dept 1997) (question of fact as to whether police officers were negligent in removing drunk passenger from her automobile and leaving her unattended); *Ferrer v Riverbay Corp.*, 214 AD2d 312, 624 NYS2d 425 (1st Dept 1995) (defendant's officers isolated decedent from rest of her friends after she had been sexually assaulted by group of older boys, refused to allow her to call her mother and verbally abused her until she agreed to press charges against her assailants, soon after which she was left unattended and climbed over window balcony to her death; triable issues of fact presented as to whether defendant voluntarily assumed duty of care); *Zelenko*

v Gimbel Bros., 158 Misc 904, 287 NYS 134 (Sup 1935), *aff'd*, 247 App Div 867, 287 NYS 136 (1st Dept 1936) (defendant's employee undertook to give medical aid to decedent but left decedent unattended in infirmary for six hours); see also *Zalak v Carroll*, 15 NY2d 753, 257 NYS2d 177, 205 NE2d 313 (1965); *Middleton v Whitridge*, 213 NY 499, 108 NE 192 (1915); *Daily v Tops Markets, LLC*, 134 AD3d 1332, 20 NYS3d 487 (3d Dept 2015) (grocery store owed no duty to unconscious individual in car in store's parking lot to summon assistance for individual; although store employees were notified of individual's presence in parking lot, individual was not customer, was not on premises for activity related to store's business, and store's employees did not see or have contact with individual); *Maldonado v Suffolk*, 10 AD3d 387, 781 NYS2d 369 (2d Dept 2004) (no liability where officer dropped off intoxicated car passenger at diner and passenger later wandered into highway); *Miller v Boland*, 208 AD2d 508, 616 NYS2d 793 (2d Dept 1994); *Johnson v New York*, 208 AD2d 595, 617 NYS2d 200 (2d Dept 1994); *Ross v Ching*, 146 AD2d 55, 539 NYS2d 181 (4th Dept 1989); *Thibault v Franzese*, 24 AD2d 903, 264 NYS2d 783 (2d Dept 1965); *Clark v State*, 195 Misc 581, 89 NYS2d 132 (Ct Cl 1949), *aff'd*, 276 App Div 10, 93 NYS2d 28 (3d Dept 1949), *aff'd*, 302 NY 795, 99 NE2d 300 (1951). Care should be taken in analyzing cases involving the liability of police officers and other municipal authorities for undertaking to voluntarily aid individuals in light of *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011), and *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009). In those cases, the Court of Appeals held that municipalities cannot be liable for their employees' negligently performed discretionary acts, regardless of whether a special relationship exists. In the absence of additional case law on the subject, it is unclear whether that principle extends to situations in which police officers have assumed control of incapacitated individuals for their own safety. For a discussion of municipal liability for negligently performed acts, see PJI 2:225; for a discussion of municipal liability for negligent performance of police functions, see PJI 2:229A.

The actor who negligently performs a voluntarily-assumed duty may also be liable to potential rescuers who were injured after coming to the aid of the individual whose safety was jeopardized by the actor's lack of due care, *Velazquez v New York City Health and Hosp. Corp.*, 65 AD3d 981, 886 NYS2d 129 (1st Dept 2009); see PJI 2:13. Whether defendant acted unreasonably in discontinuing assistance to the person in distress may involve a question of foreseeability, see *Parvi v Kingston*, 41 NY2d 553, 394 NYS2d 161, 362 NE2d 960 (1977); PJI 2:12; see also *Selletti v Port Washington Police Dist.*, 215 AD2d 642, 628 NYS2d 132 (2d Dept 1995) (where police removed slightly inebriated driver from car and brought her to train station, police not liable for assault sustained by driver when she voluntarily walked away from the station).

Special immunity from liability may be available to the defendant under the Good Samaritan laws, Education Law §§ 6527(2) (physicians); 6537 (licensed physical therapist); 6547 (physician's assistant); 6611 (dentists); 6909(1) (nurses); General Business Law § 627-a(3) and Public

Health Law § 3000-a (provider of public access defibrillator or certified operator of that device); Public Authorities Law § 1266-b (certain LIRR employees); Public Health Law § 3013 (certified emergency medical technicians, advanced emergency medical technicians and voluntary ambulance services). The topic of liability for medical services rendered gratuitously is treated in PJI 2:150 (malpractice-physician); 2:151 (malpractice-hospital).

Voluntary assumption of a duty intended to benefit an individual or a special class of persons requires performance of that duty with reasonable care, *Nowlin v New York*, 81 NY2d 81, 595 NYS2d 927, 612 NE2d 285 (1993); *Florence v Goldberg*, 44 NY2d 189, 404 NYS2d 583, 375 NE2d 763 (1978); *Schuster v New York*, 5 NY2d 75, 180 NYS2d 265, 154 NE2d 534 (1958); see *Kievman v Philip*, 84 AD3d 1031, 924 NYS2d 112 (2d Dept 2011); see also *Miller v State*, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984), *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); *Chiplock v Niagara Mohawk Power Corp.*, 134 AD2d 96, 523 NYS2d 232 (3d Dept 1988). But the assumption of a duty of reasonable care does not make the defendant a guarantor of plaintiff's safety, *Axon v New York City Transit Authority*, 120 AD2d 475, 502 NYS2d 31 (2d Dept 1986). Voluntary assumption of a duty also imports the obligation not to abandon it, see *Florence v Goldberg*, *supra*; Restatement, Torts 2d § 323 comment c; see *Schuster v New York*, 5 NY2d 75, 180 NYS2d 265, 154 NE2d 534 (1958); *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928), at least until such time that it appears that discontinuance will neither cause harm to the plaintiff nor leave plaintiff in a worse position than before, *Florence v Goldberg*, *supra*; *Kenyon v Van Vorce*, 144 AD2d 925, 534 NYS2d 244 (4th Dept 1988); see Restatement, Torts 2d, §§ 320, 323. However, a municipal employee's voluntary performance of a discretionary act may not give rise to liability on the municipality's part, *Valdez v New York*, 18 NY3d 69, 936 NYS2d 587, 960 NE2d 356 (2011); *McLean v New York*, 12 NY3d 194, 878 NYS2d 238, 905 NE2d 1167 (2009).

Although *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 159 NE 896 (1928), did not impose liability upon the defendant, it provides the guiding principle: "If conduct has gone forward to such a state that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward . . .," see *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); *West Side Corp. v PPG Industries, Inc.*, 225 AD2d 459, 639 NYS2d 342 (1st Dept 1996). For example, in *Florence v Goldberg*, 44 NY2d 189, 404 NYS2d 583, 375 NE2d 763 (1978), the court held that once the jury found that the police department, having provided a school crossing guard, owed a duty to children at the school not to discontinue this special protection, the police department could be relieved from the voluntarily assumed duty only if it gave adequate notice that the protection was to be discontinued or if it took other appropriate action. As to the statutory duty owed to school bus passengers, see Comment to PJI 2:229.

Gratuitous Promises

An unkept gratuitous promise to do an act does not give rise to liability, *Thorne v Deas*, 4 Johns 84 (NY Sup 1809); *Hunt v Scotia-Glenville Central School District*, 92 AD2d 680, 460 NYS2d 205 (3d Dept 1983), but one who makes such a promise, and enters upon performance, is bound to perform according to his promise, *Siegel v Spear & Co.*, 234 NY 479, 138 NE 414 (1923), and for failure to do so is liable to anyone relying on the performance. In *Thorne v Deas*, *supra*, it was held that the defendant was not liable to plaintiff for the loss of plaintiff's ship, even though defendant had dissuaded plaintiff from obtaining insurance upon the ship, defendant having promised to procure the insurance himself. Chancellor Kent held that breach of contract would not lie because there was no consideration; tort would not lie because there was no step taken toward performance.

In *Siegel v Spear & Co.*, 234 NY 479, 138, 138 NE 414 (1923), the defendant, a gratuitous bailee, was held liable for the loss of the bailed goods because defendant failed to keep its promise to insure the goods which were subsequently destroyed by fire. The Court in *Siegel* distinguished *Thorne v Deas*, 4 Johns 84 (NY Sup 1809), upon the fact that the plaintiff in *Thorne* had parted with nothing, given up possession of none of his property, nor of any interest in it, while the promise to insure the goods in *Siegel* was held to be as much a part of the bailment as the promise to care for them. The *Siegel* case also questions the *Thorne* decision on whether consideration is needed to support the imposition of liability upon defendant: "[W]hether or not we would feel bound to follow *Thorne v Deas*, *supra*, upon the question of consideration today must be left open until the question comes properly before us," *Siegel v Spear & Co.*, 234 NY 479, 138 NE 414 (1923).

The *Thorne* and *Siegel* cases have been cited as showing the distinction between nonfeasance (*Thorne*) and misfeasance (*Siegel*), see *Marks v Nambil Realty Co.*, 245 NY 256, 157 NE 129 (1927) and *Glanzer v Shepard*, 233 NY 236, 135 NE 275 (1922). In *Smedes v Utica Bank*, 20 Johns 372 (NY Sup 1823), the court said: "There is a well settled distinction between actions for nonfeasance and for misfeasance. When one party intrusts the performance of a business to another, who, without consideration, undertakes, but wholly omits to do it, no action lies, notwithstanding the plaintiff may have sustained special damages; but if the party enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for the misfeasance." If there is consideration for the undertaking, nonfeasance is a breach of contract, while misfeasance is a tort or breach of contract, see *B. L. W. Realty Holding Co. v Socony Mobil Oil Co.*, 32 AD2d 312, 301 NYS2d 389 (1st Dept 1969), *aff'd in part and app dismd*, 26 NY2d 1002, 311 NYS2d 36, 259 NE2d 500 (1970); *Trans Caribbean Airways, Inc. v Lockheed Aircraft Service-International, Inc.*, 14 AD2d 749, 220 NYS2d 485 (1st Dept 1961). Absent consideration, if such be needed, commencement of performance marks the point of passage from nonfeasance, for which there

is no liability under *Thorne v Deas*, 4 Johns 84 (NY Sup 1809), to the possibility of liability for failing to complete the task undertaken, or performing it without due care. It has been held that commencement of performance may be found in some minor initiatory act, e.g., attending a meeting, *Kirby v Brown, Wheelock, Harris, Vought & Co.*, 229 App Div 155, 241 NYS 255 (1st Dept 1930), rev'd on other grounds, 255 NY 274, 174 NE 652 (1931), or writing a letter, *Condon v Exton-Hall Brokerage & Vessel Agency*, 80 Misc 369, 142 NYS 548 (NY City Ct 1913), rev'd on other grounds, 83 Misc 130, 144 NYS 760 (AppT 1913).

Marks v Nambil Realty Co., 245 NY 256, 157 NE 129 (1927), illustrates the principle. There a landlord, under no obligation to make repairs, caused a faulty repair to be made to a stairway in a building. The stairway collapsed, injuring plaintiff, a tenant in the building. A landlord in these circumstances could not be charged with liability for failure to perform a voluntary promise. The landlord is charged with liability because, having chosen to perform, he or she thereby became subject to a duty in respect of the manner of performance, see also *Miller v International Harvester Co. of New Jersey*, 193 App Div 258, 184 NYS 91 (4th Dept 1920) (seller is liable for negligence in giving instructions to purchaser's employee on how to operate certain machinery even if under no obligation to give such instructions); see PJI 2:125B (re: liability of repairer of product).

B. STATUTORY STANDARD OF CARE**Introductory Statement**

New York courts have long recognized a distinction between state statutes on the one hand, and local ordinances or administrative rules and regulations on the other, for purposes of establishing negligence, *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001). As a rule, violation of a state statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability. By contrast, violation of a municipal ordinance constitutes only evidence of negligence, *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 941 NYS2d 20, 964 NE2d 391 (2012); *Elliott v New York*, supra; see *Van Gaasbeek v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967); *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920).

A critical distinction between state and local law is that a state statute can only be changed by the Legislature, while a state administrative code or local ordinance can be modified by a state commissioner or a local government, *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001). Thus, in *Elliott v New York*, supra, the Court of Appeals held that, as a general rule, violations of the provisions of the New York City Administrative Code provide only some evidence of negligence. Although the Administrative Code has been adopted by the Legislature, the *Elliott* Court stressed that its provisions do not have the same force as state law because New York City retains the authority to amend or repeal them. Opining that the origin of a particular provision should be considered in determining whether that provision gives rise to negligence per se, the *Elliott* Court stated, in dictum, that “certain sections of the Administrative Code have their origin in State law and, as such, they might be entitled to statutory treatment in tort cases.” In *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 941 NYS2d 20, 964 NE2d 391 (2012), the court held that such treatment was warranted for a provision of the Administrative Code former (§ 27-1031(b)(1)) that was originally enacted as a state law but was later repealed and incorporated instead in the Administrative Code. In so holding, the court stressed that the language and purpose of the Code provision are virtually identical to those of its state law predecessors, which shifted the risk of injury from the injured landowner to the excavator of adjoining land, and noted that the Code provision derived from a “special law,” i.e., a law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages, N.Y. Const., art. IX, § 3(d)(4).

The trial judge should charge statutes or ordinances where there is any evidence in the case that may require the jury to know and apply them, *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970); *Taggart v Vogel*, 3 NY2d 58, 163 NYS2d 674, 143 NE2d 390

(1957); *DiLallo v Katsan Ltd. Partnership*, 134 AD3d 885, 21 NYS3d 329 (2d Dept 2015); *Chanler v Manocherian*, 151 AD2d 432, 543 NYS2d 671 (1st Dept 1989); *Montanez v Manhattan and Bronx Surface Transit Operating Authority*, 139 AD2d 411, 526 NYS2d 466 (1st Dept 1988); *Hardy v Sicuranza*, 133 AD2d 138, 518 NYS2d 812 (2d Dept 1987); *Ellsworth v General Motors Corp.*, 85 AD2d 829, 446 NYS2d 438 (3d Dept 1981). A regulation establishing a standard of conduct should be charged if there is evidence in the record to support a finding that the regulation was violated, *Gayle v New York*, 256 AD2d 541, 682 NYS2d 426 (2d Dept 1998); see *DiLallo v Katsan Ltd. Partnership*, *supra*. However, where a state statute and a local regulation are essentially consistent with each other and there is no express statutory provision making the latter controlling, the former controls and the court should instruct the jury only on the effect of a violation of the statute, if the violation constitutes negligence as a matter of law, *Collazo v Metropolitan Suburban Bus Authority*, 68 AD3d 803, 891 NYS2d 129 (2d Dept 2009). Instructing the jury on the effect of both a violation of the statute and a violation of the ordinance, which is only some evidence of negligence, may confuse the jurors and may even warrant granting a new trial in a proper case, *id*. It is also error to charge a statute or regulation which is inapplicable to the facts of the case, *Marigliano v New York*, 196 AD2d 533, 601 NYS2d 161 (2d Dept 1993) (abrogated on other grounds by, *Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769, 716 NYS2d 24 (2d Dept 2000)); *O'Shaunecy v Niagara*, 255 App Div 827, 7 NYS2d 42 (4th Dept 1938); *Davis v Saltser*, 192 App Div 921, 183 NYS 108 (2d Dept 1920); or in the absence of any evidence that a party in fact violated the particular statute or regulation, *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996), or which has no retroactive effect, *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982). Where plaintiff claimed that the building in which the incident occurred was constructed without certain required safety features, the fact that existing building code provisions were violated is not evidence of negligence if the provisions were adopted after the building was constructed and there is no evidence that the code provisions were intended to be applied retroactively, *White v Jeffco Western Properties, Inc.*, 304 AD2d 824, 759 NYS2d 138 (2d Dept 2003). The party with the burden of proof at the particular procedural juncture of the case, e.g., summary judgment, trial, must establish the requirements of the applicable statute, regulation, ordinance or other local rule, see *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84, 996 NYS2d 210, 20 NE3d 990 (2014).

In charging a statute or ordinance the better practice is to read applicable portions to the jury, and the trial judge should explain it in any proper way where it is unclear or confusing, *Ellsworth v General Motors Corp.*, 85 AD2d 829, 446 NYS2d 438 (3d Dept 1981); *Manca v Spencer, White & Prentis, Inc.*, 37 AD2d 554, 323 NYS2d 85 (1st Dept 1971); *Clark v Donovan*, 34 AD2d 1099, 312 NYS2d 610 (4th Dept 1970); *Robinson v Ferens*, 33 AD2d 688, 306 NYS2d 530 (2d Dept 1969); see *Montes v H. C. Bohack Co.*; *Feneis v Lewin*, 185 App Div 41, 172 NYS 821 (2d Dept 1918). Where the statute appears to be contradictory on

its face, it is incumbent upon the Court to reconcile the apparently contradictory requirements and set forth the rule which should apply to the facts of the case, see *Merkling v Ford Motor Co.*, 251 App Div 89, 296 NYS 393 (4th Dept 1937). The judge should neither permit an attorney to read the statute or ordinance to the jury nor leave the question of its pertinence to the jury, *Petru v Hertz Corp.*, 33 AD2d 755, 305 NYS2d 828 (1st Dept 1969).

If the statute or ordinance imposes a duty, and directs a method for performing it, the duty is primary and the method is secondary. When the method is not prescribed, the defendant must, nevertheless, take some step to discharge the duty imposed, *Schulman v Consolidated Edison Co. of New York, Inc.*, 85 AD2d 186, 447 NYS2d 722 (1st Dept 1982) (failure to post notice).

For the purposes of tort law, a governmental entity engaged in a proprietary activity is liable for failing to comply with the same regulatory standards applicable to other similarly situated landowners, *Huerta v New York City Transit Authority*, 290 AD2d 33, 735 NYS2d 5 (1st Dept 2001). Thus, the New York City Administrative Code is applicable to the New York City Transit Authority, a public authority, and the Authority's violation of a provision of the Code has the same tort consequences as a violation of any other pertinent ordinance, *id.*

With respect to the liability of a municipality for failure to enforce a statute or ordinance, see Introductory Statement preceding PJI 2:225.

Whether a statute creates a private civil cause of action may present a complicated question to be decided by the court based on an analysis of the particular statute at issue, *Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629, 543 NYS2d 18, 541 NE2d 18 (1989); *CPC Intern. Inc. v McKesson Corp.*, 70 NY2d 268, 519 NYS2d 804, 514 NE2d 116 (1987); *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 464 NYS2d 712, 451 NE2d 459 (1983). It should be noted, however, that the existence of a statutory command does not necessarily give rise to a right of private enforcement through tort litigation, *Uhr ex rel. Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 698 NYS2d 609, 720 NE2d 886 (1999); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013).

Generally, a statute does not give rise to an implied private cause of action unless: (1) the plaintiff is one of a class for whose particular benefit the statute was enacted, (2) the recognition of a private right of action would promote the legislative purpose, and (3) the creation of such a right would be consistent with the legislative scheme, *Cruz v TD Bank, N.A.*, 22 NY3d 61, 979 NYS2d 257, 2 NE3d 221 (2013); *Hammer v American Kennel Club*, 1 NY3d 294, 771 NYS2d 493, 803 NE2d 766 (2003); *Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629, 543 NYS2d 18, 541 NE2d 18 (1989); *Golden v Diocese of Buffalo, NY*, 184 AD3d 1176, 125 NYS3d 813 (4th Dept 2020); *Eskenazi-McGibney v*

Connetquot Central School District, 169 AD3d 8, 89 NYS3d 295 (2d Dept 2018); *Kamins v United Healthcare Insurance Company of New York, Inc.*, 171 AD3d 715, 98 NYS3d 96 (2d Dept 2019); *Flagstar Bank, FSB v State*, 114 AD3d 138, 978 NYS2d 266 (2d Dept 2013); see *Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 61 NYS3d 83 (2d Dept 2017); *Earsing v Nelson*, 212 AD2d 66, 629 NYS2d 563 (4th Dept 1995) (Penal Law § 265.10[5], prohibiting providing air gun to persons under age of 16, and General Business Law § 399-a, requiring seller of air guns to post notice of Penal Law provision, give rise to private right of action against seller who sold air gun to minor; right of action does not extend to manufacturer of air gun).

The third factor is generally the most critical, because the legislature has both the right and the authority to select the methods to be used in effectuating its goals, *Cruz v TD Bank, N.A.*, 22 NY3d 61, 979 NYS2d 257, 2 NE3d 221 (2013); *Eskenazi-McGibney v Connetquot Central School District*, 169 AD3d 8, 89 NYS3d 295 (2d Dept 2018); see *Golden v Diocese of Buffalo, NY*, 184 AD3d 1176, 125 NYS3d 813 (4th Dept 2020); *Kamins v United Healthcare Insurance Company of New York, Inc.*, 171 AD3d 715, 98 NYS3d 96 (2d Dept 2019). A private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the legislature or some other aspect of the overall statutory scheme, *Cruz v TD Bank, N.A.*, *supra*; *Eskenazi-McGibney v Connetquot Central School District*, *supra*; *Kamins v United Healthcare Insurance Company of New York, Inc.*, *supra*; see *Golden v Diocese of Buffalo, NY*, *supra* (implying private right of action under Penal Law § 240.45 to enjoin alleged clergy sex abuse would be incompatible with Sex Offender Registration Act; compensatory damages available to plaintiffs with viable claims under Child Victims Act). Where the legislature clearly contemplated administrative enforcement of the statute, the question then becomes whether, in addition to administrative enforcement, an implied right of action would be consistent with the legislative scheme, *Uhr ex rel. Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 698 NYS2d 609, 720 NE2d 886 (1999); *Eskenazi-McGibney v Connetquot Central School District*, *supra*; *Kamins v United Healthcare Insurance Company of New York, Inc.*, *supra*. A private right of action will not be found where it would upend a legislative enforcement scheme, potentially resulting in duplicative or inconsistent results, *Kamins v United Healthcare Insurance Company of New York, Inc.*, *supra* (New York's mental health parity law, also known as Timothy's law, does not imply private right of action).

A. Violations of Statutes

The cases indicate that a violation of statute may have one of three legal effects:

(1) It may create absolute liability (sometimes called liability *per se*) without regard to principles of comparative fault;

- (2) it may establish negligence (sometimes called negligence per se);
- (3) it may be some evidence of negligence.

1. *Violations that create absolute liability*

When the statute is designed to protect a definite class from a particular hazard which they themselves are incapable of avoiding a violation establishes absolute liability without regard to principles of negligence, *Lopes v Rostad*, 45 NY2d 617, 412 NYS2d 127, 384 NE2d 673 (1978); *Vincent v Riggi & Sons, Inc.*, 30 NY2d 406, 334 NYS2d 380, 285 NE2d 689 (1972); *Van Gaasbeck v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967); *Koenig v Patrick Const. Corporation*, 298 NY 313, 83 NE2d 133 (1948); *Pierce v International Harvester Co.*, 61 AD2d 255, 402 NYS2d 674 (4th Dept 1978) (citing PJI). Such a statute creates a cause of action not dependent on proof of specific acts of negligence of defendant nor is the cause of action affected by plaintiff's lack of care, *Van Gaasbeck v Webatuck Central School Dist. No. 1*, supra; *Koenig v Patrick Const. Corporation*, supra; see CPLR 1401. While the doctrine of absolute liability is generally applied to violations of statutes designed for the safety of employees, the doctrine has also been applied to other types of statutes as well, see *Chainani by Chainani v Board of Educ. of City of New York*, 87 NY2d 370, 639 NYS2d 971, 663 NE2d 283 (1995) (violation of VTL § 1174(b)); *Van Gaasbeck v Webatuck Central School Dist. No. 1*, supra (bus driver violated Vehicle & Traffic Law); *Dean v Baumann*, 39 AD2d 138, 332 NYS2d 665 (3d Dept 1972), aff'd, 32 NY2d 756, 344 NYS2d 950, 298 NE2d 114 (1973) (VTL § 1174(a) violated by passing a school bus); *Goode v Meyn*, 165 AD2d 436, 568 NYS2d 472 (3d Dept 1991) (violation of VTL § 375(17)); *Grefe v Volberg*, 42 AD2d 603, 345 NYS2d 110 (2d Dept 1973) (violation of VTL § 1174(a)). In *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 941 NYS2d 20, 964 NE2d 391 (2012), the court held that the doctrine of absolute liability applies to a provision of the Administrative Code of the City of New York governing certain excavation work (former § 27-1031(b)(1)). The court afforded that Code provision absolute liability treatment because the provision has its origins in state law; the language and purpose of the provision are virtually identical to those of its state law predecessors (which shifted the risk of injury from the injured landowner to the excavator of adjoining land); and the provision derived from a "special law," i.e., a law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages, N.Y. Const., art. IX, § 3(d)(4). Plaintiff must be a member of the class protected by the statute, *Koenig v Patrick Const. Corporation*, supra; *Moyer v Lo Jim Cafe, Inc.*, 19 AD2d 523, 240 NYS2d 277 (1st Dept 1963), aff'd, 14 NY2d 792, 251 NYS2d 30, 200 NE2d 212 (1964); *Keiser v Elmer*, 225 AD2d 589, 639 NYS2d 118 (2d Dept 1996) (plaintiff who was not boarding or alighting from school bus is not within class of individuals entitled to protection of VTL § 1174); *Shaffer v Aumick*, 53 AD2d 1027, 385 NYS2d 904 (4th Dept 1976).

A statute may impose absolute liability, without regard to class

membership if its express language imposes civil liability, without limitation, in favor of anyone injured as a result of its violation, *Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 200 NE 824 (1936); *Moyer v Lo Jim Cafe, Inc.*, 19 AD2d 523, 240 NYS2d 277 (1st Dept 1963), *aff'd*, 14 NY2d 792, 251 NYS2d 30, 200 NE2d 212 (1964) (General Obligations Law § 11-101); *Daggett v Keshner*, 284 App Div 733, 134 NYS2d 524 (1st Dept 1954), *mod*, 6 AD2d 503, 179 NYS2d 428 (1st Dept 1958), *aff'd*, 7 NY2d 981, 199 NYS2d 41, 166 NE2d 324 (1960) (New York City Administrative Code concerning resale of gasoline in containers).

The violation must be the proximate cause of the accident, *Van Gaasbeck v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967); *Pierce v International Harvester Co.*, 61 AD2d 255, 402 NYS2d 674 (4th Dept 1978). This, however, may not require the same degree of causal connection needed to find common law negligence, *Neu v McKechnie*, 95 NY 632 (1884); *Mead v Stratton*, 87 NY 493 (1882); *Bertholf v O'Reilly*, 74 NY 509 (1878); *Volans v Owen*, 74 NY 526 (1878); *Daggett v Keshner*, 284 App Div 733, 134 NYS2d 524 (1st Dept 1954), *mod*, 6 AD2d 503, 179 NYS2d 428 (1st Dept 1958), *aff'd*, 7 NY2d 981, 199 NYS2d 41, 166 NE2d 324 (1960); see *Hall v Germain*, 131 NY 536, 30 NE 591 (1892), but merely require a practical or reasonable connection between the violation and injury, *Daggett v Keshner*, *supra*. Liability may not be predicated, however, upon a technical violation which lacks a legal connection to the injuries sustained, *Morales v New York*, 70 NY2d 981, 526 NYS2d 418, 521 NE2d 425 (1988) (selling arsonists gasoline in milk container, which was not an "approved type" of gasoline container, not legal cause of injury sustained by patrons of social club which was target of arson).

This type of violation is covered in PJI 2:28.

2. *Violations which establish negligence*

When a statute, in the interest of the general public, defines the degree of care to be used under specified circumstances, it does not create a new liability but defines a duty enforceable in a common-law negligence action, *Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 200 NE 824 (1936); *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920); *Duncan v Kelly*, 249 AD2d 802, 671 NYS2d 841 (3d Dept 1998) (General Obligations Law § 18-105(4), (9) defines skier's duties, which are enforceable in common law negligence action); *Brogan v Zummo*, 92 AD2d 533, 459 NYS2d 293 (2d Dept 1983); *Feisthamel v State*, 89 AD2d 756, 453 NYS2d 904 (3d Dept 1982); *Miller v Higgins*, 57 AD2d 1010, 394 NYS2d 497 (3d Dept 1977); see *Herdzik v Chojnacki*, 68 AD3d 1639, 892 NYS2d 724 (4th Dept 2009). Only the violation of a statute that imposes a specific duty constitutes negligence per se, see *DiLallo v Katsan Ltd. Partnership*, 134 AD3d 885, 21 NYS3d 329 (2d Dept 2015); *Sheila C. v Povich*, 11 AD3d 120, 781 NYS2d 342 (1st Dept 2004) (Penal Law § 260.10(1), which proscribes endangering the welfare of a child, does not impose a specific duty); see also *Elliott v New York*, 95 NY2d

730, 724 NYS2d 397, 747 NE2d 760 (2001). The violation of a statute that imposes a specific duty is not merely evidence of negligence, *Miller v Hine*, 281 App Div 387, 120 NYS2d 231 (3d Dept 1953), and it is not sufficient for the court to instruct the jury that the violation of a statute is just something to be “taken into consideration” with all the other circumstances of the case, *Miller v Hine*, *supra*; see also *Ricci v Rolles*, 16 AD2d 788, 227 NYS2d 944 (2d Dept 1962), and discussion in *Utica Mut. Ins. Co. v Paul Mancini & Sons*, 9 AD2d 116, 192 NYS2d 87 (4th Dept 1959).

Because the action is based on negligence, comparative fault principles apply, CPLR 1401, *Feisthamel v State*, 89 AD2d 756, 453 NYS2d 904 (3d Dept 1982). For a charge and Comment on comparative fault, see PJI 2:36.

The generally accepted view is that a violation of a statutory duty constitutes negligence for the reason that the non-observance of what the legislature has prescribed as a suitable precaution is, as a matter of law, failure to observe that care which an ordinarily prudent person would observe. In determining whether there has been such a violation of the statute as to constitute negligence, the courts do not impose a duty beyond that which the legislature intended to impose, *Dance v Southampton*, 95 AD2d 442, 467 NYS2d 203 (2d Dept 1983). Violation results in liability only if injury results from a hazard against which the statute was intended to afford protection, *Lopes v Rostad*, 45 NY2d 617, 412 NYS2d 127, 384 NE2d 673 (1978); *De Haen v Rockwood Sprinkler Co. of Massachusetts*, 258 NY 350, 179 NE 764 (1932); *Brown v Shyne*, 242 NY 176, 151 NE 197 (1926); *Monacelli v Armstrong*, 64 AD2d 428, 409 NYS2d 899 (4th Dept 1978), *aff'd*, 49 NY2d 971, 428 NYS2d 949, 406 NE2d 804 (1980); *Dance v Southampton*, *supra*; see *Di Ponzio v Riordan*, 89 NY2d 578, 657 NYS2d 377, 679 NE2d 616 (1997) (ordinance).

A person not intended to be benefited by the statute may not prove its breach to establish negligence, *DiCaprio v New York Cent R. Co.*, 231 NY 94, 131 NE 746 (1921); *Chester Litho, Inc. v Palisades Interstate Park Com.*, 33 AD2d 202, 305 NYS2d 682 (3d Dept 1969), *aff'd*, 27 NY2d 323, 317 NYS2d 761, 266 NE2d 229 (1971); *McEvoy v New York*, 266 App Div 445, 42 NYS2d 746 (2d Dept 1943), *aff'd*, 292 NY 654, 55 NE2d 517 (1944). If the statute was not intended to cover the plaintiff and the type of harm sustained, its violation is not even evidence of negligence and has no effect on liability, *DiCaprio v New York Cent R. Co.*, *supra*. In determining whether plaintiff may rely on the statute, neither the omission from the statute of provision for individual action, *Chotapeg, Inc. v Bullowa*, 291 NY 70, 50 NE2d 548 (1943), nor the failure of municipal authorities to utilize the enforcement powers given them, *Herrman v Hartwood Holding Co.*, 193 App Div 115, 183 NYS 402 (1st Dept 1920), bars an action by an individual if it can fairly be implied that the statute was enacted for the benefit of a class of which he is a member, see *Daggett v Keshner*, 284 App Div 733, 134 NYS2d 524 (1st Dept 1954), *mod on other grounds*, 6 AD2d 503, 179 NYS2d

428 (1st Dept 1958), *aff'd*, 7 NY2d 981, 199 NYS2d 41, 166 NE2d 324 (1960); see generally *Dance v Southampton*, 95 AD2d 442, 467 NYS2d 203 (2d Dept 1983) (citing PJI).

Commission of an act prohibited or omission of an act required by statute is not negligence unless its commission or omission is in violation of a duty owed by the person committing or omitting the act, *Homin v Cleveland & Whitehill Co.*, 281 NY 484, 24 NE2d 136 (1939); see *Motyka v Amsterdam*, 15 NY2d 134, 256 NYS2d 595, 204 NE2d 635 (1965). In determining upon whom a duty is imposed by a statute, ordinance, regulation or order, its specific language must be followed, *Arnold v Buffalo Terminal Elevators, Inc.*, 25 AD2d 611, 267 NYS2d 563 (4th Dept 1966).

Violations of the above character are covered in PJI 2:25 and PJI 2:26, and justifiable noncompliance is covered in PJI 2:27.

3. *Violations which are some evidence of negligence*

Violation of a statute which creates absolute liability does not involve negligence, *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985); *Van Gaasbeck v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967). Violation of a statute which establishes a degree of care for the interest of the general public is negligence, *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920). There are cases which suggest that violation of a statute is only evidence of negligence where the statute is general in character and intended to benefit the public at large, or where plaintiff is not within the protected class, see *Amberg v Kinley*, 214 NY 531, 108 NE 830 (1915); *Kelley v New York State Rys.*, 207 NY 342, 100 NE 1115 (1913); *DiSilvestro v Samler*, 32 AD3d 987, 821 NYS2d 632 (2d Dept 2006); *Daggett v Keshner*, 284 App Div 733, 134 NYS2d 524 (1st Dept 1954), *mod*, 6 AD2d 503, 179 NYS2d 428 (1st Dept 1958), *aff'd*, 7 NY2d 981, 199 NYS2d 41, 166 NE2d 324 (1960); *Stern v Great Island Corp.*, 250 App Div 115, 293 NYS 608 (1st Dept 1937). These cases seem contrary to *Martin v Herzog*, *supra*, which holds that violation of the statutory standard is negligence, and to *DiCaprio v New York Cent R. Co.*, 231 NY 94, 131 NE 746 (1921), which holds that where plaintiff is not within the protected class, violation is not even evidence of negligence. However, in *Koenig v Patrick Const. Corporation*, 298 NY 313, 83 NE2d 133 (1948), it was stated that when a statute creates absolute liability in favor of a limited class incapable of protecting itself, a violation which causes injury to one outside the class might do no more than evidence negligence.

B. Violation of Ordinances, Regulations, or Administrative Orders

The unexcused breach of an ordinance or regulation is some evidence of negligence, provided that such violation was a proximate cause of the accident, *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001); *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434

NE2d 231 (1982); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Conte v Large Scale Development Corp.*, 10 NY2d 20, 217 NYS2d 25, 176 NE2d 53 (1961); *Major v Waverly & Ogden, Inc.*, 7 NY2d 332, 197 NYS2d 165, 165 NE2d 181 (1960); *Fox v Lyte*, 143 AD2d 390, 532 NYS2d 432 (2d Dept 1988) (error to charge violation of regulation where such violations were not proximate cause of occurrence); *Feisthamel v State*, 89 AD2d 756, 453 NYS2d 904 (3d Dept 1982); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979); *Pierce v International Harvester Co.*, 61 AD2d 255, 402 NYS2d 674 (4th Dept 1978) (citing PJI); *Colon v Bridge Plaza Rental Corp.*, 46 AD2d 13, 360 NYS2d 896 (1st Dept 1974); *Corbett v Brown*, 32 AD2d 27, 299 NYS2d 219 (3d Dept 1969); see *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996); *DiLallo v Katsan Ltd. Partnership*, 134 AD3d 885, 21 NYS3d 329 (2d Dept 2015) (State building code) (citing PJI); *Morreale v Froelich*, 125 AD3d 1280, 3 NYS3d 479 (4th Dept 2015) (building code); *Black v Schenectady*, 21 AD3d 661, 800 NYS2d 240 (3d Dept 2005) (administrative rule); but see *Lein v Czaplinski*, 106 AD2d 723, 484 NYS2d 154 (3d Dept 1984). It is for the jury to determine whether defendants violated the ordinance and whether the alleged violation of the ordinance proximately caused the accident, *Barnes v Stone-Quinn*, 195 AD2d 12, 606 NYS2d 485 (4th Dept 1993); *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991); see *Morreale v Froelich*, *supra*. Note, however, that no regulation can create or enlarge upon the liability provisions of the statute under which the regulation is promulgated, *Georgiou v State*, 28 AD2d 1027, 283 NYS2d 767 (3d Dept 1967), and that violation of a valid regulation or ordinance cannot result in liability unless the accident is a consequence against which the ordinance or regulation was intended to guard, *Di Ponzio v Riordan*, 89 NY2d 578, 657 NYS2d 377, 679 NE2d 616 (1997); *Chester Litho, Inc. v Palisades Interstate Park Com.*, 33 AD2d 202, 305 NYS2d 682 (3d Dept 1969), *aff'd*, 27 NY2d 323, 317 NYS2d 761, 266 NE2d 229 (1971); *O'Brien v Falmore Cab Corp.*, 18 AD2d 1078, 239 NYS2d 380 (2d Dept 1963), *aff'd*, 15 NY2d 648, 255 NYS2d 868, 204 NE2d 200 (1964); *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991); *Clohessy v Felle*, 36 AD2d 757, 319 NYS2d 547 (2d Dept 1971); *Piarulli v Lason*, 35 AD2d 605, 313 NYS2d 613 (2d Dept 1970), or was an event occurring in a place covered by the ordinance, *Velazquez v Tyler Graphics, Ltd.*, 214 AD2d 489, 625 NYS2d 537 (1st Dept 1995); *DeYorio v Jamer*, 40 AD2d 861, 338 NYS2d 11 (2d Dept 1972).

Generally, causes of action predicated upon violations of administrative regulations do not give rise to strict liability, *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002). Similarly, violation of a provision of the Administrative Code of the City of New York typically constitutes some evidence of negligence, regardless of whether the provision is specific, *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001). However, an Administrative Code provision may, under certain circumstances, have the force of a state statute. The Elliott Court, while observing that the provisions of the Administrative Code generally do not have the same

force as state law because New York City retains the authority to amend or repeal them, stated, in dictum, that “certain sections of the Administrative Code have their origin in State law and, as such, they might be entitled to statutory treatment in tort cases.” In *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 941 NYS2d 20, 964 NE2d 391 (2012), the court held that such treatment was warranted for a provision of the Administrative Code (former § 27-1031(b)(1)). In so holding, the court stressed that the language and purpose of the Code provision are virtually identical to those of its state law predecessors, which shifted the risk of injury from the injured landowner to the excavator of adjoining land, and noted that the Code provision derived from a “special law,” i.e. a law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages, N.Y. Const., art. IX, § 3(d)(4). Violation of an administrative order would appear to stand on the same basis as a violation of an ordinance, see *Healy v New Rochelle*, 25 AD2d 446, 266 NYS2d 861 (2d Dept 1966); *Nourse v Welsh*, 23 AD2d 618, 257 NYS2d 96 (4th Dept 1965); 57 Am Jur 2d, Negligence §§ 271–273; see also *Black v Schenectady*, 21 AD3d 661, 800 NYS2d 240 (3d Dept 2005).

For the purposes of tort law, a governmental entity engaged in a proprietary activity is liable for failing to comply with the same regulatory standards applicable to other similarly situated landowners, *Huerta v New York City Transit Authority*, 290 AD2d 33, 735 NYS2d 5 (1st Dept 2001). Thus, the New York City Administrative Code is applicable to the New York City Transit Authority, a public authority, and the Authority’s violation of a provision of the Code has the same tort consequences as a violation of any other pertinent ordinance, *id.*

These violations are covered in PJI 2:29 and for justifiable non-compliance see PJI 2:27.

PJI 2:25. Statutory Standard of Care—Statute of General Application

Plaintiff claims that defendant failed to comply with, and thus violated the following statute: [*Here read statute and relate facts to statute*].

If you find that defendant violated the statute, and if that violation was a substantial factor in bringing about the injury [*in bifurcated trial, substitute: accident or occurrence*], **then defendant is liable.**

Comment

[*See also Introductory Statement to this division, supra.*]

This charge would be given where violation of a statute is claimed

and such violation does not create liability per se (compare PJI 2:28). If warranted by the evidence, the Court may see fit to modify this charge by instructing the jury with reference to excuse for violation due to emergency (PJI 2:27). The charge is not applicable to cases involving claimed violations of the Administrative Code, *Cruz v New York*, 13 AD3d 254, 787 NYS2d 21 (1st Dept 2004); see *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001).

The violation must be a proximate cause of the accident or injury, *Raylite Elec. Corp. v New York*, 30 AD2d 38, 289 NYS2d 673 (1st Dept 1968), *aff'd*, 24 NY2d 785, 300 NYS2d 574, 248 NE2d 433 (1969); *DiLallo v Katsan Ltd. Partnership*, 134 AD3d 885, 21 NYS3d 329 (2d Dept 2015) (citing PJI); *Finn v New York State Dept. of Mental Hygiene*, 49 AD2d 995, 374 NYS2d 394 (3d Dept 1975); *Ortiz v Kinoshita & Co.*, 30 AD2d 334, 292 NYS2d 48 (1st Dept 1968). Proximate cause must be defined for the jury, see PJI 2:70.

For a charge relating specifically to violation of the Vehicle and Traffic Law, see PJI 2:26.

It may also be appropriate to charge that full compliance with the governing statute is some, though not conclusive, evidence of the exercise of due care, see *Feiner v Calvin Klein, Ltd.*, 157 AD2d 501, 549 NYS2d 692 (1st Dept 1990); *Sherman v M. Lowenstein & Sons, Inc.*, 28 AD2d 922, 282 NYS2d 142 (2d Dept 1967). It has been so held in products liability cases, *Sherman v M. Lowenstein & Sons, Inc.*, 28 AD2d 922, 282 NYS2d 142 (2d Dept 1967); *Phillips v Roux Laboratories*, 286 App Div 549, 145 NYS2d 449 (1st Dept 1955), and the principle applies to other types of cases as well, see *Lamuraglia v New York City Transit Authority*, 299 AD2d 321, 749 NYS2d 82 (2d Dept 2002); see also *Kelly v Metropolitan Ins. and Annuity Co.*, 82 AD3d 16, 918 NYS2d 50 (1st Dept 2011). Notably, however, compliance with a statutory or regulatory enactment generally does not preclude a finding that a defendant violated a common law duty, see *Kellman v 45 Tiemann Associates, Inc.*, 87 NY2d 871, 638 NYS2d 937, 662 NE2d 255 (1995); *Romero v Waterfront N.Y.*, 168 AD3d 1012, 92 NYS3d 333 (2d Dept 2019); *Baity v General Elec. Co.*, 86 AD3d 948, 927 NYS2d 492 (4th Dept 2011); *Kelly v Metropolitan Ins. and Annuity Co.*, *supra*; see also *Jacqueline S. by Ludovina S. v New York*, 81 NY2d 288, 598 NYS2d 160, 614 NE2d 723 (1993); *Barley v Robert J. Wilkins, Inc.*, 122 AD3d 1116, 997 NYS2d 758 (3d Dept 2014); *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 954 NYS2d 348 (4th Dept 2012); *Feiner v Calvin Klein, Ltd.*, *supra*; *Mercogliano v Sears, Roebuck and Co.*, 303 AD2d 566, 756 NYS2d 472 (2d Dept 2003).

Where there is evidence that the plaintiff violated a statute and that the violation was a contributing cause of the occurrence, the jury should be instructed that a violation of the statute would constitute negligence, *Cordero v New York*, 112 AD2d 914, 492 NYS2d 430 (2d Dept 1985) (citing PJI); see *Solomon v Green Bay Sanitation Corp.*, 164 AD3d 854, 79 NYS3d 539 (2d Dept 2018) (citing PJI); *Goode v Meyn*,

165 AD2d 436, 568 NYS2d 472 (3d Dept 1991) (citing PJI). Where plaintiff's conduct is in issue, the above charge should be adapted accordingly.

It is error to permit a party to attempt to prove negligence by expert testimony regarding the meaning and applicability of a statute or regulation imposing a standard of care, *LaPenta v Loca-Bik Ltee Transport*, 238 AD2d 913, 661 NYS2d 132 (4th Dept 1997); *Rodriguez v New York City Housing Authority*, 209 AD2d 260, 618 NYS2d 352 (1st Dept 1994); *Ross v Manhattan Chelsea Associates*, 194 AD2d 332, 598 NYS2d 502 (1st Dept 1993).

PJI 2:26. Statutory Standard of Care—Vehicle and Traffic Law Violation

The Vehicle and Traffic Law establishes rules of conduct that must be obeyed by motorists and pedestrians alike. Plaintiff claims that defendant failed to comply with § _____ of the Vehicle and Traffic Law. Section _____ provides as follows: *[Here read applicable section and relate to the facts of the case.]* **In considering the evidence in this case, you must determine whether plaintiff has proved that defendant failed to comply with (that, those) statute(s). If you find that defendant violated (that, those) statute(s), such a violation constitutes negligence.**

You cannot disregard a violation of the statute and substitute some standard of care other than that set forth in the statute.

Comment

[See also Introductory Statement to this division, supra.]

Based on *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920); *Goode v Meyn*, 165 AD2d 436, 568 NYS2d 472 (3d Dept 1991) (citing PJI); *Alongi v Beuter*, 286 App Div 990, 144 NYS2d 756 (4th Dept 1955); *Restatement of Torts 2d*, § 286.

The unexcused failure to observe the standard imposed by statute is negligence, *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920); *Fillette v Lundberg*, 150 AD3d 1574, 55 NYS3d 783 (3d Dept 2017); *Arms v Halsey*, 43 AD3d 1419, 842 NYS2d 847 (4th Dept 2007) (citing PJI); *Weiser v Dalbo*, 184 AD2d 935, 585 NYS2d 124 (3d Dept 1992); *Cordero v New York*, 112 AD2d 914, 492 NYS2d 430 (2d Dept 1985) (citing PJI); *Mailler v Mayer*, 89 AD2d 784, 453 NYS2d 500 (4th Dept 1982) (citing

PJI); *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979) (citing PJI); see *Regdos v Buffalo*, 132 AD3d 1343, 17 NYS3d 528 (4th Dept 2015) (citing PJI). A violation of a traffic regulation may be excused if the driver exercised reasonable care in an effort to comply, *Brown v State*, 31 NY3d 514 (2018); *Arms v Halsey*, supra; *Arricale v Leo*, 295 AD2d 920, 744 NYS2d 109 (4th Dept 2002).

Any deviation from the pattern charge suggesting that violation of a statute is merely evidence of negligence is improper and constitutes reversible error, *Holleman v Miner*, 267 AD2d 867, 699 NYS2d 840 (3d Dept 1999). Thus, where a state statute establishing a standard of conduct and a local regulation are essentially consistent with each other and there is no express statutory provision making the latter controlling, the former controls and the court should instruct the jury only on the effect of a violation of the statute, if the violation constitutes negligence as a matter of law, *Collazo v Metropolitan Suburban Bus Authority*, 68 AD3d 803, 891 NYS2d 129 (2d Dept 2009). Instructing the jury on the effect of both a violation of the statute and a violation of the ordinance, which is only some evidence of negligence, may confuse the jurors, *id.* As to what constitutes unexcused failure to comply with a statutory standard of care, see PJI 2:27. As to the duty of the owner and operator to maintain the vehicle in safe condition and properly equipped, see PJI 2:86. Note, however, that the failure to equip a vehicle with seat belts or to maintain such seat belts in working order, where required by Section 383 of the Vehicle and Traffic Law and the regulations promulgated thereunder, may constitute negligence as a matter of law, *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). But the jury may not consider whether the owner of an old vehicle, not subject to the statutory requirement, should have retrofitted the vehicle with seat belts, *Ramundo v Guilderland*, 142 AD2d 50, 534 NYS2d 543 (3d Dept 1988).

Liability does not result unless the violation was a proximate cause of the accident, *Sewar v Gagliardi Bros. Service*, 69 AD2d 281, 418 NYS2d 704 (4th Dept 1979), *aff'd*, 51 NY2d 752, 432 NYS2d 367, 411 NE2d 786 (1980); *Holownia v Caruso*, 183 AD3d 1035, 123 NYS3d 291 (3d Dept 2020); *Piarulli v Lason*, 35 AD2d 605, 313 NYS2d 613 (2d Dept 1970); *New v Cortright*, 32 AD2d 576, 299 NYS2d 43 (3d Dept 1969); *Ortiz v Kinoshita & Co.*, 30 AD2d 334, 292 NYS2d 48 (1st Dept 1968); *O'Neill v Hamill*, 22 AD2d 691, 253 NYS2d 289 (2d Dept 1964); see *Reed v Syracuse*, 309 AD2d 1195, 765 NYS2d 125 (4th Dept 2003); *Finn v New York State Dept. of Mental Hygiene*, 49 AD2d 995, 374 NYS2d 394 (3d Dept 1975); *Smith v Ryan*, 48 AD2d 1003, 368 NYS2d 642 (4th Dept 1975). Thus, where there is no reasonable view that a violation of the statute proximately caused the accident, the charge should not be given, *Solomon v Green Bay Sanitation Corp.*, 164 AD3d 854, 79 NYS3d 539 (2d Dept 2018) (citing PJI). For a charge on proximate cause, see PJI 2:70.

An unexcused violation of a statute is negligence per se only if the statute is designed to protect a particular class of persons against a par-

ticular class of harm and plaintiff is a member of the protected class, *Dance v Southampton*, 95 AD2d 442, 467 NYS2d 203 (2d Dept 1983). Thus, operation of an unregistered motor vehicle is not negligence per se, *Hyde v McCreery*, 145 App Div 729, 130 NYS 269 (3d Dept 1911); 8A NYJur2d, Automobiles, § 909, nor is driving without a license, see *Cordero v New York*, 112 AD2d 914, 492 NYS2d 430 (2d Dept 1985) (citing PJI); *Dance v Southampton*, supra.

The absence or possession of a driver's license relates only to the authority for operating the vehicle and not to the manner thereof, *Huff v Rodriguez*, 88 AD3d 1274, 930 NYS2d 717 (4th Dept 2011); *Dalal v New York*, 262 AD2d 596, 692 NYS2d 468 (2d Dept 1999) (citing PJI); see *Almonte v Marsha Operating Corp.*, 265 AD2d 357, 696 NYS2d 484 (2d Dept 1999); see also *St. Andrew v O'Brien*, 45 AD3d 1024, 845 NYS2d 184 (3d Dept 2007) (VTL § 501(3), insofar as it relates to hours in which junior license holder may drive without parent present, concerns only authority to drive and does not create a standard of care in operation of vehicle; thus, violation of restriction does not constitute negligence); *Miszko v Luma*, 284 AD2d 641, 725 NYS2d 459 (3d Dept 2001) (operation with learner's permit could be considered by jury only on issue of operator's experience and ability to operate vehicle). A restriction placed upon the license requiring the wearing of glasses when driving, however, relates directly to the actual operation of the vehicle, *Dalal v New York*, supra. Therefore, an unexcused violation of VTL § 509(3), which provides that no person shall operate any vehicle in violation of any restriction contained in the driver's license, does constitute negligence per se, *id.* The violation must be a proximate cause of the accident.

Where plaintiff's claim is predicated upon an alleged violation of an applicable statute, it is error to instruct the jury as to negligence generally without charging the jury as to the specific statute at issue, *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970); *Montanez v Manhattan and Bronx Surface Transit Operating Authority*, 139 AD2d 411, 526 NYS2d 466 (1st Dept 1988). However, any error in the court's refusal to charge PJI 2:26 was harmless where the jury found defendants not negligent under the "reasonable and prudent" standard as charged by the court and the only statute allegedly violated was VTL § 1129(a), which merely prohibits drivers from "follow[ing] another vehicle more closely than is reasonable and prudent," *Stalikas v United Materials, L.L.C.*, 100 NY2d 626, 769 NYS2d 191, 801 NE2d 411 (2003) (citing PJI).

Care must be taken to assure that (1) the statute read is the one that was in effect at the time and place of the occurrence; (2) it is applicable to the fact situation at hand, see *Frias v Fanning*, 119 AD2d 796, 501 NYS2d 423 (2d Dept 1986) (citing PJI); *Curry v New York City Housing Authority*, 77 AD2d 534, 430 NYS2d 305 (1st Dept 1980); *Siivonen v Oneida*, 33 AD2d 934, 306 NYS2d 278 (3d Dept 1970); (3) the Court explains the applicability of the section charged, *Clark v Donovan*, 34 AD2d 1099, 312 NYS2d 610 (4th Dept 1970), and includes

any condition to its applicability stated in the statute, *Siivonen v Oneida*, supra; and (4) the Court separates the issues of negligence and proximate cause, *Weiser v Dalbo*, 184 AD2d 935, 585 NYS2d 124 (3d Dept 1992). Care must also be taken to differentiate between the Vehicle and Traffic Law, which is a statute, and the traffic regulations and ordinances in effect in some cities or on parkways controlled by various authorities, *Piarulli v Lason*, 35 AD2d 605, 313 NYS2d 613 (2d Dept 1970). As to the latter, PJI 2:29 should be used.

Note that VTL § 1100 makes the Vehicle and Traffic Law applicable “upon public highways, private roads open to public motor vehicle traffic and any other parking lot except where a different place is specifically referred to in a given section.”

PJI 2:26A. Statutory Standard of Care—Vehicle and Traffic Law Violation—Driving to Left of Official Highway Markings

The failure to obey the Vehicle and Traffic Law is negligence. The parties agree that there was a double yellow line on the roadway at the point of collision. Regulations of the Department of Transportation denominate a double line marking consisting of two parallel solid yellow lines as a “yellow full barrier” and provide: The yellow full barrier marking indicates a no passing zone for traffic in both directions on a 2-lane, 2-way highway . . . “vehicles proceeding in either direction along a highway shall not be driven on the left side of a yellow full barrier” and Section 1126(a) of the Vehicle and Traffic Law in effect on the date of the collision provided:

“. . . no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such markings.”

If you find that defendant did not drive to the left of the double yellow line, you must find that (he, she) was not negligent. If you find that defendant did drive to the left of the double yellow line, you must find that (he, she) was negligent.

Comment

Based on VTL § 1126(a); 15 NYCRR § 261.4(b) and *Montes v H.C. Bohack Co.*, 284 App Div 448, 131 NYS2d 775 (1st Dept 1954); see

Pfaffenbach v White Plains Exp. Corp., 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966); *Jemison v Goodman*, 49 AD2d 1011, 373 NYS2d 926 (4th Dept 1975); *Sherman v Pullman*, 29 AD2d 1044, 289 NYS2d 802 (4th Dept 1968); *Schwartz v Fletcher*, 238 App Div 554, 265 NYS 277 (1st Dept 1933) (involving driving on the wrong side of the road [see VTL §§ 1120, 1121, 1125] rather than crossing a double yellow line [VTL § 1126]); see also VTL § 1126(c) (left turns to or from a flush median or center lane; VTL § 1128 (lane changing)). The rules and regulations of the Department of Transportation must be judicially noticed without request, VTL § 1611; CPLR 4511(a). For the violation of the statute to be relevant for the jury to consider, it must be found to be a proximate cause of the injury or occurrence; however, where the plaintiff has made a prima facie showing that defendant was negligent, the questions of proximate cause and the foreseeability of intervening events are properly left for the trier of facts to resolve, *Baldwin v Degenhardt*, 82 NY2d 867, 609 NYS2d 563, 631 NE2d 569 (1993), rev'g for reasons in AD dissenting opinion, 189 AD2d 941, 592 NYS2d 821 (3d Dept 1993); *Montes v H.C. Bohack Co.*, supra. For a charge on proximate cause, see PJI 2:70. The question on which side of the double line the collision occurred will usually be for the jury, see *Peters v Gersch*, 32 AD2d 122, 300 NYS2d 156 (3d Dept 1969), rev'd on other grounds, 26 NY2d 976, 311 NYS2d 20, 259 NE2d 488 (1970).

Violation of the Vehicle and Traffic Law, unless excused, is negligence, *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920); *McDaniel v Clarkstown Cent. School Dist. No. 1*, 111 AD2d 151, 488 NYS2d 783 (2d Dept 1985); *Tomaselli v Goldstein*, 104 AD2d 872, 480 NYS2d 382 (2d Dept 1984) (citing PJI); *Alongi v Beuter*, 286 App Div 990, 144 NYS2d 756 (4th Dept 1955), even if the collision occurs when the defendant has returned to the proper lane after crossing the double solid line, *Baldwin v Degenhardt*, 82 NY2d 867, 609 NYS2d 563, 631 NE2d 569 (1993), reversing on dissenting mem at AD, 189 AD2d 941, 592 NYS2d 821.

Any deviation from the pattern charge suggesting that violation of a statute is merely evidence of negligence is improper and constitutes reversible error, *Holleman v Miner*, 267 AD2d 867, 699 NYS2d 840 (3d Dept 1999). Violation of a departmental regulation, rule or order is, however, only evidence of negligence, see Introductory Statement, supra, and PJI 2:29. Notwithstanding that the meaning of the marking is defined by regulation, the charge applies the *Martin v Herzog* principle and informs the jury that driving to the left of the marking is negligence because it is the statute that interdicts driving to the left of the marking.

The Legislature is the body that has declared that individuals have a duty not to drive to the left of such markings as are in place upon the highway. The reason for the rule that violation of a regulation is merely evidence of negligence is that the legislature cannot delegate to an administrative body authority to make substantive law, *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001); *Major v Waverly & Ogden, Inc.*, 7 NY2d 332, 197 NYS2d 165, 165 NE2d 181

(1960); *Schumer v Caplin*, 241 NY 346, 150 NE 139 (1925). The Legislature has left it to the Department of Transportation to cooperate with officials of cities and villages in adopting uniform markings, VTL § 1610, and has left the determination of which portions of the highway shall be marked as no-passing zones to the Department as to state highways, VTL § 1621(11), to the legislative body of a city or village as to highways in such city or village, VTL § 1640(7), to the county superintendent of highways as to county roads, VTL § 1650(3), to the town board with respect to highways outside of villages in the town, VTL § 1660(4), and to certain other local authorities within their respective jurisdictions, VTL § 1683(9). The repetition of the prohibition in the regulation is but declaratory of the statute. Therefore, there is no delegation of authority of the type proscribed by *Schumer v Caplin*, *supra*. The conclusion that violation of VTL § 1126 is negligence is not inconsistent with cases such as *Blixton v MacNary*, 23 AD2d 573, 256 NYS2d 362 (2d Dept 1965), and *Gale v New York*, 18 AD2d 12, 238 NYS2d 135 (1st Dept 1963), which hold that the mere fact that a vehicle is on the wrong side of the road does not constitute negligence as a matter of law. As is shown by the reference in the *Gale* opinion to “the presence and location of the barricade,” 18 AD2d at p. 13, 238 NYS2d at 137, the possibility of an excused violation had not been ruled out. In any event, both *Blixton* and *Gale* involved summary judgment motions and were decided prior to *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966).

Noncompliance with the statute may be justified by emergency or other unusual circumstances, in which case the pattern charge should be used together with PJI 2:27. Moreover, the statute itself in subdivision (b) provides that its “limitations shall not apply to the driver of a vehicle turning left while entering or leaving such highway,” and see VTL § 1120(c).

The marking referred to in the pattern charge is the full barrier double yellow line. Subd (a) of 15 NYCRR § 261.4 also defines a partial barrier as follows:

The partial barrier, . . . is a double line marking consisting of a solid yellow line and a parallel broken white line.

The partial barrier on two lane and three lane roadways shall be the marking which defines a no-passing zone for traffic in one direction. Vehicles proceeding along the highway in the direction which places the solid line to the right of the broken line may not be driven on the left side of the partial barrier. Vehicles proceeding in the opposite direction, i.e., the direction which places the solid line to the left of the broken line, are not prohibited from driving on the left side of the partial barrier and hence may cross the partial barrier at the discretion of the drivers.

When it is claimed that defendant crossed a solid yellow line that

was to the right of a parallel broken white line, the pattern charge must be modified accordingly.

PJI 2:27. Statutory Standard of Care—Justifiable Non-compliance With Statute [To be used with PJI 2:26]

As you have heard, the defendant CD claims that any violation of [*identify statute violated*] was justified by [*state claimed justification, such as the avoidance of a child who suddenly ran into the street*]. CD has the burden of proof on this claim.

Although there are laws that govern the actions of people using the streets and highways, people are also expected to use common sense and reasonable care under the particular circumstances and conditions. Under certain circumstances and conditions, it might create less risk to CD or others if CD disobeyed rather than obeyed [*identify statute violated*].

If you find that CD violated [*identify statute violated*] but that, under the circumstances, obeying that law would have placed CD [*add where appropriate: or another person placed at risk*] in greater danger than (he, she) would have been in if CD had not violated the law, then you will find that CD was not negligent because of (his, her) violation.

Comment

[See also Introductory Statement to this division, supra.]

Based on *Tedla v Ellman*, 280 NY 124, 19 NE2d 987 (1939), in which the Court of Appeals held that where the legislature has enacted a statute embodying the common law standard of care, violation of the statute need not result in a holding of negligence per se if emergency or unusual circumstances justify non-compliance, see *Petosa v New York*, 52 AD2d 919, 383 NYS2d 397 (2d Dept 1976) (citing PJI); see also Restatement, Second, Torts § 288A. Note that the violation of the statute may be excused where one exercised reasonable care in an effort to comply, see PJI 2:86; *Sherman v M. Lowenstein & Sons, Inc.*, 28 AD2d 922, 282 NYS2d 142 (2d Dept 1967); *Phillips v Roux Laboratories*, 286 App Div 549, 145 NYS2d 449 (1st Dept 1955).

Once the plaintiff has established a prima facie case, showing viola-

tion of the statute, the defendant has the burden of coming forward with evidence to demonstrate that his conduct was justified under the circumstances, *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920); *Barber v Jewel Tea Co.*, 252 App Div 362, 300 NYS 302 (3d Dept 1937), *aff'd*, 278 NY 540, 16 NE2d 94 (1938); *Alongi v Beuter*, 286 App Div 990, 144 NYS2d 756 (4th Dept 1955); *Schaeffer v Caldwell*, 273 App Div 263, 78 NYS2d 652 (4th Dept 1948). The jury need not be so told, however, for to do so may confuse them and the rule concerning the burden of going forward is for the guidance of the judge in determining whether a *prima facie* case has been made or whether a verdict should be directed. Note, however, in *Ortiz v Kinoshita & Co.*, 30 AD2d 334, 292 NYS2d 48 (1st Dept 1968), the court held that the jury should be told that violation of a statute is sufficient to support a finding of negligence contributing to the happening of the accident unless the probative force of the evidence of violation is overcome, see *Tomaselli v Goldstein*, 104 AD2d 872, 480 NYS2d 382 (2d Dept 1984) (citing PJI); *Finn v New York State Dept. of Mental Hygiene*, 49 AD2d 995, 374 NYS2d 394 (3d Dept 1975). Whether justification existed may, on the facts of a particular case, be a question for the court, *Rees v Grandelli*, 21 NY2d 946, 289 NYS2d 977, 237 NE2d 230 (1968).

PJI 2:28. Statutory Standard of Care—Special Statutory Actions

Plaintiff bases (his, her) claim upon a violation of § 11-101 of the General Obligations Law of the State of New York. The statute states as follows:

“Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.”

Unlawful selling occurs when a person sells, delivers, or gives away, or causes, permits or procures the sale, delivery or gift of, any alcoholic beverage to any visibly intoxicated person. A person is visibly intoxicated when a reasonable person would conclude, based on observation of

the subject's appearance and conduct, that the person is intoxicated.

Violation of the statute creates liability. While the statute is not violated unless the subject was visibly intoxicated, it does not matter whether defendant knew that (his, her) conduct was in violation of the statute. You may not disregard a violation of the statute and substitute some other standard of care in place of the statutory liability. What you must determine is whether plaintiff has proved that defendant violated the statute.

If you find (1) that the defendant unlawfully sold an alcoholic beverage to AB at (2) a time when AB was visibly intoxicated, (3) that such sale was a cause or contributed to AB's intoxication in any appreciable degree and (4) that there is some reasonable connection between the intoxication and plaintiff's injury, you must find for plaintiff on this issue. If, however, you find that the defendant did not unlawfully sell an alcoholic beverage to AB, or that AB was not visibly intoxicated at the time, or that any such sale did not cause or contribute to AB's intoxication, or that there is no reasonable connection between the intoxication and plaintiff's injury, you must find for the defendant on this issue.

Comment

[See also Introductory Statement to this division, supra.]

Based on *Van Gaasbeck v Webatuck Central School Dist. No. 1*, 21 NY2d 239, 287 NYS2d 77, 234 NE2d 243 (1967); *Koenig v Patrick Const. Corporation*, 298 NY 313, 83 NE2d 133 (1948); *Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 200 NE 824 (1936); *Karpeles v Heine*, 227 NY 74, 124 NE 101 (1919); see *Mitchell v Shoals, Inc.*, 26 AD2d 78, 271 NYS2d 137 (1st Dept 1966), *aff'd*, 19 NY2d 338, 280 NYS2d 113, 227 NE2d 21 (1967); *Moyer v Lo Jim Cafe, Inc.*, 19 AD2d 523, 240 NYS2d 277 (1st Dept 1963), *aff'd*, 14 NY2d 792, 251 NYS2d 30, 200 NE2d 212 (1964); *Allan v Keystone Nineties, Inc.*, 74 AD2d 992, 427 NYS2d 107 (4th Dept 1980), concerning the effect of a statute imposing absolute liability; see *Mitchell v Shoals, Inc.*, *supra*, and *Moyer v Lo Jim Cafe, Inc.*, *supra*, for the application of absolute liability under General Obligations Law § 11-101. See Alcoholic Beverage Control Law § 65 for the definition of unlawful selling; and Alcoholic Beverage

Control Law § 3(19) for the definition of liquor, which includes beer, *Bartkowiak v St. Adalbert's Roman Catholic Church Soc.*, 40 AD2d 306, 340 NYS2d 137 (4th Dept 1973). See General Obligations Law § 11-100 for liability where alcohol is furnished, without a sale, to an underage person. General Obligations Law § 11-103 makes similar provisions for an action against one “unlawfully selling to or unlawfully assisting in procuring a controlled substance.”

The pattern charge is designed for use in cases where plaintiff's cause of action was created by a statute imposing absolute liability. Such cause of action is not dependent on proof of specific acts of negligence. Breach of the statutory duty necessitates a finding of liability, see Introductory Statement, *supra*. As to comparative fault, see PJI 2:36.

I. General Obligations Law §§ 11-100 and 11-101

A. Generally

Liability under GOL §§ 11-100 and 11-101 attaches only in the event of an “unlawful” sale or delivery of alcohol, see *McGlynn v St. Andrew the Apostle Church*, 304 AD2d 372, 761 NYS2d 151 (1st Dept 2003); *Cole v O'Tooles of Utica, Inc.*, 222 AD2d 88, 643 NYS2d 283 (4th Dept 1996). That term is defined in Alcoholic Beverage Control Law § 65. However, Alcoholic Beverage Control Law § 65 does not create a private right of action, *Sherman by Sherman v Robinson by Robinson*, 80 NY2d 483, 591 NYS2d 974, 606 NE2d 1365 (1992); *Parslow v Leake*, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014); *Carr v Kaifler*, 195 AD2d 584, 601 NYS2d 8 (2d Dept 1993). The cause of action is established in General Obligations Law §§ 11-100 and 11-101, which, as an exception to the common law rule, must be read narrowly and not enlarged beyond its borders, *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987). Plaintiffs, asserting a cause of action under General Obligations Law § 11-101, need not specifically mention the statute in their complaint to properly state a statutory cause of action, *Cole v O'Tooles of Utica, Inc.*, 222 AD2d 88, 643 NYS2d 283 (4th Dept 1996). See generally concerning the New York Dram Shop Act, *Manfredonia v American Airlines, Inc.*, 68 AD2d 131, 416 NYS2d 286 (2d Dept 1979); Notes: 30 Albany L Rev 271; Note, 8 Syracuse L Rev 252.

B. Alcoholic Beverage Control Law § 65; unlawful sale of alcohol

1. Sale to a Visibly Intoxicated Person

Alcoholic Beverage Control Law § 65 (subd. 2) prohibits the sale, delivery or gift of alcoholic beverages to “any visibly intoxicated person.” The pattern charge is designed for use in a case where plaintiff claims that this portion of Alcoholic Beverage Control Law § 65 was violated. Prior to its amendment in 1986, the statute proscribed the dispensation of alcoholic beverages to “any intoxicated person or to any person, actually or apparently, under the influence of liquor.” The use of the disjunctive in the former version of the statute seemed to create liability even

if the defendant was not put on notice that a person was “intoxicated” by any objective outward appearance. However, the caselaw tended to require that plaintiff establish that defendant have knowledge or notice of intoxication, *Senn v Scudieri*, 165 AD2d 346, 567 NYS2d 665 (1st Dept 1991); *Gonyea v Folger*, 133 AD2d 964, 520 NYS2d 670 (3d Dept 1987). The 1986 legislation, L. 1986, c. 750, was intended to “clarify” the issue by limiting the applicability of this aspect of Alcoholic Beverage Control Law § 65 to cases where the seller had a reasonable basis for knowing that the consumer was intoxicated, see Governor’s Memorandum of Approval, 1986 Session Laws of NY, p. 3194; *Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589, 684 NE2d 19 (1997). The amendment deleted the prohibition on the dispensing of alcoholic beverages to persons “actually or apparently under the influence of liquor” and limited the prohibition only to the dispensing of alcoholic beverages to persons “visibly intoxicated,” L. 1986, ch. 750. The legislature’s use of the term “visible,” however, does not create a rigid requirement that this essential element of the claim be established by direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person’s demeanor at the time and place that the alcohol was served, *Romano v Stanley*, *supra*. To the contrary, the statutory language does not preclude the introduction of circumstantial evidence to establish the visible intoxication of the customer, *id*; see *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (1998); *Marconi v Reilly*, 254 AD2d 463, 678 NYS2d 785 (2d Dept 1998). Thus, although individual factors such as a person’s consumption of a quantity of alcohol and the odor of alcohol on the person’s breath may alone be insufficient to support a finding of visible intoxication, it is error to give an instruction suggesting that such factors would constitute insufficient evidence even if considered together, *LaCatena v M.C. & E.D. Beck, Inc.*, 35 AD3d 388, 825 NYS2d 727 (2d Dept 2006).

a. Evidence of Visible Intoxication

Evidence that a person has consumed alcohol and has the odor of alcohol on his or her breath is not conclusive proof of intoxication, since the effect of alcohol may differ greatly from person to person, *Burkhard v Sunset Cruises, Inc.*, 191 AD2d 669, 595 NYS2d 555 (2d Dept 1993); *Senn v Scudieri*, 165 AD2d 346, 567 NYS2d 665 (1st Dept 1991). A factual determination of intoxication cannot be made solely on the basis of how much alcohol a person has consumed, *id*; see *Csizmadia v Town Of Webb*, 289 AD2d 854, 735 NYS2d 222 (3d Dept 2001). Therefore, proof of a high blood alcohol count, standing alone, does not establish the visible intoxication that Alcoholic Beverage Control Law § 65(2) requires, *Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589, 684 NE2d 19 (1997).

Direct evidence that the seller knew that the customer was intoxicated should satisfy the “visibly” intoxicated standard. However, circumstantial evidence to establish visible intoxication is admissible and sufficient to establish liability, see *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (1998) (expert’s testimony, taken

together with police officer's accounts of defendant's behavior at accident scene shortly after he left bar and inferences jury was permitted to draw from bar's failure to call a bartender who was on duty and had opportunity to serve defendant patron, provided ample evidence that defendant patron was visibly intoxicated when served at bar); *Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589, 684 NE2d 19 (1997) (statutory language does not preclude the introduction of circumstantial evidence to establish visible intoxication of customer); *Calagiovanni v Carello*, 177 AD3d 1286, 111 NYS3d 481 (4th Dept 2019) (eyewitness testimony that defendant was visibly intoxicated shortly after being served his last drink raised issue of fact as to whether he was visibly intoxicated at time he was served); *Marconi v Reilly*, 254 AD2d 463, 678 NYS2d 785 (2d Dept 1998) (deposition testimony of police officer and plaintiffs who observed defendant's appearance and demeanor at accident scene, as well as expert affidavit from forensic toxicologist, were sufficient to demonstrate question of fact as to whether defendant was visibly intoxicated when she was sold liquor); *Martinez v Camardella*, 161 AD2d 1107, 558 NYS2d 211 (3d Dept 1990) (direct evidence of actual amount of alcohol consumed by intoxicated person not required under former version of ABCL § 65(2)). The 1986 legislation only sought to require that the seller have "sufficient notice" of the customer's condition, Governor's Memorandum of Approval, 1986 Session Laws of NY, p. 3194. Accordingly, it appears that liability may be imposed where a reasonable person, observing the customer's outward objective appearance and conduct, would conclude that the customer was intoxicated. The seller is liable even if the seller denies that the customer was intoxicated, claims that the customer's intoxication was not visible to the seller, or claims that he or she did not observe the customer.

Where, on a motion for summary judgment, the seller presents evidence which negates the allegation that alcohol was sold to an intoxicated person, to defeat the motion plaintiff must present evidence sufficient to permit the inference of intoxication at the time of the sale, *Donato v McLaughlin*, 195 AD2d 685, 599 NYS2d 754 (3d Dept 1993); *Meizinger v Akin*, 192 AD2d 1011, 596 NYS2d 930 (3d Dept 1993); *Terbush v Buchman*, 147 AD2d 826, 537 NYS2d 916 (3d Dept 1989); *Wasserman v Godoy*, 136 AD2d 631, 523 NYS2d 597 (2d Dept 1988); *Gonyea v Folger*, 133 AD2d 964, 520 NYS2d 670 (3d Dept 1987); see *Ray v Barnhart*, 117 AD2d 874, 498 NYS2d 588 (3d Dept 1986). Evidence of mere consumption of alcohol is not sufficient to defeat a motion for summary judgment in a Dram Shop action, *Pizzaro v New York*, 188 AD2d 591, 591 NYS2d 485 (2d Dept 1992); see *Wolf v Paxton-Farmer*, 23 AD3d 1046, 803 NYS2d 468 (4th Dept 2005); *Csizmadia v Town Of Webb*, 289 AD2d 854, 735 NYS2d 222 (3d Dept 2001). Conversely, evidence that a person was not visibly intoxicated when he first entered the bar is not sufficient to establish summary judgment for the seller where the seller did not submit any evidence that the person was not visibly intoxicated when the bartender served him another drink approximately 45 minutes later and others at the bar could have bought the person drinks that evening, *Duran v Poggio*, 244 AD2d 162, 663 NYS2d 572 (1st Dept 1997).

Vehicle and Traffic Law § 1192 makes illegal the operation of a motor vehicle while (1) the operator's ability to operate is impaired by the consumption of alcohol; (2) the operator has .08 of one per centum or more by weight of alcohol in his or her blood; (3) the operator is intoxicated; or (4) the operator's ability to operate is impaired by the use of drugs. Vehicle and Traffic Law § 1195 provides that upon "the trial of any action or proceeding" arising out of actions committed by a person arrested for a violation of § 1192, test results of the amount of alcohol or drugs in the operator's blood are admissible. § 1195 further provides for the legal effect to be given such evidence, see *People v Blair*, 98 NY2d 722, 749 NYS2d 809, 779 NE2d 748 (2002); PJI 2:20. In *People v Blair*, supra, the Court held that the People were entitled at trial to an opportunity to rebut the presumption established by VTL § 1195 in attempting to establish that defendant was intoxicated. The Fourth Department has held that where blood test results are admitted into evidence, the court must instruct the jury as to the legal effect of such test results, *Van Valkenburgh v Koehler*, 164 AD2d 971, 559 NYS2d 766 (4th Dept 1990) (error to refuse to charge that a blood alcohol test result of .01 of one percent was prima facie proof that the subject's ability to drive was not impaired and that the subject was not intoxicated); see *Calagiovanni v Carello*, 177 AD3d 1286, 111 NYS3d 481 (4th Dept 2019) (issue of fact as to whether violations of GOL § 11-101 and Alcohol Beverage Control Law § 65 caused decedent's death, notwithstanding that defendant's blood alcohol content was measured at .05% approximately two and one-half hours after accident); *Johnson v Plotkin*, 172 AD2d 88, 577 NYS2d 329 (3d Dept 1991) (Third Department holds that blood alcohol content of .26% is "some evidence" of intoxication). However, the Second Department has held that the evidentiary presumptions set forth in VTL § 1195 as to the legal effect to be given test results need not be charged in civil cases, and in any event are inapplicable to tests which do not involve testing of breath, blood, urine or saliva, *McCarthy v Fernandez*, 156 AD2d 544, 549 NYS2d 51 (2d Dept 1989). The above case law must be read in light of the amendments effective November 1, 2003, which lower the blood alcohol percentages in VTL §§ 1192 and 1195.

2. *Provision of Alcohol to Minors*

In addition to prohibiting sales to visibly intoxicated persons, Alcoholic Beverage Control Law § 65 also proscribes the sale of alcoholic beverages to two other types of persons. The statute, in subdivision 1, prohibits the sale, delivery or giving of alcoholic beverages to any person who is actually or apparently under "the age of twenty-one years." Prior to 1985 the statute had fixed the legal drinking age at nineteen. GOL § 11-101 thus imposes liability upon a vendor for injuries resulting from the sale of liquor to a person actually or apparently underage, even when such person was sober at the time of the sale, *Powers v Niagara Mohawk Power Corp.*, 129 AD2d 37, 516 NYS2d 811 (3d Dept 1987); see *Cole v O'Tooles of Utica, Inc.*, 222 AD2d 88, 643 NYS2d 283 (4th Dept 1996). However, to assert a cause of action under GOL § 11-101, plaintiff must establish that the underage person who was sold alcohol was

intoxicated at the time of the incident causing injuries, *Aminov v East 50th Street Restaurant Corp.*, 232 AD2d 592, 649 NYS2d 452 (2d Dept 1996). Liability under General Obligations Law § 11-101 may be imposed only on a person who knowingly causes or contributes to intoxication by selling or assisting in the procurement of alcohol for persons known or reasonably believed to be underage, *Sherman by Sherman v Robinson by Robinson*, 80 NY2d 483, 591 NYS2d 974, 606 NE2d 1365 (1992). The term “assisting in procuring” alcohol includes using one’s own money to purchase alcohol for another and contributing money to the purchase of alcohol, *Bregartner v Southland Corp.*, 257 AD2d 554, 683 NYS2d 286 (2d Dept 1999).

Subdivision 3 of the statute makes unlawful the sale, delivery, or giving of alcoholic beverages to any “habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages.”

GOL § 11-101 and Alcohol Beverage Control Law § 65 are to be read together, see *Mitchell v Shoals, Inc.*, 26 AD2d 78, 271 NYS2d 137 (1st Dept 1966), *aff’d*, 19 NY2d 338, 280 NYS2d 113, 227 NE2d 21 (1967); *Moyer v Lo Jim Cafe, Inc.*, 19 AD2d 523, 240 NYS2d 277 (1st Dept 1963), *aff’d*, 14 NY2d 792, 251 NYS2d 30, 200 NE2d 212 (1964); *Matalavage v Sadler*, 77 AD2d 39, 432 NYS2d 103 (2d Dept 1980).

C. General Obligations Law § 11-101

General Obligations Law section 11-101 has consistently been held applicable only to sales of alcohol for profit, i.e., commercial sales, *D’Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987); *McGlynn v St. Andrew the Apostle Church*, 304 AD2d 372, 761 NYS2d 151 (1st Dept 2003); *Haskell v Chautauqua County Fireman’s Fraternity, Inc.*, 184 AD2d 12, 590 NYS2d 637 (4th Dept 1992). A vendor cannot be held liable under General Obligations Law section 11-101 absent evidence that it sold alcoholic beverages directly to the alleged tortfeasor, *Haskell v Chautauqua County Fireman’s Fraternity, Inc.*, *supra*; *Stewart v Taylor*, 167 AD2d 846, 562 NYS2d 253 (4th Dept 1990). General Obligations Law § 11-101 does not impose liability upon a private person who serves (as at a private party) alcoholic beverages, *Joly v Northway Motor Car Corp.*, 132 AD2d 790, 517 NYS2d 595 (3d Dept 1987); *Conigliaro v Franco*, 122 AD2d 15, 504 NYS2d 186 (2d Dept 1986); *Gabrielle v Craft*, 75 AD2d 939, 428 NYS2d 84 (3d Dept 1980); *Lauer v Slobbe*, 65 AD2d 938, 411 NYS2d 551 (4th Dept 1978); *Schirmer v Yost*, 60 AD2d 789, 400 NYS2d 655 (4th Dept 1977); *Paul v Hogan*, 56 AD2d 723, 392 NYS2d 766 (4th Dept 1977); *Edgar v Kajet*, 84 Misc2d 100, 375 NYS2d 548 (Sup 1975), *aff’d*, 55 AD2d 597, 389 NYS2d 631 (2d Dept 1976). The statute does not impose liability upon an employer for the off-premises acts of an intoxicated employee where the employer did not make a commercial sale of alcohol to the employee nor upon an employee’s association which was not engaged in the commercial sale of alcohol to its members, *D’Amico v Christie*, *supra*. Neither a private association which sponsored a picnic is liable in negligence for the conduct of an intoxicated member which occurred outside the picnic area, *D’Amico v*

Christie, *supra*; Casselberry v Dominick, 143 AD2d 528, 533 NYS2d 31 (4th Dept 1988) (union local which sponsored a banquet not liable for damage done by intoxicated member where it purchased the alcohol from membership dues and ticket sales and did not make any direct or commercial sale of alcohol). Nor is an employer, who directed an intoxicated employee to leave work, liable in negligence to a person struck by the employee's vehicle, D'Amico v Christie, *supra*; see also Ohdan v New York, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000); Ramsammy v New York, 216 AD2d 234, 628 NYS2d 693 (1st Dept 1995) (neither university nor security firm it employed was liable for injuries sustained by pedestrian struck by drunk driver who had been instructed by security guard to move car which was illegally parked). However, if the host is in a position to control the conduct of the inebriate on the premises, there may be liability for negligence, Huyler v Rose, 88 AD2d 755, 451 NYS2d 478 (4th Dept 1982).

General Obligations Law § 11-101 imposes an absolute liability unknown to the common law and is not based on negligence, Bertholf v O'Reilly, 74 NY 509 (1878); Moyer v Lo Jim Cafe, Inc., 19 AD2d 523, 240 NYS2d 277 (1st Dept 1963), *aff'd*, 14 NY2d 792, 251 NYS2d 30, 200 NE2d 212 (1964); see 3 NYJur2d 458-473, Alcoholic Beverages §§ 121-133. It is, therefore, error to charge that violation of Alcoholic Beverage Control Law § 65 is evidence of negligence, Moyer v Lo Jim Cafe, Inc., *supra*. The section is remedial in character and its true meaning should not be enlarged, Wright v Sunset Recreation, Inc., 91 AD2d 701, 457 NYS2d 606 (3d Dept 1982), and thus does not extend to a landlord whose business (a bowling alley) adjoins and is serviced by a tenant-tavern, see also Dowling v Stephan, 206 Misc 518, 133 NYS2d 667 (Sup 1954).

A cause of action under the Dram Shop Act, GOL § 11-101, is separate and distinct from a wrongful death action and, therefore, is subject to the three year statute of limitations, CPLR 214(2), rather than the two year period imposed by EPTL 5-4.1, Bongiorno v D.I.G.I., Inc., 138 AD2d 120, 529 NYS2d 804 (2d Dept 1988).

General Obligations Law § 11-101 will apply where the illegal sale of the intoxicating beverage occurs in New York, even though the resulting injury takes place out of state, Rutledge v Rockwells of Bedford, Inc., 200 AD2d 36, 613 NYS2d 179 (2d Dept 1994); see Patton v Carnrike, 510 F Supp 625 (NDNY 1981). GOL § 11-101 is inapplicable, because of Federal preemption, to a claim arising out of injuries sustained during the course of an air flight originating in New York, Manfredonia v American Airlines, Inc., 68 AD2d 131, 416 NYS2d 286 (2d Dept 1979). Note, however, that the court recognized a claim arising out of Federal regulations prohibiting sales of alcoholic beverages to an intoxicated passenger.

D. General Obligations Law § 11-100

Consistent with the increase in the legal drinking age to age twenty-one, General Obligations Law § 11-100 creates a cause of action in

certain circumstances for persons injured by reason of the intoxication or impairment of someone under the age of twenty-one. This action to recover “actual damages” (thus precluding “exemplary damages,” which are recoverable under GOL § 11-101) applies to “any person who knowingly causes . . . intoxication or impairment . . . by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person under 21, with knowledge or reasonable cause to believe that such person was under the age of twenty-one years,” GOL § 11-100(1); see *Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822, 693 NE2d 1074 (1998); *Heins v Vanbourgonvien*, 180 AD3d 1019, 119 NYS3d 158 (2d Dept 2020). It appears that GOL § 11-100(1) modifies the holdings under GOL § 11-101 so as to impose liability where alcohol is furnished, without a sale, to an underage person, *McCauley v Carmel Lanes Inc.*, 178 AD2d 835, 577 NYS2d 546 (3d Dept 1991). GOL § 11-100 does not provide a right of recovery for underage individuals who seek to recover for injuries sustained as a result of their own intoxication, *Heins v Vanbourgonvien*, *supra*; *Parslow v Leake*, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014); *Rudden v Bernstein*, 61 AD3d 736, 878 NYS2d 373 (2d Dept 2009). However, a parent of an underage injured person may recover for medical and other expenses incurred on behalf of that person, *Parslow v Leake*, *supra*; *Rudden v Bernstein*, *supra*.

Where defendant allegedly gave permission for the alcohol at the party she was planning, provided storage for the alcohol both before and after the party, negotiated a share of the proceeds from cup sales of alcohol for herself and attempted to arrange for her friends to drink the alcohol without charge, defendant could be held liable under the statute, *Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822, 693 NE2d 1074 (1998); see *Fantuzzo v Attridge*, 291 AD2d 871, 737 NYS2d 192 (4th Dept 2002); *Lane v Barker*, 241 AD2d 739, 660 NYS2d 194 (3d Dept 1997). Similarly, the members of a fraternity who held a party at which a minor was given alcohol were potentially liable under GOL § 11-100 where there were questions of fact as to whether each was involved in a plan to host a party at which alcohol would be served to underage individuals and whether each helped to procure the alcohol for the party through dues or fees charged to attendees, *Parslow v Leake*, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014). But liability may not be imposed under GOL § 11-100(1) based on defendant’s mere knowledge that underage persons were consuming alcoholic beverages, where defendant did not furnish or assist in procuring the alcoholic beverages, *MacGilvray v Denino*, 149 AD2d 571, 540 NYS2d 449 (2d Dept 1989). Nor may liability be imposed under GOL § 11-100 where underage drinking occurs upon an individual’s premises without his or her knowledge or permission, or with alcoholic beverages the defendant did not “furnish” or “procure,” *Lane v Barker*, *supra*; *Reickert v Misciagna*, 183 AD2d 151, 590 NYS2d 100 (2d Dept 1992); see *Fantuzzo v Attridge*, *supra*; *Cole v O’Tooles of Utica, Inc.*, 222 AD2d 88, 643 NYS2d 283 (4th Dept 1996); *Pelinsky v Rockensies*, 209 AD2d 392, 618 NYS2d 103 (2d Dept 1994); see also *Lombart v Chambery*, 19 AD3d 1110, 797 NYS2d 216 (4th Dept 2005). Where alcohol is sold to an underage person, GOL § 11-101 imposes liability upon the vendor, even where the underage person was sober at the time

of the sale, *Powers v Niagara Mohawk Power Corp.*, 129 AD2d 37, 516 NYS2d 811 (3d Dept 1987), and authorizes a cause of action against a person under 21, *Schrader v Carney*, 180 AD2d 200, 586 NYS2d 687 (4th Dept 1992). The individual minor who by reason of intoxication causes injury must be the very person to whom defendant sold or furnished the alcoholic beverages to establish a cause of action under GOL §§ 11-100, 11-101, *Sherman by Sherman v Robinson by Robinson*, 80 NY2d 483, 591 NYS2d 974, 606 NE2d 1365 (1992); *Ahigian v Davis*, 6 AD3d 956, 774 NYS2d 845 (3d Dept 2004); *Jacobs v Amodeo*, 208 AD2d 1171, 618 NYS2d 120 (3d Dept 1994); *Dalrymple v Southland Corp.*, 202 AD2d 548, 609 NYS2d 284 (2d Dept 1994); *Rann by Rann v Hamilton*, 194 AD2d 599, 599 NYS2d 51 (2d Dept 1993). Nothing in the General Obligations Law imposes a duty upon a defendant, merely because of the quantity of alcoholic beverages purchased, to investigate possible, ultimate consumers beyond its doors, *Sherman by Sherman v Robinson by Robinson*, supra; *Jacobs v Amodeo*, supra; see *Ahigian v Davis*, supra. However, while GOL § 11-100 imposes liability on persons who unlawfully furnish or assist in procuring alcoholic beverages to underage persons where no sale is involved, the statute does not extend so far as to impose liability upon the manufacturer and retailer of a simulated driver's license which was used by the underage person to purchase alcoholic beverages from a store, *Etu v Cumberland Farms, Inc.*, 148 AD2d 821, 538 NYS2d 657 (3d Dept 1989).

II. Common Law Negligence

Courts have declined to impose common law negligence liability upon a tavern owner for the acts of voluntarily intoxicated patrons in instances where the injury occurred at a location distant from the tavern owner's establishment and outside the area controlled by the tavern owner, *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 (3d Dept 1993); *Marianne OO v C & M Tavern Inc.*, 180 AD2d 998, 580 NYS2d 549 (3d Dept 1992); *Hosmer v Distler*, 150 AD2d 974, 541 NYS2d 650 (3d Dept 1989); *Besner v Bucci*, 135 AD2d 1081, 523 NYS2d 300 (4th Dept 1987); *Delamater v Kimmerle*, 104 AD2d 242, 484 NYS2d 213 (3d Dept 1984); see *Sheehy v Big Flats Community Day, Inc.*, 137 AD2d 160, 528 NYS2d 213 (3d Dept 1988), aff'd, 73 NY2d 629, 543 NYS2d 18, 541 NE2d 18 (1989); *Haskell v Chautauqua County Fireman's Fraternity, Inc.*, 184 AD2d 12, 590 NYS2d 637 (4th Dept 1992); *Etu v Cumberland Farms, Inc.*, 148 AD2d 821, 538 NYS2d 657 (3d Dept 1989); *Powers v Niagara Mohawk Power Corp.*, 129 AD2d 37, 516 NYS2d 811 (3d Dept 1987) see also *Portaro v Gerber*, 217 AD2d 539, 629 NYS2d 277 (2d Dept 1995) (plaintiff-bartender not comparatively negligent, as a matter of law, where, after arriving at home of inebriated defendant who he had earlier served at bar, bartender was accidentally shot and killed by defendant). Nor have the courts imposed liability upon a tavern owner for the injuries sustained by a customer who voluntarily furnished alcohol to a third person who thereby became intoxicated and injured the customer, *Vandenburg v Brosnan*, 129 AD2d 793, 514 NYS2d 784 (2d Dept 1987), aff'd, 70 NY2d 940, 524 NYS2d 672, 519 NE2d 618 (1988); see *Campbell v Step/Lind Restaurant Corp.*, 143 AD2d

111, 531 NYS2d 576 (2d Dept 1988). The Court of Appeals has refused to impose common law liability upon a convenience store operator who sold beer to a minor with fake identification when that minor thereafter gave the liquor to another minor who caused plaintiff's injuries, *Sherman v Sherman v Robinson v Robinson*, 80 NY2d 483, 591 NYS2d 974, 606 NE2d 1365 (1992).

Common law negligence liability may be imposed for breach of duty to adequately supervise and control patrons within an area where such supervision and control might reasonably be exercised, *Panzer v Johnny's II*, 253 AD2d 864, 678 NYS2d 336 (2d Dept 1998); *Lippman v Hines*, 138 AD2d 845, 525 NYS2d 955 (3d Dept 1988); see *Kern v Ray*, 283 AD2d 402, 724 NYS2d 457 (2d Dept 2001); *Lane v Barker*, 241 AD2d 739, 660 NYS2d 194 (3d Dept 1997) (discussing common law duty of private landowner to control conduct of third persons); see also *Lombart v Chambery*, 19 AD3d 1110, 797 NYS2d 216 (4th Dept 2005); *Dynas v Nagowski*, 307 AD2d 144, 762 NYS2d 745 (4th Dept 2003). But liability may not be imposed upon the lessor of an assembly hall for the conduct of persons brought onto the premises by the tenant where the lessor has no opportunity to control their conduct and is not reasonably aware of the necessity for doing so, *Cavanaugh v Knights of Columbus Council 4360*, 142 AD2d 202, 535 NYS2d 275 (3d Dept 1988); see *McGlynn v St. Andrew the Apostle Church*, 304 AD2d 372, 761 NYS2d 151 (1st Dept 2003); *Toma v Charbonneau*, 186 AD2d 846, 588 NYS2d 219 (3d Dept 1992); see also *Aronson v Hyatt Intern. Corp.*, 202 AD2d 153, 608 NYS2d 187 (1st Dept 1994); *Reickert v Misciagna*, 183 AD2d 151, 590 NYS2d 100 (2d Dept 1992). The statute is not exclusive, and when the pleadings and evidence present questions for the jury on both the statutory and the common-law liability, it is error not to charge both, *Morrissey v Sheedy*, 26 AD2d 683, 272 NYS2d 430 (2d Dept 1966); Annot: 76 ALR3d 1218.

III. Causation

In order to recover under General Obligations Law § 11-101, plaintiff must show that the furnishing of liquor was a cause of intoxication of the person to whom the liquor was furnished, although it need not be found that it was the "proximate cause" in the sense in which those words are normally used, see *Morales v New York*, 70 NY2d 981, 526 NYS2d 418, 521 NE2d 425 (1988); *Neu v McKechnie*, 95 NY 632 (1884); *Mead v Stratton*, 87 NY 493 (1882); *Bertholf v O'Reilly*, 74 NY 509 (1878); *Volans v Owen*, 74 NY 526 (1878); *Daggett v Keshner*, 284 App Div 733, 134 NYS2d 524 (1st Dept 1954), mod, 6 AD2d 503, 179 NYS2d 428 (1st Dept 1958), aff'd, 7 NY2d 981, 199 NYS2d 41, 166 NE2d 324 (1960); *Aminov v East 50th Street Restaurant Corp.*, 232 AD2d 592, 649 NYS2d 452 (2d Dept 1996); *Church v Burdick*, 227 AD2d 817, 642 NYS2d 426 (3d Dept 1996); 3 NYJur2d 469, *Alcoholic Beverages* § 131; Annot: 64 ALR2d 705; 65 ALR2d 923. It is enough to show that it was a contributing cause. If the liquor sold or furnished contributed in any appreciable degree to the intoxication, the case is within the statute, *Johnson v Plotkin*, 172 AD2d 88, 577 NYS2d 329 (3d

Dept 1991), and it is immaterial that the intoxicated person did not purchase the liquor exclusively from the defendant, *Lawson v Eggleston*, 28 App Div 52, 52 NYS 181 (4th Dept 1898), *aff'd*, 164 NY 600, 59 NE 1124 (1900). It is sufficient under the statute if some reasonable or practical connection between the unlawful sale and the resulting injuries is established, *Catania v 124 In-To-Go, Corp.*, 287 AD2d 476, 731 NYS2d 207 (2d Dept 2001); *Bartkowiak v St. Adalbert's Roman Catholic Church Soc.*, 40 AD2d 306, 340 NYS2d 137 (4th Dept 1973). Proximate cause in the conventional common law negligence action is not required, *Cruceta v Funnel Equities, Inc.*, 286 AD2d 747, 730 NYS2d 531 (2d Dept 2001); *Bartkowiak v St. Adalbert's Roman Catholic Church Soc.*, *supra*.

IV. Damages

The statutes referred to above (General Obligations Law §§ 11-100, 11-101), commonly create causes of action on behalf of any person "who shall be injured in person, property, means of support or otherwise" by an intoxicated person under the circumstances defined in each statute respectively, *Dunphy v J & I Sports Enterprises, Inc.*, 297 AD2d 23, 748 NYS2d 595 (2d Dept 2002). Note that the statutory causes of action run in favor of two classes of persons: those injured by any intoxicated person (the situation covered by the pattern charge) and those injured by reason of the intoxication of any person. The statutes do not create a cause of action in favor of a party whose intoxication resulted from an illegal sale, *Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629, 543 NYS2d 18, 541 NE2d 18 (1989); *Marsico v Southland Corp.*, 148 AD2d 503, 539 NYS2d 378 (2d Dept 1989); *Powers v Niagara Mohawk Power Corp.*, 129 AD2d 37, 516 NYS2d 811 (3d Dept 1987); *Reuter v Flobo Enterprises, Ltd.*, 120 AD2d 722, 503 NYS2d 67 (2d Dept 1986); *Delamater v Kimmerle*, 104 AD2d 242, 484 NYS2d 213 (3d Dept 1984); see *Van Neil v Hopper*, 167 AD2d 954, 561 NYS2d 1019 (4th Dept 1990) and *McCulloch v Standish*, 167 AD2d 723, 563 NYS2d 294 (3d Dept 1990) (declining to make an exception in the case of an infant who became intoxicated). Nor may the personal representative of such an intoxicated person sue on behalf of the estate or for wrongful death, *Delamater v Kimmerle*, *supra*; *Matalavage v Sadler*, 77 AD2d 39, 432 NYS2d 103 (2d Dept 1980); *Annot*: 94 ALR2d 1140. Nor does an infant to whom liquor is illegally sold have a cause of action against the operator of the bar under the Dram Shop Act, *Sheehy v Big Flats Community Day, Inc.*, *supra*; *Etu v Cumberland Farms, Inc.*, 148 AD2d 821, 538 NYS2d 657 (3d Dept 1989); *Powers v Niagara Mohawk Power Corp.*, *supra*. Penal Law § 260.20(4) makes it unlawful dealing with a child (a Class B misdemeanor) to give or sell, or cause to give or sell, any alcoholic beverage to a person under twenty one, except where the beverage is provided to the infant by a parent or guardian or as part of a course of instruction during classes licensed by the Education Department. *Sheehy v Big Flats Community Day, Inc.*, *supra*, holds that there is no private cause of action for violation of Penal Law § 260.20(4).

A cause of action exists in favor of a spouse, child or parent injured

in “means of support” by the death of a spouse, parent, or child as the result of intoxication, *Mead v Stratton*, 87 NY 493 (1882); *Lyons v Tiedemann*, 135 AD2d 509, 522 NYS2d 159 (2d Dept 1987), but there can be no recovery for loss of consortium, *Valicenti v Valenze*, 68 NY2d 826, 507 NYS2d 616, 499 NE2d 870 (1986); *Dunphy v J & I Sports Enterprises, Inc.*, 297 AD2d 23, 748 NYS2d 595 (2d Dept 2002), or for loss of services, affection and companionship, *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743, 858 NYS2d 692 (2d Dept 2008); *Ray v Galloway’s Cafe*, 221 AD2d 612, 634 NYS2d 495 (2d Dept 1995); *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 (3d Dept 1993); *McCauley v Carmel Lanes Inc.*, 178 AD2d 835, 577 NYS2d 546 (3d Dept 1991); but see *Reuter v Flobo Enterprises, Ltd.*, 120 AD2d 722, 503 NYS2d 67 (2d Dept 1986), or for the mental distress suffered by a parent, *Marsico v Southland Corp.*, 148 AD2d 503, 539 NYS2d 378 (2d Dept 1989). The parents of a deceased infant can recover for medical and funeral expenses, since the right to recover such damages is based on a parent’s obligation to support a minor child, *McArdle v 123 Jackpot, Inc.*, *supra*. Decedent’s voluntary support of a former spouse or voluntary support of a companion with whom decedent had children is sufficient to entitle the supported person to maintain the action for loss of “means of support,” even though decedent was not under a legal obligation to contribute that support under a court order, *Soto v Montanez*, 173 AD2d 90, 578 NYS2d 758 (4th Dept 1991). Likewise, a decedent’s stepchild who was the recipient of voluntary contributions of support from the deceased may maintain an action for loss of support under the statute, *Rutledge v Rockwells of Bedford, Inc.*, 200 AD2d 36, 613 NYS2d 179 (2d Dept 1994). Evidence that plaintiffs received public assistance payments was relevant to demonstrate that such payments were the source of plaintiffs’ support, rather than voluntary payments from decedents, as plaintiffs had alleged, and, therefore, that plaintiffs were not injured in their means of support, *Soto v Montanez*, 201 AD2d 876, 608 NYS2d 37 (4th Dept 1994).

General Obligations Law § 11-100(4) provides that “[i]n any case where the parents shall be entitled to [actual] damages, either of such parents may bring an action therefore.” A cause of action pursuant to this section is entirely statutory and does not depend upon the pendency of a cause of action on behalf of the injured person, *Reickert v Misciagna*, 183 AD2d 151, 590 NYS2d 100 (2d Dept 1992). General Obligations Law § 11-100(4) will only give rise to a cause of action in favor of parents where it can be shown that a defendant furnished to or assisted in procuring alcoholic beverages for the parent’s child, *id*.

After the death of a person injured by reason of the intoxication of another, the action may be brought or maintained by his or her personal representative, GOL § 11-101(2), but the recoverable damages are limited to the damages that the injured party could have recovered had death not ensued, *Scheu v High-Forest Corp.*, 129 AD2d 366, 517 NYS2d 798 (3d Dept 1987). Where the parents of a deceased child, whose death resulted from the intoxication of another person, maintain the action in their individual capacities to recover for injury to “means of support,”

the parents must establish either that the child had a legal duty to support them or that the child had voluntarily assumed a duty of support, *id.* Thus, parents may not recover for loss of “projected future means of support” where the child had not contributed to his parents’ support and had no legal duty to do so, *Gigliotti v Byrne Dairy, Inc.*, 249 AD2d 973, 672 NYS2d 172 (4th Dept 1998); *Marsico v Southland Corp.*, 148 AD2d 503, 539 NYS2d 378 (2d Dept 1989). But recovery is permitted by a parent who was receiving support from a minor child, even though the child may not have had a legal duty to contribute support, *Ray v Galloway’s Cafe*, 221 AD2d 612, 634 NYS2d 495 (2d Dept 1995); *Raynor v C.G.C. Grocery Corp.*, 159 AD2d 463, 552 NYS2d 316 (2d Dept 1990). Funeral expenses are “means of support” damages and may not be recovered absent a showing that the parent lacks sufficient means to pay such expenses, *Gigliotti v Byrne Dairy, Inc.*, *supra*; *Marsico v Southland Corp.*, *supra*. However, in order for a parent to recover such expenses, it is not necessary to establish that the parent was thereby reduced to a state of dependency, *Raynor v C.G.C. Grocery Corp.*, *supra*. The statute does not authorize recovery by a benefactor who makes gratuitous payments to health care providers who furnish medical services to a person injured as a result of intoxication, *Dunphy v J & I Sports Enterprises, Inc.*, 297 AD2d 23, 748 NYS2d 595 (2d Dept 2002).

Parents of a deceased child to whom liquor was sold illegally may maintain an action in their individual capacities but not as personal representatives of the deceased child, *Powers v Niagara Mohawk Power Corp.*, 129 AD2d 37, 516 NYS2d 811 (3d Dept 1987); see *Ray v Galloway’s Cafe*, 221 AD2d 612, 634 NYS2d 495 (2d Dept 1995); *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 (3d Dept 1993); *McCauley v Carmel Lanes Inc.*, 178 AD2d 835, 577 NYS2d 546 (3d Dept 1991). Where an intoxicated spouse has died, injury to the surviving spouse’s means of support is measured as of the date of death, *Fox v Mercer*, 109 AD2d 59, 489 NYS2d 792 (4th Dept 1985). Thus, it is irrelevant whether the survivor has remarried, has received insurance proceeds, or otherwise mitigated or has been compensated for the loss of support, *Fox v Mercer*, *supra*. Further, the statute is available to a plaintiff who participated in drinking with a person whose intoxication caused plaintiff’s injury, if plaintiff did not cause, procure or encourage the latter’s intoxication, *Mitchell v Shoals, Inc.*, 19 NY2d 338, 280 NYS2d 113, 227 NE2d 21 (1967); Annot: 26 ALR3d 1112. But no right of action exists in favor of a plaintiff who procured the alcohol for the person whose intoxication caused the incident, *Vandenburg v Brosnan*, 129 AD2d 793, 514 NYS2d 784 (2d Dept 1987), *aff’d*, 70 NY2d 940, 524 NYS2d 672, 519 NE2d 618 (1988); *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 (3d Dept 1993); *Schrader v Carney*, 198 AD2d 779, 604 NYS2d 376 (4th Dept 1993); see *Heins v Vanbourgon-dien*, 180 AD3d 1019, 119 NYS3d 158 (2d Dept 2020). However, the purchase of liquor by one who is intoxicated, for his or her own use, does not constitute unlawful “assisting in procuring liquor for such intoxicated person,” *Soto v Montanez*, 201 AD2d 875, 608 NYS2d 36 (4th Dept 1994).

It is important to distinguish between a person who procured

alcohol for the intoxicated person and is, therefore barred from recovery, and a person who was only a drinking companion, who is not barred, *Slocum v D's & Jayes Valley Restaurant & Cafe, Inc.*, 182 AD2d 981, 582 NYS2d 544 (3d Dept 1992). The term "procure" has been interpreted to include persons who contribute money toward the purchase of alcohol, *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 (3d Dept 1993). The actions of one spouse in approaching the bar to obtain possession of alcohol for consumption by the other spouse constituted the procuring of alcohol which precluded recovery, even though the procuring spouse used funds of the consuming spouse to pay for the alcohol, *id.*

Generally, as to what constitutes an injury under Dram Shop Acts, see Annot: 6 ALR2d 798; 78 ALR3d 1199.

V. Contribution

The seller and the intoxicated person are joint tortfeasors entitled to seek contribution from each other in connection with a claim by an injured third party pursuant to CPLR 1401, *Zona v Oatka Restaurant and Lounge, Inc.*, 68 NY2d 824, 507 NYS2d 615, 499 NE2d 869 (1986); *Herrick v Second Cuthouse, Ltd.*, 100 AD2d 952, 475 NYS2d 91 (2d Dept 1984), *aff'd*, 64 NY2d 692, 485 NYS2d 518, 474 NE2d 1186 (1984); PJI 2:275. There is a right of contribution between the defendant liable under the statute and another involved in an accident with the intoxicated person, *Weinheimer v Hoffman*, 97 AD2d 314, 470 NYS2d 804 (3d Dept 1983).

Where the decedent and the vendee are not the same person, and decedent's fault is unrelated to the consumption or provision of alcoholic beverages, but rather flows from evidence that decedent was driving negligently at the time of the accident, the vendor may maintain a contribution claim against the decedent, *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (1998). Rather than allowing the vendor to reduce its share of damages for its own wrongdoing, application of the comparable fault statute in such circumstances merely prevents the vendor from paying a portion of damages for conduct it could not have prevented, *id.* But, a vendor who violates the Dram Shop Act is not entitled to contribution from the deceased vendee's estate in an action by the vendee's dependents, *Coughlin v Barker Ave. Associates*, 202 AD2d 622, 609 NYS2d 646 (2d Dept 1994); *Bartlett v Grande*, 103 AD2d 671, 481 NYS2d 566 (4th Dept 1984). Where there has been a settlement between plaintiff and the intoxicated person, the provisions of GOL § 15-108(a) apply with respect to reduction of the recovery from the tavern owner, *Scheu v High-Forest Corp.*, 129 AD2d 366, 517 NYS2d 798 (3d Dept 1987); see PJI 2:275A.

Successive sellers may seek contribution from each other, except as to punitive damages, *Smith v Guli*, 106 AD2d 120, 484 NYS2d 740 (4th Dept 1985).

Where the injured party has sued the intoxicated person, the

intoxicated person may seek contribution from the dram shop under the Dram Shop Act, *Cresswell v Warden*, 164 AD2d 855, 559 NYS2d 361 (2d Dept 1990).

VI. Miscellaneous

Neither an intoxicated driver nor the driver's distributees may maintain a common law action against the owner of the vehicle on the theory of negligent entrustment, *Shultes v Carr*, 127 AD2d 916, 512 NYS2d 276 (3d Dept 1987); see *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 (3d Dept 1993). A plaintiff's intoxication at the time of an accident precludes the plaintiff, as a matter of law, from asserting a claim for negligent entrustment against a police officer who allegedly allowed plaintiff to operate a motor vehicle in an intoxicated condition, *Luczak v Colonie*, 233 AD2d 691, 650 NYS2d 455 (3d Dept 1996).

PJI 2:29. Statutory Standard of Care—Ordinances or Regulations

Plaintiff claims that the defendant violated a (city ordinance, regulation). If you find that the defendant violated the (ordinance, regulation), you may consider the violation as some evidence of negligence, along with the other evidence in the case, provided that such violation was a substantial factor in bringing about the injury [in bifurcated trial, substitute: accident or occurrence].

Section ____ of the ____ (City Ordinance, Regulations) provides as follows: [Here read applicable section(s) and relate to facts of case.]

Comment

[See also Introductory Statement to this division, supra.]

The above charge is based upon *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Conte v Large Scale Development Corp.*, 10 NY2d 20, 217 NYS2d 25, 176 NE2d 53 (1961); *Major v Waverly & Ogden, Inc.*, 7 NY2d 332, 197 NYS2d 165, 165 NE2d 181 (1960); *Rosenberg v Schwartz*, 260 NY 162, 183 NE 282 (1932); *Hyland v Cobb*, 252 NY 325, 169 NE 401 (1929); *Schumer v Caplin*, 241 NY 346, 150 NE 139 (1925); see *Durham v Metropolitan Elec. Protective Ass'n*, 18 NY2d 433, 276 NYS2d 601, 223 NE2d 17 (1966); *Hill v Cartier*, 258 AD2d 699, 685 NYS2d 336 (3d Dept 1999); *Cotter v Spear*, 139 AD2d 555, 527 NYS2d 55 (2d Dept 1988) (citing PJI). Proximate cause must be defined for the jury, see PJI 2:70, and the charge must

relate the alleged violations to the concept of proximate cause and thus avoid confusing the jury, *Nielsen v New York*, 38 AD2d 592, 328 NYS2d 698 (2d Dept 1971). The regulation must be one meant to avoid the condition or situation out of which the plaintiff's claim arose, *McSweeney v Rogan*, 209 AD2d 386, 618 NYS2d 430 (2d Dept 1994); *Barnes v Stone-Quinn*, 195 AD2d 12, 606 NYS2d 485 (4th Dept 1993); *Farkas v Saary*, 191 AD2d 178, 594 NYS2d 195 (1st Dept 1993) (FDA regulation); *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991); *O'Leary v American Airlines*, 100 AD2d 959, 475 NYS2d 285 (2d Dept 1984). Further, a regulation which controls the undertaking of a governmental activity may not be used to create an inference of negligence where, as a matter of law, a duty to act had not yet arisen, see *Morgen v New York*, 110 AD2d 501, 487 NYS2d 39 (1st Dept 1985). The jury should not be instructed as to a regulation or ordinance unless there is evidence to support a finding that the provision was violated, *Montoya v Vasquez*, 185 AD2d 875, 586 NYS2d 1003 (2d Dept 1992); *Christoforou v Lown*, 120 AD2d 387, 502 NYS2d 184 (1st Dept 1986); see *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept 1996); *Marigliano v New York*, 196 AD2d 533, 601 NYS2d 161 (2d Dept 1993) (abrogated on other grounds by, *Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769, 716 NYS2d 24 (2d Dept 2000)).

Statutory causes of action predicated upon violations of administrative regulations do not give rise to strict liability, *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002).

Ordinances, regulations and orders within the principle of the pattern charge include (1) rules adopted by the Board of Standards and Appeals, pursuant to Labor Law §§ 202, 241, *Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 741 NYS2d 491, 767 NE2d 1136 (2002); *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132, 433 NE2d 115 (1982); *Nestor v Consolidated Edison Co. of New York, Inc.*, 16 NY2d 1025, 265 NYS2d 905, 213 NE2d 315 (1965); *Fisher v Brown Group, Inc.*, 256 AD2d 1069, 683 NYS2d 773 (4th Dept 1998); *Culver v Gloo*, 27 AD2d 698, 276 NYS2d 969 (4th Dept 1967); (2) the regulations of the State Traffic Commission, *Nourse v Welsh*, 23 AD2d 618, 257 NYS2d 96 (4th Dept 1965), and of the Commissioner of Traffic of the City of New York, *Piarulli v Lason*, 35 AD2d 605, 313 NYS2d 613 (2d Dept 1970); (3) a condition set down by a Zoning Board on the granting of a permit, *Healy v New Rochelle*, 25 AD2d 446, 266 NYS2d 861 (2d Dept 1966); (4) the provisions of the State Uniform Fire Prevention and Building Code, *Hill v Cartier*, 258 AD2d 699, 685 NYS2d 336 (3d Dept 1999); *Wagner v Kenific*, 161 AD2d 1092, 557 NYS2d 650 (3d Dept 1990); (5) the provisions of the Administrative Code of the City of New York, regardless of whether the provision is specific, *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001); *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996); and (6) the provisions of the New York State Fuel Gas Code, *Palmatier v Mr. Heater Corporation*, 163 AD3d 1228, 81 NYS3d 610 (3d Dept 2018). The code, rule or regulation must have been published pur-

suant to Executive Law § 106 before it is permitted to be read into the record, *Maloney v Union Free School Dist. No. 7*, 41 AD2d 937, 343 NYS2d 648 (2d Dept 1973). Care must, however, be taken to check the statute under which a regulation was promulgated, for a regulation which goes beyond the underlying statute is invalid, *Georgiou v State*, 28 AD2d 1027, 283 NYS2d 767 (3d Dept 1967).

For the purposes of tort law, a governmental entity engaged in a proprietary activity is liable for failing to comply with the same regulatory standards applicable to other similarly situated landowners, *Huerta v New York City Transit Authority*, 290 AD2d 33, 735 NYS2d 5 (1st Dept 2001). Thus, the New York City Administrative Code is applicable to the New York City Transit Authority, a public authority, and the Authority's violation of a provision of the Code has the same tort consequences as a violation of any other pertinent ordinance, *id.*

On a motion for summary judgment to dismiss a claim based on a provision of the Administrative Code, it is the movant's burden to establish the inapplicability of Administrative Code provisions, *Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 (1st Dept 2000).

Violation of regulations of the Federal Occupational Safety and Health Administration (OSHA), which create duties of employers to employees, may be considered as evidence of negligence in an action under Labor Law § 200 against an owner or general contractor exercising supervisory control over a subcontractor's employee, *Landry v General Motors Corp., Cent. Foundry Div.*, 210 AD2d 898, 621 NYS2d 255 (4th Dept 1994). Such violation, however, does not impose a non-delegable duty on an owner or general contractor under Labor Law § 241(6), *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 (1998); *Holly v Chautauqua*, 63 AD3d 1558, 881 NYS2d 741 (4th Dept 2009), *rev'd*, 13 NY3d 931, 895 NYS2d 308, 922 NE2d 897 (2010); *Pellescki v Rochester*, 198 AD2d 762, 605 NYS2d 692 (4th Dept 1993). OSHA regulations are inadmissible if they were enacted subsequent to the design and erection of the building in question or if plaintiff does not fall within the class of protected employees, *Alesse v Valley Stream Cent. High School Dist. No. 13*, 202 AD2d 326, 609 NYS2d 217 (1st Dept 1994).

With respect to internal operating procedures, see PJI 2:16. While an internal agency rule may be introduced as evidence of the standard of reasonable care, violation of a rule requiring a standard of care higher than the common law cannot be a basis for defendant's liability, *Brown v Metropolitan Transit Authority*, 281 AD2d 159, 721 NYS2d 56 (1st Dept 2001); *Rodriguez v New York City Transit Authority*, 273 AD2d 370, 710 NYS2d 100 (2d Dept 2000).

Local Laws adopted pursuant to the Municipal Home Rule Law and the Statute of Local Governments (L. 1964, ch 205) are enacted by local legislative bodies and, it would appear, fall within the rule of the pattern charge.

If a state statute imposes regulations upon a particular locality, such statute may be superseded in some instances by local law pursuant to Municipal Home Rule Law § 22. Therefore care should be taken to be sure that such state law has not been superseded or modified by local law.

As to the admissibility at trial of an administrative regulation not raised in plaintiff's bill of particulars, see *Barzaghi v Maislin Transport*, 115 AD2d 679, 497 NYS2d 131 (2d Dept 1985).

It is error to permit a party to attempt to prove negligence by expert testimony regarding the meaning and applicability of a statute or regulation imposing a standard of care, *LaPenta v Loca-Bik Ltee Transport*, 238 AD2d 913, 661 NYS2d 132 (4th Dept 1997); *Rodriguez v New York City Housing Authority*, 209 AD2d 260, 618 NYS2d 352 (1st Dept 1994); *Ross v Manhattan Chelsea Associates*, 194 AD2d 332, 598 NYS2d 502 (1st Dept 1993).

Ignorance of the existence of an ordinance or regulation does not excuse a party from complying with its dictates, *Hill v Cartier*, 258 AD2d 699, 685 NYS2d 336 (3d Dept 1999).

C. PLAINTIFF'S NEGLIGENCE

Introductory Statement

With the advent of the comparative negligence system in 1975, plaintiff's contributory fault is no longer an absolute bar to recovery. Under the standard of comparative negligence, plaintiff's fault may proportionally diminish the recovery but will not preclude recovery unless plaintiff was solely at fault, CPLR 1411.

Comparative fault principles apply to all tort actions which accrue on or after September 1, 1975, CPLR 1413. Since very few, if any, cases remain to be tried which accrued prior to September 1, 1975, the materials presented in the Third Edition which are germane only to a contributory negligence system have been omitted. In particular, the former charge on contributory negligence (PJI 2:35) and the former charge on last clear chance (PJI 2:60) are not included herein. The doctrine of last clear chance allowed mitigation of the harsh effects of the contributory negligence rule by permitting plaintiff to recover, despite his or her contributory negligence, where defendant was aware of the danger confronted by plaintiff and negligently failed to take available means to avoid injury to plaintiff, see *Rudman v New York City Transit Authority*, 22 NY2d 863, 293 NYS2d 122, 239 NE2d 746 (1968); *Kumkumian v New York*, 305 NY 167, 111 NE2d 865 (1953). In a comparative negligence system, the parties' respective shares of culpable conduct presents factual issues for the jury to consider in determining the apportionment of responsibility. Accordingly, it would be inappropriate to instruct the jury as to last clear chance.

The general charge as to plaintiff's comparative fault is PJI 2:36 which has been found to be "the proper jury charge on comparative negligence and the apportionment of damages," *Luppino by Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986); see *Heath v Makita Corp.*, 255 AD2d 419, 681 NYS2d 289 (2d Dept 1998) (citing PJI). However, other charges may be required in special situations, see PJI 2:41 (comparative fault, emergency situation, rescue of person); 2:42 (comparative fault, emergency situation, rescue of property); 2:45 (comparative fault, intoxicated person); 2:46 (comparative fault, person with mental deficiency); 2:47 (comparative fault, aged or physically disabled person); 2:48 (comparative fault, infant); 2:49 (comparative fault, infant, violation of statute). Where the plaintiff has alleged more than one cause of action not all of which are subject to comparative fault principles, the comparative fault charge must be tailored appropriately, see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016).

An instruction on the issue of comparative negligence should be given where there is any valid line of reasoning or permissible inferences which could lead rational individuals to the conclusion of negligence on the basis of the evidence presented, *Bruni v New York*, 2 NY3d 319, 778 NYS2d 757, 811 NE2d 19 (2004); *Kutza v Bovis Lend*

Lease LMB, Inc., 131 AD3d 838, 16 NYS3d 58 (1st Dept 2015); *Johnson v New York City Transit Authority*, 88 AD3d 321, 929 NYS2d 215 (1st Dept 2011); *Shea v New York City Transit Authority*, 289 AD2d 558, 735 NYS2d 609 (2d Dept 2001).

Notwithstanding the adoption of comparative negligence, there are circumstances where plaintiff's fault is so substantial as to preclude any recovery.

First, plaintiff may not recover where the injuries were sustained by reason of plaintiff's own negligence and any fault on the part of defendant was not a cause of such injuries. This type of case almost invariably presents factual issues for the jury.

Second, plaintiff may be precluded from recovery where his or her conduct constituted a serious violation of law and the injuries were sustained as the direct result of that violation, see *Alami v Volkswagen of America, Inc.*, 97 NY2d 281, 739 NYS2d 867, 766 NE2d 574 (2002); *Oriental v U-Haul Co. of Arizona*, 130 AD3d 702, 13 NYS3d 488 (2d Dept 2015); *Hathaway v Eastman*, 122 AD3d 964, 996 NYS2d 382 (3d Dept 2014); *Wolfe v Hatch*, 95 AD3d 1394, 943 NYS2d 296 (3d Dept 2012). In such instances, recovery is denied, not because plaintiff contributed to his or her own injuries, but because public policy denies judicial relief to those injured in the course of serious criminal conduct, *Manning by Manning v Brown*, 91 NY2d 116, 667 NYS2d 336, 689 NE2d 1382 (1997); *Barker v Kallash*, 63 NY2d 19, 479 NYS2d 201, 468 NE2d 39 (1984); *LaPage v Smith*, 166 AD2d 831, 563 NYS2d 174 (3d Dept 1990); see *Rice v New York City Housing Authority*, 239 AD2d 400, 658 NYS2d 347 (2d Dept 1997), see also *Soto v New York City Transit Authority*, 6 NY3d 487, 813 NYS2d 701, 846 NE2d 1211 (2006) (declining to extend preclusion principle to plaintiff who acted recklessly in running along catwalk adjacent to subway tracks, while intoxicated, in effort to catch train); *Bumbolo v Faxton St. Luke's Healthcare*, 196 AD3d 1119, 151 NYS3d 770 (4th Dept 2021) (plaintiff's plea of not responsible by reason of mental disease or defect to killing three family members did not preclude him from suing mental health care providers who discharged him). When the above test is met, recovery is precluded "at the very threshold of the plaintiff's application for judicial relief," *Barker v Kallash*, *supra*. However, plaintiff is not precluded from recovering by violations of law that are not deemed sufficiently "serious," such as driving without a valid motorcycle license and registration or driving without insurance, both of which are traffic infractions, *Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 852 NYS2d 148 (2d Dept 2008). Determination of whether a "serious" violation of the law occurred necessarily must be made upon due consideration of all the relevant facts and circumstances, including the extent to which the public at large was threatened, see *Hathaway v Eastman*, *supra* (in case involving plaintiff's participation in high-speed drag race, that plaintiff was a passenger in vehicle as opposed to a driver was one of many factors to consider); *Wolfe v Hatch*, *supra* (in case involving plaintiff's participation in detonation of dangerous firework-like explo-

sive device, court considered plaintiff's age at the time of the incident, the nature of the device and the potential danger it posed to plaintiff and others). In turn, in considering whether the public at large was threatened, the issue is whether the potential for harm from the conduct existed to the public, not whether the public was actually threatened, *Wolfe v Hatch*, *supra*. A plaintiff may also be precluded from recovery where his or her conduct was so reckless as to constitute an intervening and superseding event that severs any causal nexus between the occurrence of the accident and any alleged negligence on the part of the defendant, *Nelson v New York City Transit Authority*, 170 AD3d 1184, 96 NYS3d 342 (2d Dept 2019); *Lynch v Metropolitan Transp. Authority*, 82 AD3d 716, 917 NYS2d 685 (2d Dept 2011).

Third, "express" and "primary" assumption of risk continue to bar recovery. Express assumption of risk involves an agreement between the parties in advance that defendant need not use reasonable care for benefit of plaintiff and will not be liable to plaintiff for the consequences of negligent conduct, *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985). For a charge to use where it is claimed that there was an express assumption of risk, see PJI 2:55A. Primary assumption of risk, which serves to relieve a defendant of its duty of reasonable care and is a complete bar to recovery, applies to those situations where the activity in which the plaintiff is voluntarily participating is itself inherently risky, such as sporting and entertainment events, and the injury-causing event is a known, apparent or reasonably foreseeable consequence of such participation, *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986); *Walter v State*, 235 AD2d 623, 651 NYS2d 704 (3d Dept 1997). A full discussion of cases following *Turcotte* appears in the Comment to 2:55. Since primary assumption of risk involves a judicial limitation on the duty owed to certain categories of plaintiffs, the issue as to the scope of defendant's duty is one for the court, *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 (2d Dept 2013). On the other hand, where plaintiff's conduct constitutes "implied" assumption of risk, plaintiff may recover but damages may be diminished on account of plaintiff's conduct, *id.* Implied assumption of risk involves, not an express contract, but conduct by plaintiff voluntarily encountering the risk with full understanding of the possible harm, see *Arbegas v Board of Educ. of South New Berlin Cent. School*, *supra*. For a charge on implied assumption of risk, see PJI 2:55. Where comparative fault and implied assumption of the risk are both jury issues, the jury should be instructed to consider plaintiff's fault in its totality and assign a single percentage to that fault, *Ciserano v Sforza*, 130 AD2d 618, 515 NYS2d 548 (2d Dept 1987); *McCabe v Easter*, 128 AD2d 257, 516 NYS2d 515 (3d Dept 1987); see *Weinberger v Solomon Schechter School of Westchester*, *supra*; *Smith v Lebanon Valley Auto Racing Inc.*, 194 AD2d 946, 598 NYS2d 858 (3d Dept 1993).

A related concept is where plaintiff's fault consists of non-use of an available seat belt. Plaintiff may not recover for those injuries which would have been prevented by the use of a seat belt, see *Spier v Barker*,

35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974) (citing PJI). For a charge as to non-use of a seat belt, see PJI 2:87.1. Note, however, where the separate seat belt charge is given, care should be taken to charge comparative fault (PJI 2:36) only with respect to culpable conduct other than failure to wear a seat belt, in order to prevent the jury from apportioning the same conduct twice, see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984).

1. COMPARATIVE FAULT: DEFINED

PJI 2:36. Comparative Fault

If you find that the defendant was negligent and that the defendant's negligence contributed to causing (the accident, injury, [or other appropriate characterization of the event]), you must next consider whether the plaintiff (decedent) was also negligent and whether the plaintiff's (decedent's) conduct contributed to causing (the accident, injury, [or other appropriate characterization of the event]).

[Where the defendant's fault has been established prior to trial, the first paragraph of this charge should be modified:] **Prior to trial, the Court determined that the defendant was negligent and that the defendant's negligence contributed to causing (the accident, injury, [or other appropriate characterization of the event]) in that (specify the conduct of the defendant the Court determined to be negligent). You must determine whether the plaintiff (decedent) also was negligent and whether the plaintiff's (decedent's) conduct contributed to causing (the accident, injury, [or other appropriate characterization of the event]). However, in light of the Court's determinations as to the defendant's fault, you may not find that the plaintiff was 100% at fault.**

The burden is on the defendant to prove that the plaintiff (decedent) was negligent and that (his, her) negligence contributed to causing [describe, e.g. the accident, injury, or other appropriate characterization of the event]. If you find that the plaintiff (decedent) was not negligent, or if negligent, that (his, her) negligence did not contribute to causing [describe, e.g., the accident, injury, or other appropriate characterization of the event], you must find that plaintiff was not at fault and you must go on to consider damages, if any, submitted by plaintiff [in a bifurcated trial, substitute the following for the direction to go on to consider damages: in that event, you should go no further and report your findings to the court].

If, however, you find that the plaintiff (decedent) was negligent and that (his, her) negligence contributed to causing (the accident, injury, [*or other appropriate characterization of the event*]), you must then apportion the fault between the plaintiff (decedent) and the defendant [*and, where appropriate, AB, a third person*].

Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both the plaintiff (decedent) and the defendant [*and where appropriate, AB*] and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.

It may be helpful to give the jury an example of what the process of arriving at percentages of fault entails, but in doing so the court must take care not to place its imprimatur on possible factual determinations, see *Brown v Moodie*, 116 AD2d 980, 498 NYS2d 603 (4th Dept 1986). The following may be used:

PJI 2:36.1

For example, if you should find that the defendant and the plaintiff (decedent) were equally at fault you would report that each was 50% responsible. If you should find that one party was more at fault, you would assign a higher percentage to that party and a lower percentage to the other, with the total of the percentages equaling one hundred percent.

In the damages stage of the bifurcated trial, before the same jury which decided liability, the following charge should be given before instructing the jury on damages:

PJI 2:36.2

You must now decide from the evidence before you the total amount of damages suffered by the plaintiff in dollars in accordance with the rules that I am about to explain to you. In arriving at the total, you must not consider the percentages of

fault but must simply report the total amount of the plaintiff's damages.

The above supplemental charge was cited with approval in *Heath v Makita Corp.*, 255 AD2d 419, 681 NYS2d 289 (2d Dept 1998) (citing PJI) and *Ferguson v New York*, 201 AD2d 422, 607 NYS2d 939 (1st Dept 1994); see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016). Once the jury returns its verdict fixing the total amount of damages, the court should reduce the total damages by the percentage of fault attributable to plaintiff as fixed in the liability phase of the trial. A trial court's failure to instruct the jury, in accordance with PJI 2:36.2, to disregard its apportionment of fault in calculating the amount of damages is a fundamental error that precludes the jury from properly considering the issue of damages, *Best v Swan Group Ltd. Partnership*, 81 AD3d 1344, 915 NYS2d 782 (4th Dept 2011); see *Vallone v Saratoga Hosp.*, *supra*.

Damages charges appear at PJI 2:277, et seq., infra.

Comment

Caveat 1: The pattern charge deals with the more commonly met problem of negligence, but the statute is broader, applying to all forms of comparative fault as well as implied assumption of the risk, see *infra*, this Comment. The charge does not use the statutory term "culpable conduct" which, it is believed, would be unclear for the jury. When conduct other than negligence is involved a term descriptive of that conduct, such as "fault" or "contributory fault," should be substituted in the pattern charge.

Caveat 2: With respect to PJI 2:36, the better practice is to charge in terms of the fact situation of the particular case rather than in the abstract principles of the pattern charge, and to note that the standard is what a reasonable person would regard as the cause of the incident and that that concept involves considerations of time, space and intimacy of connection, see Comment to PJI 2:70.

Caveat 3: Where the plaintiff has alleged more than one cause of action not all of which are subject to comparative fault principles, the comparative fault charge must be tailored appropriately, see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016).

Caveat 4: Where the court has determined that the defendant was negligent but defers for trial the issue of whether the defendant's negligence was a substantial factor in causing the accident, see *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018), the charge should be appropriately modified.

Caveat 5: Where the defendant's fault has been determined by summary judgment prior to trial and the plaintiff's comparative fault remains an issue, see *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018), the court should consider whether, in its discretion, it would be more expedient to conduct a unified trial, as the jury will necessarily be required to reach the issue of damages.

Where both plaintiffs negligence and implied assumption of risk are involved, while the court should charge separately as to each of these issues, the jury should be instructed to consider plaintiff's fault in its totality and assign a single percentage to that fault, *Ciserano v Sforza*, 130 AD2d 618, 515 NYS2d 548 (2d Dept 1987); *McCabe v Easter*, 128 AD2d 257, 516 NYS2d 515 (3d Dept 1987); see *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 (2d Dept 2013); *Smith v Lebanon Valley Auto Racing Inc.*, 194 AD2d 946, 598 NYS2d 858 (3d Dept 1993).

Based on CPLR Article 14-A which adopted the standard of pure comparative negligence, under which plaintiff's fault may proportionally diminish his or her recovery but will not bar recovery unless plaintiff is solely at fault. The legislative history of Article 14-A will be found in the 1975 Judicial Conference Report, Leg Doc (1975) 65B, (reprinted in 1975 McKinney's Session Laws pp 1482-1492). The pattern charge has been found to be "the proper jury charge on comparative negligence and the apportionment of damages," *Luppino by Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986); see *Vallone v Saratoga Hosp.*, 141 AD3d 886, 35 NYS3d 544 (3d Dept 2016) (citing PJI); *Grant v Nembhard*, 94 AD3d 1397, 943 NYS2d 272 (3d Dept 2012) (citing PJI); *Heath v Makita Corp.*, 255 AD2d 419, 681 NYS2d 289 (2d Dept 1998) (citing PJI). The portion of the charge to be given in the damages stage of a bifurcated trial (PJI 2:36.1) was cited with approval in *Scaduto v Suarez*, 150 AD2d 545, 541 NYS2d 826 (2d Dept 1989).

The pattern charge assumes that there is an issue of proximate cause as to either negligence or comparative negligence; if there is not, the charge need not include the statements concerning proximate cause.

The burden of affirmatively pleading and of proving culpable conduct of plaintiff is upon the party asserting it as a defense in diminution of damages, CPLR 1412; EPTL §§ 5-4.2, 11-3.2(b); *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 (1st Dept 2010); *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979); see *Inglut v Consolidated Rail Corp.*, 185 AD2d 614, 586 NYS2d 41 (4th Dept 1992) (trial court erred in submitting the issue of plaintiff's negligence to jury where defense was neither pleaded nor proven).

In *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018), the Court of Appeals resolved a longstanding question as to whether a plaintiff moving for partial summary judgment on the issue of liability bears the "double burden" of establishing, not only the defendant's fault as a matter of law, but, in addition, plaintiff's freedom

from comparative fault. The Court held that placing the burden on the plaintiff to establish freedom from fault would be inconsistent with the plain language of CPLR 1412, which states that the plaintiff's culpable conduct "shall not bar recovery." Further, CPLR 1412 provides that culpable conduct claimed in diminution of damages is an affirmative defense to be pleaded and proved by the defendant. Accordingly, the Court held that, to obtain partial summary judgment on the issue of liability, a plaintiff need only establish the defendant's fault as a matter of law. However, the issue of a plaintiff's comparative fault may be decided where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence, *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 (2d Dept 2018).

Actions to which the statute applies are those, regardless of theory, "to recover damages for personal injury, injury to property or wrongful death," CPLR 1411, including claims of plaintiffs who are themselves guilty of an intentional wrong, *Lomonte v A & P Food Stores*, 107 Misc2d 88, 438 NYS2d 54 (AppT 1981), unless that conduct rises to the level of "a serious violation of the law" as in *Manning by Manning v Brown*, 91 NY2d 116, 667 NYS2d 336, 689 NE2d 1382 (1997) (plaintiff injured while knowingly participating in unauthorized use of motor vehicle); *Barker v Kallash*, 63 NY2d 19, 479 NYS2d 201, 468 NE2d 39 (1984) (plaintiff injured while constructing a "pipe bomb"); *Moore v Suffolk*, 11 AD3d 591, 783 NYS2d 72 (2d Dept 2004) (plaintiff injured while resisting arrest); *LaPage v Smith*, 166 AD2d 831, 563 NYS2d 174 (3d Dept 1990); see *Soto v New York City Transit Authority*, 6 NY3d 487, 813 NYS2d 701, 846 NE2d 1211 (2006) (plaintiff entitled to recover from defendant for its percentage of fault even though he acted recklessly in running along catwalk adjacent to subway tracks, while intoxicated, in effort to catch train); *Alami v Volkswagen of America, Inc.*, 97 NY2d 281, 739 NYS2d 867, 766 NE2d 574 (2002) (plaintiff successfully opposed summary judgment, even though decedent was intoxicated at time of auto accident, by arguing that design defect enhanced decedent's injuries); see also *Rokitka v Barrett*, 303 AD2d 983, 757 NYS2d 184 (4th Dept 2003) (violation of Penal Law § 265.05 [unlawful possession of weapon by person under sixteen] would not bar plaintiffs' suit when illegal possession not direct cause of injury). Thus, it embraces any action based on breach of duty, whether through negligence, through breach of warranty or predicated upon strict liability, upon a violation of statute giving rise to civil liability or upon intentional misconduct, 1975 McKinney's Session Laws, 1482, 1483–1484, 1486. However, neither comparative negligence nor contributory negligence is a defense to an action based on a statute imposing absolute liability, *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 (2003); *Mullen v Zoebe, Inc.*, 86 NY2d 135, 630 NYS2d 269, 654 NE2d 90 (1995) (comparative negligence no defense to an action by firefighter under General Municipal Law § 205-a); *Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 (1985) and *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 493 NYS2d 102, 482 NE2d 898 (1985) (both holding that comparative negligence is no defense to an action by injured employee under Labor Law § 240); *Dubois*

v Vanderwalker, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997) (comparative negligence no defense to action by police officer under General Municipal Law § 205-e). As to the circumstances under which a pedestrian in a crosswalk may be held comparatively negligent for injuries he or she sustained when struck by a motor vehicle, see Comment to PJI 2:75.

The pattern charge makes clear by use of the phrase “negligence” in relation to both plaintiff and defendant that the same rule concerning degree applies to both.

The standard of care, that of the reasonably prudent person, is the same whether the issue be defendant’s or plaintiff’s negligence, *Nucci v Warshaw Const. Corp.*, 12 NY2d 16, 234 NYS2d 196, 186 NE2d 401 (1962), but since defendant must act with relation to the safety of others whereas plaintiff acts with relation to his or her own safety, it is not necessarily true that an act which the trier of fact finds to constitute negligence, for example, of the driver involved in a two-car collision in relation to his or her passenger, will constitute negligence in the driver’s action against the operator of the other car, *Restatement, Second, Torts* § 464, Illustration 2; see *Schwartz v Public Adm’r of Bronx County*, 24 NY2d 65, 298 NYS2d 955, 246 NE2d 725 (1969); *Nelson v Nygren*, 259 NY 71, 181 NE 52 (1932); *Prosser & Keeton, Torts* (5th Ed), § 65.

Seat belt and crash helmet legislation, which are sometimes urged as the basis for a comparative negligence charge, are considered below and also in the Comment to PJI 2:87. The pattern charge must be modified in cases which present a question as to plaintiff’s non-use of an available seat belt. The non-use of an available seat belt may be considered solely in mitigation of plaintiff’s damages, *Spier v Barker*, 35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974); *Cummins v Rose*, 185 AD2d 839, 586 NYS2d 988 (2d Dept 1992). Except in the unusual case where the failure to use a seat belt is the alleged cause of the collision, see *Curry v Moser*, 89 AD2d 1, 454 NYS2d 311 (2d Dept 1982), to charge that the failure to use the seat belt may be considered culpable conduct may result in allowing the jury, in effect, to apportion liability twice, see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). The above charge should be used with respect to alleged culpable conduct of plaintiff in causing the first collision and PJI 2:87.1 may be adapted with respect to the seat belt issue.

With respect to violation of a statute as a basis for comparative negligence, PJI 2:26 and PJI 2:27 may be adapted; with respect to violation of a statute by an infant, see PJI 2:49; as to comparative negligence of a passenger in a motor vehicle, see PJI 2:87; as to comparative negligence and plaintiff’s loss of memory, see PJI 1:62; and for other specific comparative negligence situations, see Index. Negligence is not a defense to an action for breach of contract, *Nantasket, Inc. v E. F. Raboy & Co.*, 31 AD2d 804, 297 NYS2d 684 (1st Dept 1969). With respect to assumption of risk, see PJI 2:55 and 2:55A. With respect to burden of proof, see PJI 1:23, 1:60, 1:61.

Where both parties may be entitled to a verdict and judgment, the Judicial Conference Report makes clear that it is not intended that any insurance carrier be permitted to set-off against the payment due under its policy to a third person any amount owed by that third person to its insured, 1975 McKinney's Session Laws, 1488, 1489 and so a net judgment should not be entered.

Generally as to comparative fault, see PJI 2:180 (comparative negligence under FELA) and 2:275 (apportionment of fault among joint or concurrent wrongdoers).

Assumption of Risk

Although CPLR 1411 provides that assumption of risk shall not bar recovery, *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985), held that an important distinction is to be made between "express" assumption of risk and "implied" assumption of risk. "Express" assumption of risk involves an agreement between the parties in advance that the defendant need not use reasonable care for benefit of the plaintiff and would not be liable for the consequence of negligent conduct, see PJI 2:10A; 2:55A. In addition, primary assumption of risk, which serves to relieve a defendant of its duty of reasonable care and is a complete bar to recovery, applies to those situations where the activity in which the plaintiff is voluntarily participating is itself inherently risky, such as sporting and entertainment events, and the injury-causing event is a known, apparent or reasonably foreseeable consequence of such participation, *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986); *Walter v State*, 235 AD2d 623, 651 NYS2d 704 (3d Dept 1997). "Implied" assumption of risk is not based upon express contract but upon the plaintiff's voluntarily encountering the risk of harm from defendant's conduct with full understanding of the possible harm. Comparative negligence principles are to be applied to a case involving "implied" assumption of risk and, thus, plaintiff may recover but plaintiff's damages may be diminished, *Arbegas v Board of Educ. of South New Berlin Cent. School*, *supra*; *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 (2d Dept 2013). Nonetheless, in *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007) (citing PJI), the court noted that implied assumption of risk and comparative negligence involve two different types of culpable conduct. The former involves a voluntary encounter with a known risk of harm, while the latter involves a failure to use reasonable care under the circumstances, *id.* Thus, the court adequately addressed plaintiff's culpable conduct when it charged implied assumption of risk where plaintiff arguably disregarded a known risk by voluntarily walking into a loading dock area that he knew was dangerous, but did not act unreasonably while walking in the area, *id.*

For a charge on implied assumption of risk and a comment on implied and primary assumption of risk, see PJI 2:55. For a charge and comment on express assumption of risk, see PJI 2:55A.

Serious Violation of Law by Plaintiff

In addition to “express” and primary assumption of risk, there is another important exception to the general rule that the fault of the plaintiff will not bar recovery: “[W]hen the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff’s conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation. In this latter instance recovery is denied, not because the plaintiff contributed to his or her injury, but because the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act,” *Barker v Kallash*, 63 NY2d 19, 479 NYS2d 201, 468 NE2d 39 (1984); see *Manning v Manning v Brown*, 91 NY2d 116, 667 NYS2d 336, 689 NE2d 1382 (1997); *Wolfe v Hatch*, 95 AD3d 1394, 943 NYS2d 296 (3d Dept 2012). The Barker-Manning Rule “embodies a narrow application of public policy imperatives under limited circumstances,” *Alami v Volkswagen of America, Inc.*, 97 NY2d 281, 739 NYS2d 867, 766 NE2d 574 (2002). The rule denying compensation to the serious offender is limited to claims where the parties to the suit were involved in the underlying criminal conduct or where the criminal plaintiff seeks to impose a duty arising out of an illegal act, *id*; *Wolfe v Hatch*, *supra* (14-year-old’s participation in detonation of dangerous firework-like device, which constituted either unlawfully dealing with fireworks and dangerous fireworks [Penal Law § 270.00] or criminal possession of a weapon in the third degree [Penal Law § 265.02(2)], constituted serious violation of law); see *Oriental v U-Haul Co. of Arizona*, 130 AD3d 702, 13 NYS3d 488 (2d Dept 2015) (staging a motor vehicle accident for pecuniary gain is serious violation of law); *Hathaway v Eastman*, 122 AD3d 964, 996 NYS2d 382 (3d Dept 2014) (individual’s participation, as passenger in vehicle, in high-speed drag race in violation of VTL § 1182[1] constituted a serious violation of law); *Moore v Suffolk*, 11 AD3d 591, 783 NYS2d 72 (2d Dept 2004) (resisting arrest constitutes serious violation); *Craft v Mid Island Dept. Stores, Inc.*, 112 AD2d 969, 492 NYS2d 780 (2d Dept 1985) (Barker doctrine not applicable unless conduct constitutes serious violation of a penal statute). Determination of whether a “serious” violation of the law occurred necessarily must be made upon due consideration of all the relevant facts and circumstances, including the extent to which the public at large was threatened, see *Hathaway v Eastman*, *supra* (in case involving plaintiff’s participation in high-speed drag race, that plaintiff was a passenger in vehicle as opposed to a driver was one of many factors to consider); *Wolfe v Hatch*, *supra* (in case involving plaintiff’s participation in detonation of dangerous firework-like explosive device, court considered plaintiff’s age at the time of the incident, the nature of the device and the potential danger it posed to plaintiff and others). In turn, in considering whether the public at large was threatened, the issue is whether the potential for harm from the conduct existed to the public, not whether the public was actually threatened, *Wolfe v Hatch*, *supra*; see *Hathaway v Eastman*, *supra*. In *Soto v New York City Transit Authority*, 6 NY3d 487, 813 NYS2d 701, 846 NE2d 1211 (2006), the Court of Appeals declined to extend the rule to a

plaintiff who acted recklessly by running along a catwalk adjacent to subway tracks, while intoxicated, in an effort to catch a train.

Plaintiff's Culpable Conduct

CPLR 1411 requires a comparison of conduct which, for whatever reason, the law deems blameworthy, *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); see *Simoneit v Mark Cerrone, Inc.*, 122 AD3d 1246, 996 NYS2d 810 (4th Dept 2014). Where a plaintiff's blameworthy conduct was a substantial factor in causing the plaintiff's injuries, that conduct must be compared with the total culpable conduct that caused the damages, see *Arbegas v Board of Educ. of South New Berlin Cent. School*, *supra*. Therefore, the culpable conduct of plaintiff includes "use of [a] . . . product for other than its normally intended purpose or other than in the manner normally intended," *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); see Comment to PJI 2:120. It also encompasses duty negating concepts such as the "patent danger" rule applicable in actions based on negligence, *Campo v Scofield*, 301 NY 468, 95 NE2d 802 (1950) (ovrld by *Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976)), or strict liability, *Bolm v Triumph Corp.*, 33 NY2d 151, 350 NYS2d 644, 305 NE2d 769 (1973). Additionally, culpable conduct includes intentional misconduct, *Killon v Parrotta*, 125 AD3d 1220, 6 NYS3d 153 (3d Dept 2015), *rev'd on other grounds*, 28 NY3d 101, 42 NYS3d 70, 65 NE3d 41 (2016).

The "culpable conduct" of plaintiff is stated in the pattern charge in traditional negligence language since it concerns the negligence situation and only the effect of the conduct, not the concept of the doctrine, has changed. The pertinent language of other charges should be similarly adapted depending on the facts of the particular case: as to a passenger's negligence, PJI 2:87; as to assumption of risk, PJI 2:55 and 2:55A; as to fault in misuse of a product, PJI 2:120; as to plaintiff's acts in the rescue of another person, PJI 2:41, or of property, PJI 2:42. Although not intended to expand the doctrine of imputed contributory negligence, Article 14-A requires that the legally imputable negligence of others attributable to plaintiff or plaintiff's decedent be considered by the trier of fact, CPLR 1411, and, therefore, the facts of a particular case may require incorporation in the charge of the principles of PJI 2:87, 2:250, 2:262, 2:263 or 2:265. The doctrine of last clear chance is inapplicable to cases governed by CPLR Article 14-A, see *Dominguez v Manhattan and Bronx Surface Transit Operating Authority*, 46 NY2d 528, 415 NYS2d 634, 388 NE2d 1221 (1979); *Duncan by Guidry v Hillebrandt*, 239 AD2d 811, 657 NYS2d 538 (3d Dept 1997); Thirteenth Annual Report of the Judicial Conference to the Legislature on the CPLR, 1975 McKinney's Session Laws 1477, 1488, Farrell, Civil Practice, 27 Syracuse L Rev 425, 437-439. Nevertheless, the factors involved in the doctrine may still be considered by the jury in determining "culpable conduct" and the causation of damages, Report of the Judicial Conference, *supra*; see *Duncan by Guidry v Hillebrandt*, *supra*;

Hoyt v McCann, 88 AD2d 633, 450 NYS2d 231 (2d Dept 1982). Similarly, momentary forgetfulness is not contributory negligence as a matter of law, *Cohen v St. Regis Paper Co.*, 64 NY2d 656, 485 NYS2d 246, 474 NE2d 606 (1984) (citing PJI); but plaintiff's failure to keep a known danger in mind may fall below the standard of reasonable conduct, *Flynn v New York*, 103 AD2d 98, 478 NYS2d 666 (2d Dept 1984).

Causation is a factor, since only culpable conduct that caused damages to plaintiff is to be considered. The issue of the comparative fault of a plaintiff should not be presented to the jury in the absence of evidence that plaintiff's conduct was a substantial cause of plaintiff's injuries, *Grcic v New York*, 139 AD2d 621, 527 NYS2d 263 (2d Dept 1988); see *Popolizio v Schenectady*, 62 AD3d 1181, 879 NYS2d 616 (3d Dept 2009); *Southwell v Riverdale Transit Corp.*, 149 AD2d 385, 540 NYS2d 425 (1st Dept 1989). Where supported by the evidence, a jury may rationally find that a plaintiff was at fault but that such fault was not a substantial factor in causing the accident or injury, *Popolizio v Schenectady*, *supra*. A verdict reflecting such findings would be inconsistent only if the issues were so inextricably intertwined as to make it logically impossible to find negligence without also finding proximate cause, *id*.

Causation is relevant from another perspective as well. There may be cases in which the theory of defendant's liability and the theory of plaintiff's comparative fault are mutually inconsistent. In such cases, it may not always be necessary to instruct the jury on comparative fault, see *Fitzpatrick v A.H. Robbins Co., Inc.*, 126 AD2d 513, 510 NYS2d 632 (2d Dept 1987).

The diminution of recovery is in the proportion which the culpable conduct attributable to plaintiff or plaintiff's decedent bears to the total culpable conduct which causes the damage regardless of the legal character of the parties' conduct, see CPLR 1411. Thus, if defendant's liability is based on breach of warranty, defendant may be entitled to diminution of damages resulting from plaintiff's negligence, see *Velez v Craine & Clark Lumber Corp.*, 33 NY2d 117, 350 NYS2d 617, 305 NE2d 750 (1973). There must also be diminution if plaintiff's negligent conduct placed her in a position to be injured by defendant, even if she would not have suffered any harm but for defendant's negligence, see *Clark v State*, 124 AD2d 879, 508 NYS2d 648 (3d Dept 1986).

Effect of General Obligations Law § 15-108

Where one tortfeasor has settled with plaintiff, a non-settling defendant is entitled to reduction of damages under CPLR 1411 for plaintiff's conduct and under GOL § 15-108 for the amount of the settlement or for the equitable share of the settling tortfeasor, whichever is greater. GOL § 15-108 only applies where parties are "liable in tort for the same injury," *Ackerman v Price Waterhouse*, 252 AD2d 179, 683 NYS2d 179 (1st Dept 1998) (statute not applicable in action against ac-

countant for negligent post-investment advice where earlier settlement was for fraud in inducing investment).

In an action with multiple defendants where two or more of the defendants have settled with the plaintiff prior to submission of the case to the jury, the amount of the GOL § 15-108(a) offset to the jury award is determined by the aggregate method, in which the verdict is reduced either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater, *Matter of New York City Asbestos Litigation [Didner v Keene Corp.]*, 82 NY2d 342, 604 NYS2d 884, 624 NE2d 979; *Pollicina v Misericordia Hosp. Medical Center*, 82 NY2d 332, 604 NYS2d 879, 624 NE2d 974 (1993); see Comment, PJI 2:275A.

A party may amend its pleadings to raise GOL § 15-108 as an affirmative defense at any time, even after trial, provided that the late amendment does not prejudice the other party, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998). Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case that could have been avoided had the original pleading contained the proposed amendment, *id*; *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 444 NYS2d 571, 429 NE2d 90 (1981). Therefore, a non-settling defendant who fails to plead the fault of a settling defendant may, after a verdict, amend its answer to assert GOL § 15-108's set-off provisions as an affirmative defense. However, by failing to seek apportionment of liability against a defendant before a verdict, the non-settling defendant is foreclosed from reducing the verdict by the settling defendant's equitable share of the fault and is limited to a reduction by the amount stipulated or paid by the settling defendant, *Whalen v Kawasaki Motors Corp.*, *supra*.

Where the culpable conduct of a non-party is in issue (whether by virtue of GOL § 15-108 or CPLR Article 16), the negligence and causation instructions to the jury must be amended to deal with that conduct, see Comment to PJI 2:275, 2:275A, 2:275B. AB, referred to in the parenthetical material in the charge, is the non-party charged with culpable conduct contributing to the injury.

In a case where plaintiff is comparatively negligent and a GOL § 15-108 claim is asserted, the Court should first apply the GOL § 15-108 reduction and then apply CPLR 1411 to discount the remaining sum by the proportion of plaintiff's comparative negligence, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 680 NYS2d 435, 703 NE2d 246 (1998).

CPLR 4533-b requires that proof of a settlement by a joint tortfeasor be taken out of the presence of the jury and appropriate deduction be made by the court. To give effect to both provisions the jury should be instructed to return a special verdict (CPLR 4111(b)) stating the plaintiff's total damages without reduction, the percentage of total

culpable conduct attributable to plaintiff, and the percentage of total culpable conduct attributable to AB, and the court can then direct entry of an appropriate judgment. As to limitations on joint and several liability of defendants in actions commenced on or after July 30, 1986, see Comment to PJI 2:275.

As noted above, CPLR 4533-b requires that proof of a settlement by a joint tortfeasor be taken outside the presence of the jury. However, statements made by a plaintiff in procuring a settlement may be utilized at trial as prior inconsistent statements to impeach plaintiff's credibility, *Hayes v Henault*, 131 AD2d 930, 516 NYS2d 798 (3d Dept 1987). The fact of the settlement itself should not be disclosed and the statements may not be used to attempt to mitigate damages, see *id.*

If a defendant's liability is solely vicarious as a result of liability for the acts of another then, for the purposes of plaintiff's claim, both the actor and the vicariously liable defendant should be treated as a unit. Thus, the vicariously liable defendant's "percentage" of fault must be the same as that of the actor, *Mead v Bloom*, 94 AD2d 423, 464 NYS2d 904 (4th Dept 1983), *aff'd*, 62 NY2d 788, 477 NYS2d 326, 465 NE2d 1262 (1984); *Cartagena v P & F Trucking, Inc.*, 73 AD2d 490, 426 NYS2d 486 (1st Dept 1980). To illustrate, if an employer's liability is predicated solely upon its vicarious liability for the acts of an employee, the employer's "percentage" of fault must be that of the employee, *Cartagena v P & F Trucking, Inc.*, *supra*.

Mode of Trial (Bifurcated or Full)

If a bifurcated trial is held, liability and relative degrees of fault should be decided in the first stage of the trial; damages in the second, see *Greenberg v Yonkers*, 37 NY2d 907, 378 NYS2d 382, 340 NE2d 744 (1975) (re: contribution claims). Where the defendant's fault has been determined by summary judgment prior to trial and the plaintiff's comparative fault remains an issue, see *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018), the court should consider whether, in its discretion, it would be more expedient to conduct a unified trial, as the jury will necessarily be required to reach the issue of damages. Ultimately, the determination of whether to conduct a unified or bifurcated trial is a matter within the discretion of the trial court, *Zbock v Gietz*, 162 AD3d 1636, 79 NYS3d 441 (4th Dept 2018); *Matthew H. v Nassau*, 131 AD3d 135, 14 NYS3d 38 (2d Dept 2015). The completed special verdict form should be marked as a Court exhibit. With respect to the inter-play between comparative fault and a defense based upon failure to use an available seat belt, see *Caveat*, *supra*, first paragraph of this Comment; see also PJI 2:87.1, and *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984).

Where liability and damages are tried together, the court should not combine the questions of plaintiff's percentage of fault and the monetary award to be made to plaintiff. By asking the jury in a special

verdict to fix plaintiff's percentage of fault and then requesting that the jury state "the total amount of damages you award to Plaintiff for his injury and conscious pain and suffering," the jury may become confused and reduce plaintiff's recovery twice, see *Scaduto v Suarez*, 150 AD2d 545, 541 NYS2d 826 (2d Dept 1989); *Luppino v Luppino v Busher*, 119 AD2d 554, 500 NYS2d 557 (2d Dept 1986). The better practice, followed in the special verdict form below, is to separate the two questions and to ask the jury to fix the percentage of fault and to answer appropriate damage interrogatories, see PJI 2:151A(1), 2:151A(2), 2:229A, 2:301; see *Heath v Makita Corp.*, 255 AD2d 419, 681 NYS2d 289 (2d Dept 1998) (citing PJI). In this fashion, the prospect of jury confusion is avoided and the court may make the appropriate calculations. After apportionment of fault, jurors should be instructed to disregard the apportionment in fixing damages, leaving it to the court to determine plaintiff's share of damages. This approach was approved in *Grant v Endy*, 167 AD2d 807, 563 NYS2d 368 (3d Dept 1990) (citing PJI); *Scaduto v Suarez*, supra (citing PJI).

Form of Verdict Sheet

When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:95. A special verdict is mandatory in any tort action in which plaintiff's comparative fault is in issue because meaningful review of the verdict is impossible "unless the verdict is rendered in a form which clearly denominates the percentages of fault attributable to each party by the jury," *Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD2d 570, 497 NYS2d 41 (2d Dept 1985); *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995). The order of the questions on the verdict sheet has been approved, *Bida v Port Authority of New York and New Jersey*, 172 AD3d 601, 102 NYS3d 20 (1st Dept 2019) (citing PJI).

Special Verdict Form PJI 2:36 SV-I. Full Trial—Comparative Fault and Damages

1. Was the defendant negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer is "No," proceed no further and report to the court.

If your answer is "Yes," proceed to Question "2."

2. Was defendant's negligence a substantial factor in causing (the accident, injury or other appropriate characterization of the occurrence)?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to Question “2” is “No,” proceed no further and report to the court.

If your answer to Question “2” is “Yes,” proceed to Question “3.”

3. Was plaintiff negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to Question “3” is “No,” proceed to answer Question “6.”

If your answer to Question “3” is “Yes,” proceed to Question “4.”

4. Was plaintiff's negligence a substantial factor in causing ((his, her) own injuries, the accident or other appropriate characterization of the occurrence)?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to Question “4” is “No,” do not answer Question “5” and proceed to Question “6.”

If your answer to Question “4” is “Yes,” proceed to Question “5.”

5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff?

At least five jurors must agree on the answer to this question.

Defendant ____%

Plaintiff ____%

Total must be 100%

[Insert signature lines]

Proceed to Question "6."

6. [Insert appropriate damage interrogatories, see PJI 2:151A(1), 2:151A(2), 2:229A, 2:301]

At least five jurors must agree on the answer to this question.

**Special Verdict Form PJI 2:36 SV-II. Bifurcated Trial—
Comparative Fault**

1. Was the defendant negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

If your answer is "No," proceed no further and report to the court.

If your answer is "Yes," proceed to Question "2."

2. Was defendant's negligence a substantial factor in causing (the accident [or other appropriate characterization of the occurrence])?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

If your answer is "No," proceed no further and report to the court.

If your answer to Question "2" is "Yes," proceed to Question "3."

3. Was plaintiff negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to Question “3” is “No,” proceed no further and report to the court.

If your answer to Question “3” is “Yes,” proceed to Question “4.”

4. Was plaintiff’s negligence a substantial factor in causing (the accident [or other appropriate characterization of the occurrence])?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to Question “4” is “No,” proceed no further and report to the court.

If your answer to Question “4” is “Yes,” proceed to Question “5.”

5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff?

At least five jurors must agree on the answer to this question.

Defendant ____%
 Plaintiff ____%
 Total must be 100%

[Insert signature lines]

Where there are multiple defendants, the case will present the complicating factor of claims for contribution (as to which, see PJI 2:275) as well as the defense of comparative fault. In such a case, use of a special verdict appears essential. The following form is suggested:

Special Verdict Form PJI 2:36 SV-III. Comparative Fault and Contribution

1. As to the defendant AB:

a. Was the defendant AB negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to part “a” is “Yes,” proceed to part “b.”

If your answer to part “a” is “No,” do not answer “b.”

b. Was AB’s negligence a substantial factor in causing the (plaintiff’s injury, the accident *[or other appropriate characterization of the event]*)?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

2. As to the defendant CD:

a. Was the defendant CD negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to part “a” is “Yes,” proceed to part “b.”

If your answer to part “a” is “No,” do not answer “b.”

b. Was CD’s negligence a substantial factor in causing the (plaintiff’s injury, the accident *[or other appropriate characterization of the event]*)?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

Only if you answered “Yes” to both parts “a” and “b” of either Question 1. or Question 2., proceed to Question 3. Otherwise, report to the Court.

3. As to the plaintiff:

a. Was plaintiff negligent?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

If your answer to part “a” is “Yes,” proceed to part “b.”

If your answer to part “a” is “No,” do not answer “b.”

b. Was plaintiff’s negligence a substantial factor in causing (his or her own injury, the accident [or other appropriate characterization of the event])?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

[Insert signature lines]

Answer Question “4.” only if you have answered “Yes” to both parts “a” and “b” of any two of the preceding question.

4. What was the percentage of fault of:

Defendant AB ____%

Defendant CD ____%

Plaintiff ____%

At least five jurors must agree on the answer to this question.

[Insert signature lines]

Post-Verdict Considerations

Once the jury has provided the total amount of plaintiff's damages and the percentages of fault of plaintiff and defendants, its task is completed. There still remains, however, the expression of the rights and obligations of the several parties in the judgment. If the jury has found plaintiff and both defendants at fault, the judgment must provide: (i) judgment for plaintiff against the defendants, and (ii) defendant's rights to contribution. The following example may be of assistance in preparing the judgment:

Assume that the jury has returned a verdict finding plaintiff 20% at fault, defendant AB 30% at fault, defendant CD 50% at fault, and has fixed plaintiff's total damages at \$100,000.00. Plaintiff is entitled to judgment against the defendants in the amount of \$80,000.00 (plus interest and any costs awarded). Defendant AB is entitled to contribution if he or she pays plaintiff more than $\frac{30}{80}$ of the judgment; defendant CD is entitled to contribution if he or she pays more than $\frac{50}{80}$ of the judgment.

Note, however, that plaintiff's ultimate recovery and defendants' liability may be different in cases subject to CPLR Article 16; see PJI 2:275.

If the court concludes that the apportionment of liability is contrary to the weight of the evidence, it may consider granting a motion for a new trial, see CPLR 4404(a), unless a party stipulates to a higher percentage of his or her own fault, *Robinson v New York City Transit Authority*, 105 AD2d 614, 481 NYS2d 85 (1st Dept 1984); see *O'Brien v Covert*, 187 AD2d 419, 589 NYS2d 543 (2d Dept 1992). A new trial may also be granted where, although the jury found plaintiff not at fault, the circumstances clearly dictate that plaintiff must bear some of the responsibility for the injuries, see *Williams v Hooper*, 82 AD3d 448, 919 NYS2d 121 (1st Dept 2011); *Elliott v New York*, 145 AD2d 386, 535 NYS2d 728 (1st Dept 1988); *Gonzalez v New York*, 123 AD2d 666, 507 NYS2d 36 (2d Dept 1986).

As to considerations relevant where a new trial must be held because the trial court failed to instruct the jury on the issue of comparative fault, see *Johnson v New York City Transit Authority*, 88 AD3d 321, 929 NYS2d 215 (1st Dept 2011).

2. COMPARATIVE NEGLIGENCE: EMERGENCY SITUATION**PJI 2:41. Comparative Negligence—Emergency Situation—Rescue of a Person**

A person who is injured while attempting to rescue someone else from danger in an emergency is not negligent simply because the rescue attempt itself involved danger to the rescuer. The law has a high regard for human life and efforts to save it. Danger invites rescue, meaning that the impulse to respond to an urgent need for assistance, without complete regard for one's own safety, is recognized as normal. The law will not view an attempt to preserve life as negligent unless the attempt, under the circumstances, was reckless. In this situation, a person's conduct is reckless when (he, she) acts with gross indifference for (his, her) own safety under circumstances which make it probable that (he, she) will sustain injury.

If you decide that the plaintiff acted in an emergency situation to rescue (the defendant, a third person AB) from danger and that the plaintiff's conduct was not reckless, you will find that the plaintiff was not negligent. On the other hand, if you decide that (the defendant, AB) was not in apparent danger or that the plaintiff's conduct was reckless, then you will consider the degree to which the conduct of the plaintiff contributed to (his, her) own injury.

Comment

Based on *Guarino v Mine Safety Appliance Co.*, 25 NY2d 460, 306 NYS2d 942, 255 NE2d 173 (1969); *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968); *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921); *Eckert v Long Island R. Co.*, 43 NY 502 (1871); *Rucker v Andress*, 38 AD2d 684, 327 NYS2d 91 (4th Dept 1971); *Carney v Buyea*, 271 App Div 338, 65 NYS2d 902 (4th Dept 1946); see *Johnson v Hickson*, 55 AD2d 671, 390 NYS2d 183 (2d Dept 1976), *aff'd*, 43 NY2d 906, 403 NYS2d 722, 374 NE2d 616 (1978). As to the definition of "reckless," see PJI 2:275.1; *Prosser & Keeton, Torts* (5th Ed.), § 34, p. 213, see also PJI 2:10A. Whether plaintiff's conduct was reasonable or foolhardy is generally a jury question, see *Rossman v La Grega*, 28 NY2d 300, 321 NYS2d 588, 270 NE2d 313 (1971); *Hughes v Murnane*

Bldg. Contractors, Inc., 89 AD3d 1507, 932 NYS2d 782 (4th Dept 2011); Gifford v Haller, 273 AD2d 751, 710 NYS2d 187 (3d Dept 2000); see also Tassone v Johannemann, 232 AD2d 627, 648 NYS2d 708 (2d Dept 1996) (determining as a matter of law that “danger invites rescue” doctrine was inapplicable).

Where the rescue attempt was reasonably undertaken, it is of no import that the danger was not as real as it appeared at the time, *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968); *Hughes v Murnane Bldg. Contractors, Inc.*, 89 AD3d 1507, 932 NYS2d 782 (4th Dept 2011); *Gifford v Haller*, 273 AD2d 751, 710 NYS2d 187 (3d Dept 2000). Where, however, there is no evidence to suggest that the plaintiff reasonably could have believed that a party was actually at risk of serious injury or in imminent peril, the “danger invites rescue” doctrine is inapplicable, *Tassone v Johannemann*, 232 AD2d 627, 648 NYS2d 708 (2d Dept 1996).

There is no requirement that the emergency must be one that was created by defendant, *Johnson v Hickson*, 43 NY2d 906, 403 NYS2d 722, 374 NE2d 616 (1978); *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968); *Voleshen v Coles*, 60 AD2d 468, 401 NYS2d 116 (4th Dept 1978) (citing PJI); *Raimondo v Harding*, 41 AD2d 62, 341 NYS2d 679 (4th Dept 1973). A defendant who negligently imperils a third person can be held liable to a rescuer, see PJI 2:13, and the negligence of the person imperiled will not be imputed to the rescuer, see *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921).

As to the standard of care in an emergency other than rescue, see PJI 2:14. As to the comparative fault of plaintiff in the rescue of property, see PJI 2:42.

The pattern charge is intended to be used in conjunction with the general charge on comparative fault, see PJI 2:36.

PJI 2:42. Comparative Negligence—Emergency Situation—Rescue of Property

A person who is injured while attempting to rescue property from danger is not negligent simply because the rescue attempt itself involved danger to the rescuer. A person may protect property from (loss, damage) provided that (he, she) uses reasonable care for (his, her) own safety. Reasonable care means that degree of care that a reasonably prudent person would use in the same emergency.

If you decide that the plaintiff was attempting to rescue property from danger and that the

plaintiff acted with reasonable care for (his, her) own safety, then you will find that the plaintiff was not negligent. On the other hand, if you decide that there was no apparent danger to the property which (he, she) was attempting to rescue, or that the plaintiff did not act with reasonable care for (his, her) own safety, you will consider the degree to which the conduct of the plaintiff contributed to (his, her) injuries.

Comment

Based on *Rague v Staten Island Coach Co.*, 288 NY 206, 42 NE2d 488 (1942); *Wardrop v Santi Moving & Exp. Co.*, 233 NY 227, 135 NE 272 (1922); *Morris v Lake Shore & M.S. Ry. Co.*, 148 NY 182, 42 NE 579 (1896); *Wasmer v Delaware, L. & W.R. Co.*, 80 NY 212 (1880); *Rexter v Starin*, 73 NY 601 (1878); see *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968). The *Wardrop* case recognizes that: "Undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but the rule is that a reasonable effort may be made even in the latter case." As to plaintiff's negligence in the rescue of a person, see PJI 2:41. Where the rescue attempt was reasonably undertaken, it is of no import that the danger was not as real as it appeared at the time, *Provenzo v Sam*, 23 NY2d 256, 296 NYS2d 322, 244 NE2d 26 (1968).

In attempting to rescue a disabled vehicle, plaintiff is under a duty to act in a reasonable manner to protect both the disabled vehicle and any oncoming traffic, *Hart v Scribner*, 44 AD2d 59, 353 NYS2d 230 (2d Dept 1974) (citing PJI). However, whether plaintiff's conduct was reasonable or foolhardy is generally a question for the jury, see *Rossman v La Grega*, 28 NY2d 300, 321 NYS2d 588, 270 NE2d 313 (1971) (decedent stood in roadway to warn other cars away from stopped defendant's stopped vehicle).

The emergency may be one that defendant created by negligence or breach of warranty, *Guarino v Mine Safety Appliance Co.*, 25 NY2d 460, 306 NYS2d 942, 255 NE2d 173 (1969). But there is no requirement that the emergency has been created by defendant, *Johnson v Hickson*, 43 NY2d 906, 403 NYS2d 722, 374 NE2d 616 (1978); *Voleshen v Coles*, 60 AD2d 468, 401 NYS2d 116 (4th Dept 1978) (citing PJI).

3. PERSONS UNDER DISABILITY

a. INTOXICATED PERSON

PJI 2:45. Comparative Negligence—Persons Under Disability—Intoxicated Person

One who has disabled (himself, herself) by reason of intoxication is held to the same standard of care that is required of a sober person. An intoxicated person is one whose consumption of alcoholic beverage has impaired (his, her) judgment and (his, her) ability to act. It is a question of fact for you, the jury, to determine whether or not the plaintiff was intoxicated. If you find that (he, she) was intoxicated, you will take that fact into consideration in determining whether or not the plaintiff used the care of a reasonably prudent sober person under the circumstances. If (he, she) did not use such care, then you will consider the degree to which the conduct of plaintiff contributed to (his, her) injuries.

Comment

Based on *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975); *Fagan v Atlantic Coast Line R. Co.*, 220 NY 301, 115 NE 704 (1917); *Miller v Maslow*, 60 AD2d 909, 401 NYS2d 564 (2d Dept 1978); *Gilliam v Lee*, 32 AD2d 1058, 303 NYS2d 966 (2d Dept 1969); *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969) (citing PJI); *Kenny v Rhinelander*, 28 App Div 246, 50 NYS 1088 (1st Dept 1898), *aff'd*, 163 NY 576, 57 NE 1114 (1900); see *Padula v State*, 48 NY2d 366, 422 NYS2d 943, 398 NE2d 548 (1979) (citing PJI); *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 596 NYS2d 136 (2d Dept 1993) (citing PJI).

The definition of “intoxicated person” is based on *People v Cruz*, 48 NY2d 419, 423 NYS2d 625, 399 NE2d 513 (1979) and *People v Weaver*, 188 App Div 395, 177 NYS 71 (3d Dept 1919). However, if blood alcohol tests are in evidence, the pattern charge should be enlarged to include instruction on the effect to be given such evidence under Vehicle and Traffic Law § 1195, which is discussed in this Comment below. For a discussion of the effect to be given such evidence under VTL § 1195, see the remainder of this Comment. In order to submit the issue of intoxication to the jury, it is not sufficient that there be merely some evidence that the plaintiff had been drinking or that there was alcohol on plaintiff’s breath, *Sanchez v Manhattan and Bronx Surface Transit Operating Authority*, 203 AD2d 128, 610 NYS2d 507 (1st Dept 1994).

Vehicle and Traffic Law § 1192 makes illegal the operation of a motor vehicle while (1) the operator's ability to operate is impaired by the consumption of alcohol; or (2) the operator has .08 of one per centum or more by weight of alcohol in his blood; or (3) while the operator is intoxicated; or (4) while the operator's ability to operate is impaired by the use of drugs. A violation of V & T § 1192 constitutes negligence per se and the jury should be so instructed, see PJI 2:29.

Vehicle and Traffic Law § 1195 provides that upon the "trial of any action or proceeding" arising out of actions committed by a person arrested for violation of § 1192, test results of the amount of alcohol or drugs in defendant's blood are admissible. Section 1195 further provides the effect to be given to such evidence: (1) .05 of one per centum or less is prima facie evidence that the subject's ability to operate was not impaired and that he or she was not intoxicated; (2) more than .05 of one per centum but not more than .07 of one per centum is prima facie evidence that the subject was not intoxicated, but is relevant, although not prima facie, evidence as to the impairment of ability to operate; (3) more than .07 but less than .08 of one per centum is prima facie evidence that the subject was not intoxicated, but is prima facie evidence in determining whether his or her ability to operate was impaired. In *People v Blair*, 98 NY2d 722, 749 NYS2d 809, 779 NE2d 748 (2002), the Court held that the People were entitled at trial to an opportunity to rebut the presumption established by VTL § 1195 in attempting to establish that defendant was intoxicated. See also as to snowmobiles, Parks and Recreation Law § 25.24; as to hunting while intoxicated, Environmental Conservation Law, §§ 11-201 to 11-211; as to boating while intoxicated, see Navigation Law § 49.

In *Van Valkenburgh v Koehler*, 164 AD2d 971, 559 NYS2d 766 (4th Dept 1990), the Fourth Department reversed a judgment for plaintiff and ordered a new trial because of the trial court's error in refusing to instruct the jury as to the legal effect of a blood alcohol test result of .01 of one percent. However, the Second Department has held that the evidentiary presumptions set forth in VTL § 1195 as to the legal effect to be given test results need not be charged in civil cases, and in any event, are inapplicable to tests which do not involve testing of breath, blood, urine or saliva, *McCarthy v Fernandez*, 156 AD2d 544, 549 NYS2d 51 (2d Dept 1989); see also *Johnson v Plotkin*, 172 AD2d 88, 577 NYS2d 329 (3d Dept 1991) (Third Department held that blood alcohol content of .26% is some evidence of intoxication); and *Senn v Scudieri*, 165 AD2d 346, 567 NYS2d 665 (1st Dept 1991) (First Department held it error to charge VTL § 1192(2) in civil case where there was no evidence to indicate a blood alcohol reading of at least .10). The above case law must be read in light of the amendments effective November 1, 2003 which lower the blood alcohol percentages in VTL §§ 1192 and 1195.

Violation of the penal provisions of § 1192 does not automatically establish civil liability of a defendant and would not automatically establish defendant's negligence. The violation would have to be causally related to the injury, and this would be so only if it resulted in

defendant's failure to use the reasonable care required of a sober person, see *Reed v Syracuse*, 309 AD2d 1195, 765 NYS2d 125 (4th Dept 2003); *Prince v McKee*, 24 AD2d 455, 260 NYS2d 386 (2d Dept 1965). Where only one inference can be drawn under the circumstances, the issue of whether an intoxicated person's inebriated condition substantially contributed to the accident may be determined by the court, *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969); see *Fulton v Benskin & King Bldg. & Design Associates, Inc.*, 31 AD2d 643, 296 NYS2d 272 (2d Dept 1968). The pattern charge assumes that there is no issue of causal relationship between plaintiff's act and his or her injury. If on the facts of a particular case there is such a question, the charge must be modified, see Comment to PJI 2:36. As to proximate cause, see PJI 2:70.

Query whether Vehicle and Traffic Law § 1194(4) making refusal to take an intoxication test admissible in "any trial . . . based upon a violation of" Vehicle and Traffic Law § 1192, permits such evidence in a negligence action. If such refusal is to be admitted, there must also be evidence that the person persisted in his or her refusal after being given "sufficient warning, in clear and unequivocal language, of the effect of such refusal," VTL § 1194(4). However, if a test is conducted, the results are admissible even if the test was not administered in accordance with VTL § 1194(1) and even if the consent of the person tested was not obtained, *Fafinski v Reliance Ins. Co.*, 106 AD2d 88, 484 NYS2d 729 (4th Dept 1985), *aff'd*, 65 NY2d 990, 494 NYS2d 92, 484 NE2d 121 (1985).

Note that County Law § 674(3)(b) was amended so as to delete the former provision making inadmissible testimony or reports concerning the results of blood and urine tests for alcohol obtained from an official autopsy.

b. MENTAL DEFICIENCY**PJI 2:46. Comparative Negligence—Persons Under Disability—Mental Deficiency**

A person who is mentally deficient from insanity, weak mindedness or old age, is required to use that degree of care for (his, her) own safety of which (he, she) is reasonably capable, and which may reasonably be expected of one having the same mental capacity, to appreciate and guard against danger and injury. You must determine the mental capacity of such person, and if you find that (he, she) was mentally deficient, to determine whether or not (he, she) acted with due care in accordance with (his, her) mental capacity to appreciate and guard against danger and injury to (himself, herself).

Comment

Based on *Horton v Niagara Falls Memorial Medical Center*, 51 AD2d 152, 380 NYS2d 116 (4th Dept 1976); *Mochen v State*, 43 AD2d 484, 352 NYS2d 290 (4th Dept 1974); 65 CJS 782, Negligence, § 141; 3 Warren's Negligence 47, § 140, 2; Annot. 91 ALR2d 392; see *Padula v State*, 48 NY2d 366, 422 NYS2d 943, 398 NE2d 548 (1979) (citing PJI) (inmate in State custody for treatment of drug addiction held to subjective standard based on trier of fact's determination of inmate's ability to control his actions); see also *Harris v Uebelhoer*, 75 NY 169 (1878) ("physical blindness" but otherwise on point). Note that the rule as to insanity of a defendant is different, see PJI 2:21 and the Comment thereto.

This charge assumes that there is no issue of causal relationship between plaintiff's acts and his or her injury. If such an issue exists, a charge on proximate cause should be given. See comment to PJI 2:36; as to proximate cause generally, see PJI 2:70.

Listoken v Gagolewski, 17 AD2d 637 (2d Dept 1962), holds that the jury may consider plaintiff's advanced age on the issue of culpable conduct, but that it is error to charge that the jury must consider that fact.

Note that a person who has capacity to appreciate and avoid danger of injury, but is dull of mind, is chargeable with the same degree of care as a normal person.

c. AGED OR PHYSICALLY DISABLED PERSON

PJI 2:47. Comparative Negligence—Persons Under Disability—Aged or Physically Disabled Person

One who is disabled by reason of physical defects is held to a standard of care measured not by the care expected of an adult person without physical defects, but by that care which a reasonably prudent person having the same physical defects would use under the same circumstances. A person laboring under a physical handicap must use caution commensurate with the increased hazard caused by his disability.

Comment

Based on *Harris v Uebelhoer*, 75 NY 169 (1878) (blindness). See Annot: 65 ALR2d 703. Advanced age of the plaintiff is a circumstance to be considered, *Plunkett v Brooklyn Heights R. Co.*, 129 App Div 572, 114 NYS 276 (2d Dept 1908), *aff'd*, 198 NY 568, 92 NE 1098 (1910); see *Sheridan v Brooklyn City & N.R. Co.*, 36 NY 39, 34 How Pr 217 (1867), but it is error to instruct the jury that they must consider that fact, *Listoken v Gagolewski*, 17 AD2d 637 (2d Dept 1962). In such a case the charge should be modified to refer to “One whose faculties are dulled by age.”

The pattern charge assumes that there is no issue of causal relationship between plaintiff's act and the injury. If on the facts of a particular case there is such a question, the charge must be modified, see Comment to PJI 2:36; as to proximate cause generally, see PJI 2:70.

Plaintiff's impaired sight is a circumstance to be considered, but defendant is not entitled to a charge that because of the impairment plaintiff was required “to exercise a higher degree of care” for his or her own safety, *Bartlett v New York & S.B.F. & S. Transp. Co.*, 57 NY Super Ct 348, 8 NYS 309 (1890), *aff'd*, 130 NY 659, 29 NE 1033 (1891). Evidence that plaintiff's driver's license contained a restriction requiring the operator to wear glasses when driving is relevant on question of comparative negligence when glasses were not worn, *Martin v Alabama 84 Truck Rental, Inc.*, 38 AD2d 577, 328 NYS2d 244 (2d Dept 1971). An unexcused violation of a restriction placed upon a driver's license requiring the wearing of glasses when driving constitutes negligence per se, *Dalal v New York*, 262 AD2d 596, 692 NYS2d 468 (2d Dept 1999).

A showing that a party fell asleep while driving raises a rebuttable presumption of negligence, *Spivak v Heyward*, 248 AD2d 58, 679 NYS2d 156 (2d Dept 1998); *Kilburn v Bush*, 223 AD2d 110, 646 NYS2d 429

(4th Dept 1996). The burden then falls on the driver to offer an explanation creating a triable issue of fact, *Romero v Romero*, 266 AD2d 367, 698 NYS2d 324 (2d Dept 1999); see *Dillon v Kaminsky*, 256 AD2d 483, 682 NYS2d 104 (2d Dept 1998) (trial court improperly shifted burden to plaintiff). For a charge involving a motorist who falls asleep at the wheel, see PJI 2:85A.

It is comparative negligence as a matter of law to drive with a right knee so stiff that the right leg cannot be used to brake the car, *Diem v Adams*, 266 App Div 307, 42 NYS2d 55 (1st Dept 1943), and, apparently, epileptics who are subject to seizures without warning are negligent as a matter of law in driving, see *People v Eckert*, 2 NY2d 126, 157 NYS2d 551, 138 NE2d 794 (1956) (ovrld in part on other grounds, *People v Jennings*, 69 NY2d 103, 512 NYS2d 652, 504 NE2d 1079 (1986)); *People v Decina*, 2 NY2d 133, 157 NYS2d 558, 138 NE2d 799 (1956).

See also PJI 2:22, which is a similar charge with respect to the care an aged or disabled person is required to exercise toward others.

d. INFANTS

PJI 2:48. Comparative Negligence—Persons Under Disability—Infants—In General

With respect to care for (his, her) own safety, the plaintiff, as an infant, is held to a standard of care measured not by the care expected of an adult person, but by that care which a reasonably prudent child of (his, her) years, experience, intelligence and degree of development would use under the circumstances.

Comment

Based on *McDonald v Central School Dist. No. 3, Town of Romulus*, 289 NY 800, 47 NE2d 50 (1943); *Camardo v New York State Rys.*, 247 NY 111, 159 NE 879 (1928); *Niedelman v Jacoby*, 127 AD2d 640, 511 NYS2d 870 (2d Dept 1987) (citing PJI); *Quinn v Sullivan*, 48 AD2d 965, 369 NYS2d 551 (3d Dept 1975); *Kennedy v Cromer*, 34 AD2d 859, 310 NYS2d 794 (3d Dept 1970); see *O'Connor v G & R Packing Co.*, 53 NY2d 278, 440 NYS2d 920, 423 NE2d 397 (1981) (citing PJI); 79 NYJur2d 449, § 105–106, Negligence; Restatement, 2nd Torts, § 283A; 65 CJS 785, Negligence, § 145; Annot: 32 ALR4th 56. A child under four years is as a matter of law incapable of being negligent, *Verni v Johnson*, 295 NY 436, 68 NE2d 431 (1946); *Smith v Sapienza*, 115 AD2d 723, 496 NYS2d 538 (2d Dept 1985); as is a child four years and ten months old crossing a street at the direction and under the supervision of his mother, *Ehrlich v Marra*, 32 AD2d 638, 300 NYS2d 81 (2d Dept 1969); as is a five-year-old child when his father put him on a sled which coasted down a hill in a straight line, and was struck by a truck, *Romanchuk v Westchester*, 40 AD2d 877, 337 NYS2d 926 (2d Dept 1972); but see *Chandler v Keene*, 5 AD2d 42, 168 NYS2d 788 (3d Dept 1957). Some earlier cases held that children under 12 years are presumed to be non sui juris, *Hill v Baltimore & N.Y. Ry. Co.*, 75 App Div 325, 78 NYS 134 (2d Dept 1902). Although these cases have not been expressly overruled they must be read in the light of *Camardo v New York State Rys.*, supra, 247 NY at p. 118, 169 NE at p. 881, where the Court stated that “no rule of law fixes an arbitrary age at which a particular degree of care may be expected, or furnishes a true presumption which takes the place of evidence, that a child is not chargeable with contributory negligence.” See Comment to PJI 2:23.

The pattern charge assumes that there is no issue of causal relationship between plaintiff's act and his or her injury. If on the facts of a particular case there is such a question, the charge must be modified, *Heffernan v Logue*, 40 AD2d 1071, 339 NYS2d 225 (4th Dept 1972); see Comment to PJI 2:36; as to proximate cause generally, see PJI 2:70. As to comparative negligence of infant passenger in an automobile, see PJI 2:87.

Ability of the infant to appreciate and protect against danger is the issue that the jury must determine, *Egan v Tambone*, 81 AD2d 604, 437 NYS2d 713 (2d Dept 1981). It is, therefore, error to add to the pattern charge that the law requires a five and one-half-year-old child to use her eyes and guard herself against any approaching vehicles, *Dugan v Dieber*, 32 AD2d 815, 302 NYS2d 423 (2d Dept 1969), or that a five-year-old is chargeable with understanding the "cross-walk" rule, *Avram v Haddad*, 88 AD2d 942, 451 NYS2d 178 (2d Dept 1982). Evidence of the instructions given to a child by a parent in regard to the proper method of crossing streets is inadmissible, *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982).

PJI 2:49. Comparative Negligence—Persons Under Disability—Infants—Violation of Statute

Where the violation of a statute is by an infant plaintiff, you must determine whether or not the infant will be charged with the violation. If you find that the infant on the basis of (his, her) age, experience, intelligence and development had the mental capacity to understand the meaning of the statute and to comply with it, you should find (him, her) negligent for the violation. If, on the other hand, you find that the infant lacked the mental capacity to understand the meaning of the statute and comply with it, you should not find (him, her) negligent for the violation of that statute.

Comment

The pattern charge assumes that there is no issue of causal relationship between plaintiff's act and his or her injury. If on the facts of a particular case there is such a question, the charge must be modified, *Niedelman v Jacoby*, 127 AD2d 640, 511 NYS2d 870 (2d Dept 1987) (citing PJI); see Comment to PJI 2:36; see as to proximate cause generally, PJI 2:70.

While the standard under PJI 2:48 is objective, the standard in the case of a statutory violation is subjective. The charge is supported by *Dimino v Burriesci*, 125 AD2d 361, 509 NYS2d 86 (2d Dept 1986) (citing PJI); *Poczalski v Cartwright*, 65 AD2d 945, 410 NYS2d 488 (4th Dept 1978) (citing PJI); *Van v Clayburn*, 21 AD2d 144, 249 NYS2d 310 (1st Dept 1964); see also *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986); *Conrad v Card*, 52 AD2d 685, 382 NYS2d 375 (3d Dept 1976) (citing PJI); *Quinn v Sullivan*, 48 AD2d 965, 369 NYS2d 551 (3d Dept 1975); *Trippy v Basile*, 44 AD2d 759, 354 NYS2d 235 (4th Dept 1974); *Taylor v Yukoweic*, 273 App Div 915, 77 NYS2d 620 (2d Dept 1948); *Poplet v Surface Transp. Corp.*, 109 NYS2d 871 (NY City Ct 1952).

As a matter of law, children under six years of age cannot be charged with knowledge and understanding of traffic regulations and compliance with them, *Schaffner v Rockmacher*, 38 AD2d 835, 329 NYS2d 630 (2d Dept 1972); *Rubin v O'Donnell*, 37 AD2d 858, 326 NYS2d 25 (2d Dept 1971); *Dugan v Dieber*, 32 AD2d 815, 302 NYS2d 423 (2d Dept 1969); see *Dimino v Burriesci*, 125 AD2d 361, 509 NYS2d 86 (2d Dept 1986) (citing PJI); *Branch v Stehr*, 93 AD2d 849, 461 NYS2d 346 (2d Dept 1983) (child of six not to be charged with knowledge and understanding of traffic regulations), but it is a jury question whether a fourteen-year-old plaintiff was negligent in riding his bicycle in violation of a provision of the Vehicle & Traffic Law, *Gargano v Hanington*, 40 AD2d 675, 336 NYS2d 114 (2d Dept 1972).

Caveat: A licensed infant is held to the same standard as an adult license holder and is not entitled to the benefit of the above charge, see *Reiszel v Fontana*, 35 AD2d 74, 312 NYS2d 988 (2d Dept 1970) (citing PJI). *Reiszel* concerned a defendant licensed to operate a motor vehicle, as do cases cited in the Comment to PJI 2:23. Its application to a licensed plaintiff is supported by *Wilson v Shumate*, 296 SW2d 72 (Mo 1956) and *Medina v McAllister*, 202 So 2d 755 (Fla 1967).

D. ASSUMPTION OF RISK

PJI 2:55. Implied Assumption of Risk

The law provides that where the defendant owes a duty of reasonable care to the (plaintiff, decedent), but the (plaintiff, decedent) voluntarily engages in an activity involving a risk of harm and the (plaintiff, decedent) knows and fully understands, or should have known and fully understood, the risk of harm, the plaintiff's damages must be reduced by the extent to which those damages were caused by the (plaintiff's, decedent's) own conduct. [*Where the issue of liability is tried separately, delete the clause that commences "the plaintiff's damages" and insert the following: you must apportion the fault between the plaintiff and the defendant for the (describe: e.g., the accident or other appropriate characterization of the event).*]

The defendant CD claims that the (plaintiff AB, decedent EF) knew and fully understood (should have known and fully understood) that (he, she) might be injured if (he, she) [*state activity that led to injury*], and that, therefore, (he, she) assumed the risk of the injury. It is CD's burden to prove that (AB, EF) assumed the risk of injury.

If you find that (AB, EF) knew and fully understood, or should have known and fully understood, the risk of injury, then you will find that (he, she) assumed the risk of injury and you must consider to what degree that assumption of risk contributed to the injury. If you find that (he, she) did assume the risk, you will state to the Court on the form I will provide to you the respective degrees of fault of (AB, EF) and CD. If you find that (AB, EF) did not know and fully understand the risk of injury and if you find, based upon the evidence, that (he, she) could not have known and fully understood the risk of injury, you will find that (he, she) did not assume the risk of injury and you may proceed to consider the other issues in the case.

Comment

Caveat 1: As a general rule, application of primary assumption of risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues, *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); see *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010); *Filer v Adams*, 106 AD3d 1417, 966 NYS2d 553 (3d Dept 2013).

Caveat 2: The pattern charge addresses the affirmative defense of implied assumption of risk, which may mitigate a defendant's liability and reduce the damages that a defendant must pay, see the Comment to this section, *infra*. The charge is not designed for a claim that the plaintiff's cause of action is barred by the doctrine of primary assumption of risk, *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 (2d Dept 2013). Whether that doctrine is applicable to a given case is generally a question of law for the court, *id*; see PJI 2:55.1. For a detailed discussion of the doctrine of primary assumption of risk, see the Comment to this section, *infra*.

The pattern charge is based on *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985), which discussed the impact of comparative negligence principles on the doctrine of assumption of risk, and on *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985); *Steunenberg v Hicksville Fire Dist.*, 136 AD2d 623, 523 NYS2d 594 (2d Dept 1988); see *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); *Resnick v Gribetz*, 66 NY2d 729, 496 NYS2d 998, 487 NE2d 908 (1985); *Grisoff v Nicoletta*, 107 AD2d 1047, 486 NYS2d 579 (4th Dept 1985); see also *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007) (citing PJI); *Lamey v Foley*, 188 AD2d 157, 594 NYS2d 490 (4th Dept 1993); *O'Keeffe v State*, 140 AD2d 998, 530 NYS2d 911 (4th Dept 1988). The pattern charge should be changed to fit the particular factual situations and to agree with the instructions used with the special verdict forms submitted to the jury in each case. The pattern charge should not be used for claims based on express assumption of risk. As to such claims, see PJI 2:55A.

I. Background

At common law, an injured person's failure to appreciate a known danger could constitute contributory negligence barring all recovery, *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); see *Shire v Mazzilli*, 203 AD2d 275, 609 NYS2d 350 (2d Dept 1994). Similarly, a determination that the injured person had assumed the risk of a particular harm relieved defendant of its duty of care and, for that reason, precluded the injured person's recovery, *Arbegast v Board of Educ. of South New*

Berlin Cent. School, *supra*. Although the theories were similar and the outcomes the same, which theory was invoked had legal significance, since it determined the allocation of the burden of proof, *id.*

After the 1975 enactment of CPLR Article 14-A, the State's comparative negligence statute, neither the injured person's negligent failure to appreciate a known danger nor the injured person's assumption of risk operated as a complete bar to recovery in all situations, see *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986); *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985). Under CPLR 1411, in an action to recover damages for personal injury, injury to property, or wrongful death, the injured person's culpable conduct—whether in the form of a negligent failure to appreciate a known danger or in the form of an implied assumption of risk—operates only to diminish his or her recoverable damages. Thus, the former distinctions between the two forms of culpable conduct have, in some measure, lost their legal importance, and it is for that reason that the pattern charge refers only to culpable conduct in the form of a “failure to appreciate a known risk.” Nevertheless, as will be discussed in more detail below, the analyses underlying the former distinctions continue to influence the law, *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007). Moreover, although an injured person's “implied” assumption of risk no longer precludes recovery, recovery may be barred if the doctrine of “express” assumption of risk or the doctrine of “primary” assumption of risk is deemed applicable. It is the latter doctrine that has been the focus of the majority of post-CPLR Article 14-A litigation.

II. Implied Assumption of Risk As Distinguished from Express Assumption of Risk, Primary Assumption of Risk and Comparative Negligence

CPLR 1411, which provides that the culpable conduct attributable to an injured person will not bar that person's recovery, is applicable, by its terms, to both comparative fault and implied assumption of risk. Like comparative negligence, implied assumption of risk is a type of “culpable conduct” that can operate to mitigate defendant's liability and reduce the damages that defendant must pay, *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007); see *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985). At its core, implied assumption of risk is distinguishable from comparative negligence in that the latter involves a failure to use reasonable care under the circumstances, while the former involves a voluntary encounter with a known risk of harm or a failure to appreciate a known danger, *Arbegas v Board of Educ. of South New Berlin Cent. School*, *supra*; *Beadleston v American Tissue Corp.*, *supra*; see *Shire v Mazzilli*, 203 AD2d 275, 609 NYS2d 350 (2d Dept 1994); *McCabe v Easter*, 128 AD2d 257, 516 NYS2d 515 (3d Dept 1987). The focus of analysis in implied assumption of risk cases is on what was known to plaintiff, *Beadleston v American Tissue Corp.*, *supra*. Although they are often charged together, see *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d

178 (2d Dept 2013), there are circumstances in which a charge on comparative negligence may be given even though a charge on implied assumption of risk is not appropriate, *Pisciotta v Parisi*, 155 AD2d 422, 547 NYS2d 352 (2d Dept 1989). Likewise, a charge on assumption of risk may be appropriate even where a charge on comparative negligence is not, *Beadleston v American Tissue Corp.*, *supra*.

In *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985), a post-CPLR Article 14-A case, the Court of Appeals distinguished between “implied” assumption of risk and “express” assumption of risk. “Express” assumption of risk involves an agreement between the parties in advance that plaintiff will assume the risk of known harms resulting from participating in a particular activity. In contrast, “implied” assumption of risk is based not on an express contract but on plaintiff’s voluntarily encountering a risk with full understanding of the potential for harm, *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007). Where an individual has expressly agreed to assume the risk of harm, defendant is relieved of the duty to exercise reasonable care for the benefit of that individual and will therefore not be liable for the individual’s injuries. For example, where plaintiff was told by defendant’s employee that she was participating in a game of “donkey basketball” at her own peril, plaintiff’s participation constituted an express assumption of risk and defendant was entitled to a directed verdict dismissing the action, *Arbegas v Board of Educ. of South New Berlin Cent. School*, *supra*. Notably, since express assumption of risk does not involve the kinds of culpable conduct referred to in CPLR 1411, the statutory command that such conduct “shall not bar recovery” is inapplicable to express assumption of risk cases, *Arbegas v Board of Educ. of South New Berlin Cent. School*, *supra*.

The other exception to the principle that plaintiff’s assumption of risk does not bar recovery is the “primary” assumption of risk doctrine, which was foreshadowed in *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985), and was more fully developed and explained in *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986). Like the doctrine of express assumption of risk, the primary assumption of risk doctrine focuses on the limitations in the scope of defendant’s duty in some circumstances. Specifically, in *Turcotte v Fell*, *supra*, the Court of Appeals held that the analysis of the duty of care owed to a participant in a professional sporting event must be evaluated by considering the risks that the participant assumed when he or she freely and knowingly elected to participate. The critical criterion in applying this principle is the particular participant’s awareness of the risks as determined against the background of his or her skill and experience, *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997).

Where the requisite circumstances exist, defendant’s duty is limited to exercising such care as is needed to make the conditions at the sporting event as safe as they appear to be, *Turcotte v Fell*, 68 NY2d 432,

510 NYS2d 49, 502 NE2d 964 (1986). The underlying rationale is that, where the risks of the activity are fully comprehended or perfectly obvious, the participant's "actual" consent is implied from the act of electing to participate and, as a matter of law, that consent relieves defendant of its duty of care, *id*; see *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010). Under that rationale, the participant's assumption of risk is not an absolute defense, but rather is "a measure of the defendant's duty of care." For that reason, the Court held in *Turcotte*, the bar to recovery that is associated with the primary assumption doctrine "survives the enactment of the comparative fault statute."

The Court of Appeals revisited the rationale for the primary assumption of risk doctrine in *Trupia ex rel. Trupia v Lake George Central School District*, 14 NY3d 393, 901 NYS2d 127, 927 NE2d 547. In *Trupia*, the Court observed that the rationale for the doctrine is, in most contexts, a "highly artificial construct" that "does not, and cannot, sit comfortably with comparative causation." According to the *Trupia* Court, the doctrine is "most persuasively justified 'for its utility in 'facilitat[ing] free and vigorous participation in athletic activities,'" *id*, quoting *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989); see *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012); see *DeMarco v DeMarco*, 154 AD3d 1226, 63 NYS3d 586 (3d Dept 2017). Under that analysis, the primary assumption doctrine could not be applied where an 11-year-old participant in a summer program was injured when he engaged in "horseplay" by riding, and ultimately falling from, a banister, since the activity was "not one that recommends itself worthy of protection," *Trupia ex rel. Trupia v Lake George Central School District*, *supra*.

Similarly, the doctrine does not apply where a person rollerblading in a non-competitive setting was injured when she tripped and fell near defendant's driveway as a result of a dangerous premises condition, *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012). Relying on *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010), the *Custodi* Court held that, as a general rule, application of primary assumption of risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues, *id*; *Raldiris v Enlarged City School District of Middletown*, 179 AD3d 1111, 118 NYS3d 696 (2d Dept 2020) (primary assumption of risk doctrine inapplicable to plaintiff parent who injured hand while pushing child on swing); *DeMarco v DeMarco*, 154 AD3d 1226, 63 NYS3d 586 (3d Dept 2017) (jumping on trampoline in yard of private home does not fit comfortably within parameters of primary assumption of risk doctrine); see *Bouck v Skaneateles Aerodrome, LLC*, 129 AD3d 1565, 10 NYS3d 783 (4th Dept 2015) (primary assumption of risk applicable where plaintiff, piloting a small aircraft, was

injured during unsuccessful take off from runway of airport; airport designated venue for recreational activity of private aviation); *Litz v Clinton Cent. School Dist.*, 126 AD3d 1306, 5 NYS3d 636 (4th Dept 2015) (primary assumption of risk applicable where plaintiff injured immediately following hockey practice in arena's locker room, which was designated for plaintiff's team's exclusive use); *Wolfe v North Merrick Union Free School Dist.*, 122 AD3d 620, 996 NYS2d 125 (2d Dept 2014) (primary assumption of risk inapplicable to game of "manhunt," which was analogous to hide-and-seek, because the game was not socially valuable activity); *Filer v Adams*, 106 AD3d 1417, 966 NYS2d 553 (3d Dept 2013) (primary assumption of risk inapplicable where plaintiff and her daughter were riding their horses on public highway). The Court also noted that extension of the doctrine to cases involving persons injured while traversing streets and sidewalks would create an unwarranted diminution of the general duty of landowners to maintain their premises in a reasonably safe condition, *Custodi v Amherst*, supra.

In light of the policy underlying the assumption of risk doctrine—to encourage free and vigorous participation in athletic and recreational pursuits by shielding co-participants, activity sponsors, and venue owners from ruinous liability—a court should not isolate the moment of injury, but rather should consider the context of the accident when ascertaining whether the plaintiff was engaged in an activity subject to the doctrine, *Litz v Clinton Cent. School Dist.*, 126 AD3d 1306, 5 NYS3d 636 (4th Dept 2015).

The remainder of this comment discusses the manner in which the courts have applied the implied and primary assumption of risk doctrines. It should be noted that the validity of some of the prior cases involving the primary assumption of risk doctrine may be affected by the Court of Appeals' decisions in *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012) and *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010).

III. Implied Assumption of Risk

As noted above, implied assumption of risk arises from the injured person's voluntary encounter with a known risk of harm with full understanding of the risks, *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); see *DeMarco v DeMarco*, 154 AD3d 1226, 63 NYS3d 586 (3d Dept 2017) (citing PJI 2:55). The doctrine only applies, however, where plaintiff had the capacity to understand and fully appreciate the risk, *Clark v Interlaken Owners, Inc.*, 2 AD3d 338, 770 NYS2d 58 (1st Dept 2003). Thus, *Pisciotta v Parisi*, 155 AD2d 422, 547 NYS2d 352 (2d Dept 1989), held that a charge on implied assumption of risk was not warranted in a case involving a dog-related injury where there was no evidence that plaintiff should have seen a warning sign or was otherwise aware of the dog's vicious propensities. Similarly, implied assumption of risk has

been held inapplicable to young children who climb over a fence to explore premises with potentially hazardous equipment or conditions, *Clark v Interlaken Owners, Inc.*, *supra*; *Roberts v New York City Housing Authority*, 257 AD2d 550, 685 NYS2d 23 (1st Dept 1999).

Where a person confronts an unexpected emergency situation, the doctrine of implied assumption of risk is inapplicable, *Leczmar v Sanford*, 265 AD2d 728, 697 NYS2d 186 (3d Dept 1999) (plaintiff unexpectedly and suddenly confronted with two unrestrained and untended horses).

IV. Primary Assumption of Risk

A. In General

The primary assumption of risk doctrine applies to personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues, *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); see *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010); *Filer v Adams*, 106 AD3d 1417, 966 NYS2d 553 (3d Dept 2013). Thus, the doctrine has been applied to a wide variety of sporting activities. Relieving an owner or operator of a sporting venue of liability for the inherent risks of engaging in the sport is justified when a consenting participant is aware of the risks, has an appreciation of the nature of the risks and voluntarily assumes the risks, *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986); see *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012); *Roberts v Boys and Girls Republic, Inc.*, 51 AD3d 246, 850 NYS2d 38 (1st Dept 2008), *aff'd*, 10 NY3d 889, 861 NYS2d 603, 891 NE2d 719 (2008) (rejecting argument based on dictum from *Baker v Eastman Kodak Co.*, 34 AD2d 886, 312 NYS2d 449 (4th Dept 1970), *aff'd*, 28 NY2d 636, 320 NYS2d 247, 269 NE2d 36 (1971), and holding that primary assumption of risk doctrine relieves defendant from obligation to use reasonable care to guard against reasonably foreseeable dangers). By engaging in a sport or recreational activity, a participant is deemed to have consented to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from participation in that sport, *Anand v Kapoor*, 15 NY3d 946, 917 NYS2d 86, 942 NE2d 295 (2010); *Morgan v State*, *supra*; *Raldiris v Enlarged City School District of Middletown*, 179 AD3d 1111, 118 NYS3d 696 (2d Dept 2020); *Franco v 1200 Master Association, Inc.*, 177 AD3d 858, 112 NYS3d 200 (2d Dept 2019); *Samuels v Town Sports International, LLC*, 174 AD3d 429, 101 NYS3d 833 (1st Dept 2019); *Siegel v Albertus Magnus High School*, 153 AD3d 572, 60 NYS3d 202, 347 Ed Law Rep 530 (2d Dept 2017); *Huneau v Maple Ski Ridge, Inc.*, 17 AD3d 848, 794 NYS2d 460 (3d Dept 2005); *Sharrow v New York State Olympic Regional Development Authority*, 307 AD2d 605, 762 NYS2d 703 (3d Dept 2003). This includes those risks associated with the construction of the playing surface and any

open and obvious condition on it, *Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 641, 127 NYS3d 584 (2d Dept 2020); *Zachary G. v Young Israel of Woodmere*, 95 AD3d 946, 944 NYS2d 203 (2d Dept 2012); *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194, 924 NYS2d 474 (2d Dept 2011); *Bendig v Bethpage Union Free School Dist.*, 74 AD3d 1263, 904 NYS2d 731 (2d Dept 2010); see *Viola v Carmel Cent. School Dist.*, 95 AD3d 1206, 945 NYS2d 155 (2d Dept 2012); *Nigro v New York Racing Ass'n, Inc.*, 93 AD3d 647, 939 NYS2d 565 (2d Dept 2012); *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 918 NYS2d 661 (3d Dept 2011); see *Perez v New York City Dept. of Educ.*, 115 AD3d 921, 982 NYS2d 577 (2d Dept 2014) (glass pane in entrance door to gymnasium located beyond baseline).

“Thus, the risks of becoming injured due to fatigue, being bumped by a horse during a race or exhibition, or being struck by a ball or bat during a baseball game are risks which various participants are legally deemed to have accepted personal responsibility for because they commonly inhere in the nature of those activities,” *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); see *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012). On the other hand, a participant does not assume risks resulting from dangerous conditions over and above the usual dangers inherent in the activity, *Huneau v Maple Ski Ridge, Inc.*, 17 AD3d 848, 794 NYS2d 460 (3d Dept 2005); see *Clauss v Bush*, 79 AD3d 1397, 914 NYS2d 325 (3d Dept 2010); *Sharrow v New York State Olympic Regional Development Authority*, 307 AD2d 605, 762 NYS2d 703 (3d Dept 2003). Although the injured person’s knowledge plays an important role in determining the applicability of primary assumption of risk, the inherency of the risk in the activity “is the sine qua non,” *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 918 NYS2d 661 (3d Dept 2011); see *Rosati v Hunt Racing, Inc.*, 13 AD3d 1129, 787 NYS2d 576 (4th Dept 2004). Additionally, voluntariness of the injured person’s participation is an essential element. Thus, the primary assumption of risk doctrine does not apply to a plaintiff who was compelled to participate in the activity that resulted in injury, *Stoughtenger v Hannibal Cent. School Dist.*, 90 AD3d 1696, 935 NYS2d 430 (4th Dept 2011); *Fabricius v Broome*, 24 AD3d 853, 804 NYS2d 510 (3d Dept 2005); *Pfeifer v Musiker Student Tours, Inc.*, 280 AD2d 266, 720 NYS2d 121 (1st Dept 2001); see also *Bereswill v National Basketball Ass’n, Inc.*, 279 AD2d 292, 719 NYS2d 231 (1st Dept 2001); PJI 2:56.

Despite an early Appellate Division opinion stating that the primary assumption of risk doctrine is applicable only to individuals engaged in professional sports, *Locilento v John A. Coleman Catholic High School*, 134 AD2d 39, 523 NYS2d 198 (3d Dept 1987), subsequent case law has applied the doctrine to both professional and amateur sporting and recreational activities, *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989); see *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012) (doctrine applies to educational institutions that organize team

sporting activities); *M.F. v Jericho Union Free School District*, 172 AD3d 1056, 100 NYS3d 337 (2d Dept 2019) (high school football practice).

Play need not have formally begun to justify application of the primary assumption doctrine, *O'Neill v Daniels*, 135 AD2d 1076, 523 NYS2d 264 (4th Dept 1987) (plaintiff injured during warm-up activities preceding softball game); see *Marino v Bingler*, 60 AD3d 645, 874 NYS2d 542 (2d Dept 2009). However, individuals preparing to participate in sporting activities do not necessarily assume the risks that arise before warm-up and actual play has begun, *Marino v Bingler*, supra; see *Hawkes v Catatunk Golf Club Inc.*, 288 AD2d 528, 732 NYS2d 132 (3d Dept 2001) (plaintiff struck by golf ball while in parking lot en route to golf course); *Vogel v Venetz*, 278 AD2d 489, 718 NYS2d 396 (2d Dept 2000) (plaintiff slipped on ice in motel parking lot as he was preparing to mount snowmobile to trailer). Whether play began before the accident occurred could give rise to a triable question of fact under some circumstances, *Marino v Bingler*, supra. The doctrine can apply to the claim of an individual who was injured in a locker room shortly after play had ceased, see *Litz v Clinton Cent. School Dist.*, 126 AD3d 1306, 5 NYS3d 636 (4th Dept 2015) (primary assumption of risk applicable where plaintiff injured immediately following hockey practice in arena's locker room, which was designated for plaintiff's team's exclusive use).

As a general rule, application of primary assumption of risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues, *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); *DeMarco v DeMarco*, 154 AD3d 1226, 63 NYS3d 586 (3d Dept 2017) (inapplicable to injury resulting from jumping on trampoline in private home); *Filer v Adams*, 106 AD3d 1417, 966 NYS2d 553 (3d Dept 2013); see *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010) (inference of assumption of risk that arises when a person freely and knowingly participates in athletic activities is "a ground for exculpation" only "in the context of pursuits both unusually risky and beneficial that the defendant has in some non-culpable way enabled"); *Raldiris v Enlarged City School District of Middletown*, 179 AD3d 1111, 118 NYS3d 696 (2d Dept 2020) (inapplicable to plaintiff parent who injured hand while pushing child on swing); *Stiggins v North Dansville*, 155 AD3d 1617, 63 NYS3d 796 (4th Dept 2017) (inapplicable where plaintiff's decedent was passenger in vehicle driven by intoxicated driver); *Riccio v Kid Fit, Inc.*, 126 AD3d 873, 5 NYS3d 521 (2d Dept 2015) (inapplicable to plaintiff burned by lit sterno cannister attached to chafing tray plaintiff was carrying); *Ashbourne v New York*, 82 AD3d 461, 918 NYS2d 88 (1st Dept 2011) (noting that application of doctrine of primary assumption of risk is limited primarily to sponsored sporting events and recreational activities); *Cotty v Southampton*, 64 AD3d 251, 880 NYS2d 656 (2d Dept 2009) (inapplicable to bicycle riders injured while riding in public park); *Vestal v Suffolk*, 7 AD3d 613, 776 NYS2d

491 (2d Dept 2004) (primary assumption of risk inapplicable to riders injured while riding on paved pathways in public parks); *Roe v Keane Stud Farm*, 261 AD2d 800, 690 NYS2d 336 (3d Dept 1999) (assisting horse onto trailer for transportation does not involve athletic or entertainment-related activity); *Corrigan v Musclemakers Inc.*, 258 AD2d 861, 686 NYS2d 143 (3d Dept 1999) (plaintiff's first time on treadmill does not fall within reach of primary assumption of risk); *Cohen v Heritage Motor Tours, Inc.*, 205 AD2d 105, 618 NYS2d 387 (2d Dept 1994) (assumption doctrine does not preclude negligence action by tour participant injured while crossing brook on stepping stones at direction of tour guide); see also *Bouck v Skaneateles Aerodrome, LLC*, 129 AD3d 1565, 10 NYS3d 783 (4th Dept 2015) (primary assumption of risk applicable where plaintiff, piloting a small aircraft, was injured during unsuccessful take off from runway of airport; airport designated venue for recreational activity of private aviation).

Thus, cases such as the following, which were decided before *Custodi* and *Trupia*, that extended the doctrine beyond competitive and sponsored recreational activities, should be viewed with extreme caution, see *Sy v Kopet*, 18 AD3d 463, 795 NYS2d 75 (2d Dept 2005) (doctrine applied to person climbing into boarding house room through second floor window); *Lamandia-Cochi v Tulloch*, 305 AD2d 1062, 759 NYS2d 411 (4th Dept 2003) (doctrine applied to person attempting to slide down wooden porch handrail); *Westerville v Cornell University*, 291 AD2d 447, 737 NYS2d 389 (2d Dept 2002) (experienced mental health care professional assumed risk of injury sustained while participating in work related training seminar); *Davis v Kellenberg Memorial High School*, 284 AD2d 293, 725 NYS2d 588 (2d Dept 2001) (doctrine applied to infant plaintiff rocking and then jumping off concrete bench). The First Department has held that the primary assumption of risk doctrine has been extended to voluntary participation in fights and brawls outside of the sporting-event context, *Carreras v Morrisania Towers Housing Co. Ltd. Partnership*, 107 AD3d 618, 968 NYS2d 66 (1st Dept 2013) (brawl leading to a foreseeable shooting); *Vega v Ramirez*, 57 AD3d 299, 871 NYS2d 6 (1st Dept 2008) (barroom brawl); see *Williams v Board of Educ. of City School Dist. of City of Mount Vernon*, 277 AD2d 373, 717 NYS2d 190 (2d Dept 2000).

B. Plaintiff's Awareness of the Risk

A key criterion in the application of the primary assumption of risk doctrine is the injured person's awareness of the risk of harm. Whether a given participant is aware of and appreciates a particular risk must be assessed against his or her skill, background and experience, *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985); *Myers v Friends of Shenendehowa Crew, Inc.*, 31 AD3d 853, 819 NYS2d 143 (3d Dept 2006); *Laboy v Wallkill Cent. School Dist.*, 201 AD2d 780, 607 NYS2d 746 (3d Dept 1994); see *Sharro v New York State Olympic Regional Development Authority*, 307 AD2d 605, 762 NYS2d 703 (3d Dept 2003); *De Lacy v Catamount Development Corp.*, 302 AD2d 735,

755 NYS2d 484 (3d Dept 2003); *Hyland v State*, 300 AD2d 794, 752 NYS2d 113 (3d Dept 2002); *Tepper v City of New Rochelle School Dist.*, 143 AD2d 133, 531 NYS2d 367 (2d Dept 1988) (although plaintiff's parents had signed a consent form allowing him to play, issue of fact existed as to whether plaintiff comprehended true nature of risk when he joined team). Application of the primary assumption of risk doctrine requires that the participant have not only knowledge of the defective condition, but also an appreciation of the resulting risk, *Morgan v State*, *supra*. While awareness of the risks involved in a particular sport is an essential component of the primary assumption of risk doctrine, it is not necessary that the injured plaintiff have foreseen the exact manner in which his or her injury occurred; all that is required is an awareness of the injury-causing potential of the mechanism from which the injury results, *Maddox v New York*, *supra*; *Bouck v Skaneateles Aerodrome, LLC*, 129 AD3d 1565, 10 NYS3d 783 (4th Dept 2015); *Bendig v Bethpage Union Free School Dist.*, 74 AD3d 1263, 904 NYS2d 731 (2d Dept 2010).

The injured participant's age may be a factor in assessing whether he or she knew of and appreciated the risks inherent in a particular activity. Thus, in *Trainer v Camp Hadar Hatorah*, 297 AD2d 731, 748 NYS2d 386 (2d Dept 2002), the seven-year-old plaintiff was deemed not to have appreciated the risks involved in playing on a swing set. Similarly, in *Douglas v John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 327, 778 NYS2d 77 (2d Dept 2004), the court held that a question of fact existed as to whether, in light of his age and limited experience, a nine-year-old child knew and appreciated the risks inherent in playing tag, see *Rivera v Board of Educ. of Yonkers*, 19 AD3d 394, 796 NYS2d 182 (2d Dept 2005) (question of fact as to whether, in light of his age and limited experience, six-year-old child knew and appreciated risks inherent in playing on monkey bars); *Bello v Fieldhouse at Chelsea Piers*, 18 AD3d 272, 795 NYS2d 24 (1st Dept 2005) (issue of fact regarding whether 10-year-old assumed risks inherent in running through obstacle course of balance beams); *Smith v Sapienza*, 115 AD2d 723, 496 NYS2d 538 (2d Dept 1985) (assumption of risk, whether express or implied, not applicable to child under four who, as a matter of law, is incapable of being held responsible for his or her actions and jury instruction to that effect must be given). In contrast, an 11-year-old seventh grader playing on and around a "jungle gym" in a playground was deemed to have consented to those commonly appreciated risks that are inherent in and arise out of the nature of the activity, *Auwarter v Malverne Union Free School Dist.*, 274 AD2d 528, 715 NYS2d 852 (2d Dept 2000).

In most cases, the questions whether a particular risk is inherent in an activity and whether the injured plaintiff knew of and appreciated that risk are determined by the court as a matter of law, *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 (2d Dept 2013). However, in some cases, there are facts that raise questions to be resolved by a jury, *Hyde v North Collins Cent. School Dist.*, 83 AD3d 1557, 922 NYS2d 677 (4th Dept 2011); *Gortych v Brenner*, 83 AD3d 497, 922 NYS2d 14 (1st Dept 2011); *Allwood v CW*

Post College, 190 AD2d 704, 593 NYS2d 310 (2d Dept 1993); Henig v Hofstra University, 160 AD2d 761, 553 NYS2d 479 (2d Dept 1990); Tepper v City of New Rochelle School Dist., 143 AD2d 133, 531 NYS2d 367 (2d Dept 1988). In such case, the following charge should be given:

PJI 2:55.1

An injured person may not recover for injuries incurred as the consequence of some risk or danger normally associated with an activity in which (he, she) voluntarily participated, provided that (he, she) knew of and appreciated that risk. Plaintiff AB claims [state plaintiff's claims, such as that the particular risk is not inherent in the activities or that (he, she) did not know of or appreciate the risk of harm]. Defendant CD claims [state defendant's claims].

CD has the burden of proving, by a preponderance of the evidence, that [state where appropriate: the risk of injury from (identify injury-producing hazard) is inherent in (identify activity); AB knew of and appreciated the risk of the risk of injury from (identify injury-producing hazard)]. You must decide, based on the evidence, whether CD has proven that [state where appropriate: the risk of injury from (identify injury-producing hazard) is inherent in (identify activity); that AB knew of and appreciated the risk of injury from (identify injury-producing hazard)]. [State where appropriate: In deciding whether CD has proven that AB knew of and appreciated the risk of injury from (identify injury-producing hazard), you should consider AB's age and experience as well as [identify any other relevant factors raised by the evidence].

If you decide that CD has proven, by a preponderance of the evidence that [state where appropriate: the risk of injury from (identify injury-producing hazard) is inherent in (identify activity); AB knew of and appreciated the risk of injury from [identify injury-producing hazard], then you will find for CD [state where appropriate: on this claim). If you find that CD has not proven, by a preponderance of the evidence that [state where appropriate: the risk of injury from (identify injury-

***producing hazard*) is inherent in (*identify activity*); AB knew of and appreciated the risk of injury from (*identify injury-producing hazard*)], then you will go on to consider whether CD was negligent and whether that negligence, if any, was a substantial factor in AB's injury.**

[PJI 2:10, 2:12, 2:36, 2:70 and any other charges relevant to the facts should also be given]

C. Risks That Participants Do Not Assume

Participants in sporting and recreational activities will not be deemed to have assumed the risks of concealed or unreasonably increased risks or risks that are not inherent in the activity, *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); *Owen v R.J.S. Safety Equipment, Inc.*, 79 NY2d 967, 582 NYS2d 998, 591 NE2d 1184 (1992); *Lamey v Foley*, 188 AD2d 157, 594 NYS2d 490 (4th Dept 1993); see *Samuels v Town Sports International, LLC*, 174 AD3d 429, 101 NYS3d 833 (1st Dept 2019) (question of fact as to whether accumulated dust on basketball court was risk inherent in sport of basketball or was open and obvious condition); *Connolly v Willard Mountain, Inc.*, 143 AD3d 1148, 40 NYS3d 236 (3d Dept 2016) (whether snow tubing course attendant adequately maintained run-out area of course, and whether staff appropriately allowed plaintiff to ride tandem with her son presented fact questions regarding whether defendants unreasonably increased risk of injury to plaintiff); *Zelkowitz v Country Group, Inc.*, 142 AD3d 424, 36 NYS3d 32 (1st Dept 2016) (question of fact whether risk encountered by zip-liner was created or enhanced by faulty equipment, i.e., malfunctioning brake); *Dann v Family Sports Complex, Inc.*, 123 AD3d 1177, 997 NYS2d 836 (3d Dept 2014) (question of fact whether concrete footer on which plaintiff smashed his knee while playing indoor soccer was open and obvious); *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 (2d Dept 2013) (14-year-old high school freshman softball player with limited pitching experience did not assume risk of being struck by batted ball while pitching behind faulty "L-screen" from a decreased distance between her and the batter); *McGrath v Shenendehowa Cent. School Dist.*, 76 AD3d 755, 906 NYS2d 399 (3d Dept 2010) (question of fact whether rut that allegedly caused plaintiff's accident on lacrosse field was open and obvious or concealed); *Demelio v Playmakers, Inc.*, 63 AD3d 777, 880 NYS2d 710 (2d Dept 2009) (increased risk of ricocheting baseballs presented by unpadded metal pole in enclosed batting cage may not be inherent risk of hitting balls in cage); *Schiff v State*, 31 AD3d 526, 818 NYS2d 597 (2d Dept 2006) (canoer did not assume risk of stepping on submerged metal rod embedded in river bed); *Moore v New York*, 29 AD3d 751, 816 NYS2d 131 (2d Dept 2006) (bicyclist did not assume risk of injury resulting from defect on paved pathway); *Kaczynski v United Skates of America, Inc.*, 4 AD3d 337, 770 NYS2d 888 (2d Dept 2004) (defect in metal molding separating beginner's area

of skating rink from carpeted area not risk inherent in sport of roller skating); *Kappes v Cohoes Bowling Arena, Inc.*, 2 AD3d 1034, 768 NYS2d 251 (3d Dept 2003) (bowler did not assume risk of slipping on oil deposited by lane-oiling machine that had been dragged across approach area); *Warren v Hempstead*, 246 AD2d 536, 667 NYS2d 389 (2d Dept 1998) (question of fact whether cracks covered by sealant were “open and obvious” to basketball player); *Clark v State*, 245 AD2d 413, 666 NYS2d 209 (2d Dept 1997) (basketball player did not assume risk of injury caused by steep drop-off several inches from edge of playing area’s asphalt surface); *Laboy v Wallkill Cent. School Dist.*, 201 AD2d 780, 607 NYS2d 746 (3d Dept 1994) (pole vaulter did not assume risk of separated floor mats); *Lamey v Foley*, *supra*, (question of fact whether participant in ATV stunt performance assumed risk arising from unpadded course fences). However, the primary assumption of risk doctrine encompasses risks involving “less than optimal conditions,” *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012); *Litz v Clinton Cent. School Dist.*, 126 AD3d 1306, 5 NYS3d 636 (4th Dept 2015). Therefore, care must be taken to differentiate between risks that are not inherent in the activity, such as risks presented by defective equipment, and risks that merely involve less than optimal conditions for a given activity, see *Bukowski v Clarkson University*, *supra*.

It has also been held that a participant in a sporting event does not assume the risk of another participant’s negligence that enhances the dangers inherent in the sport, *Cruz v New York*, 288 AD2d 250, 733 NYS2d 112 (2d Dept 2001) (high school football player did not assume risk of injury caused by push sled left on sideline). Whether a participant in a sporting or recreational activity assumes the risk of reckless or otherwise culpable conduct by other participants appears to depend upon whether the conduct is a risk inherent in the activity. Thus, in *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986), the Court of Appeals held that plaintiff jockey had assumed the risk of injury arising from another jockey’s violation of the rules of horse racing, see *Barton by Barton v Hapeman*, 251 AD2d 1052, 674 NYS2d 188 (4th Dept 1998) (fact that co-participant’s conduct violated rules of league or sport does not render such conduct intentional or reckless so as to justify exception to primary assumption of risk doctrine). To constitute conduct outside the primary assumption of risk doctrine, the conduct must be a flagrant infraction unrelated to the normal method of playing the game and done without a competitive purpose, *Turcotte v Fell*, *supra*; *Clauss v Bush*, 79 AD3d 1397, 914 NYS2d 325 (3d Dept 2010); *Filippazzo v Kormoski*, 75 AD3d 618, 905 NYS2d 276 (2d Dept 2010); *Pelkey v Viger*, 289 AD2d 899, 735 NYS2d 231 (3d Dept 2001); *Barton by Barton v Hapeman*, *supra*; *Duncan v Kelly*, 249 AD2d 802, 671 NYS2d 841 (3d Dept 1998) (individual participating in downhill skiing does not assume risk of another participant’s negligent, reckless or intentional conduct).

Participants and patrons of sporting venues also do not assume the risk of foreseeable harm arising from a breach of the duty to provide

reasonable supervision, *Kramer v Arbore*, 309 AD2d 1208, 765 NYS2d 118 (4th Dept 2003) (rink owners could be held liable to hockey player injured by another player's reckless or intentional conduct, where there was evidence that game was "rougher than normal" and refereeing was "poor" or "terrible"). Nor do they assume the risk of reckless conduct on the part of the venue's employees that heighten the risks inherent in the activity, *Reid v Druckman*, 309 AD2d 669, 765 NYS2d 878 (1st Dept 2003) (risk assumed by rink patron not so broad as to encompass being bowled over by reckless rink safety personnel). However, patrons of sporting and recreational venues cannot recover for injuries resulting from non-reckless conduct by employees, *Kaufman v Hunter Mountain Ski Bowl, Inc.*, 240 AD2d 371, 372, 657 NYS2d 773 (2d Dept 1997) (plaintiff assumed risk of colliding with ski patroller who was not acting recklessly), unless the conduct unreasonably enhanced the risk of injury, *Gahan v Mineola Union Free School Dist.*, 241 AD2d 439, 660 NYS2d 144 (2d Dept 1997) (plaintiff did not assume risk that coaches would exacerbate her injury by moving her before medical personnel arrived); see *Hope v Holiday Mountain Corp.*, 123 AD3d 1274, 999 NYS2d 211 (3d Dept 2014) (issue of fact as to whether actions of employees at amusement park unreasonably heightened risk of collision at base of slide by failing adequately to staff or supervise it); *Huneau v Maple Ski Ridge, Inc.*, 17 AD3d 848, 794 NYS2d 460 (3d Dept 2005) (issue of fact as to whether actions of attendants at snow tubing facility unreasonably increased risk of injury); *Rosati v Hunt Racing, Inc.*, 13 AD3d 1129, 787 NYS2d 576 (4th Dept 2004) (question of fact whether improperly trained or negligent flagman is risk inherent in sport of motorcross racing).

D. Primary Assumption of Risk As Applied to Supervised Children's Activities

The primary assumption of risk doctrine has been extended to limit the duty owed by private schools, camps, boards of education, their employees, agents and athletic councils to student athletes voluntarily involved in sports, *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989). The duty owed in such circumstances is limited to protecting student athletes from "unassumed, concealed or unreasonably increased risks," *id*; *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 918 NYS2d 661 (3d Dept 2011); *Rawson v Massapequa Union Free School Dist.*, 251 AD2d 311, 674 NYS2d 388 (2d Dept 1998); *Laboy v Wallkill Cent. School Dist.*, 201 AD2d 780, 607 NYS2d 746 (3d Dept 1994); see *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012).

The courts have disagreed on the question whether primary assumption of risk is a complete defense to a claim of negligent supervision. The Fourth Department has held that the primary assumption of risk doctrine does not automatically bar a claim for negligent supervision arising from the same facts, *Garman v East Rochester School Dist.*, 46 AD3d 1354, 850 NYS2d 306 (4th Dept 2007); *Hochreiter v Diocese of Buffalo*, 309 AD2d 1216, 764 NYS2d 753 (4th

Dept 2003); *Havens v Kling*, 277 AD2d 1017, 715 NYS2d 812 (4th Dept 2000). However, the First Department has noted its disagreement with the Fourth Department's view and held that negligent supervision is a viable theory only to the extent that the risk on which the action is based has not been assumed, *Roberts v Boys and Girls Republic, Inc.*, 51 AD3d 246, 850 NYS2d 38 (1st Dept 2008), *aff'd*, 10 NY3d 889, 861 NYS2d 603, 891 NE2d 719 (2008); *F.T. v Loisaída, Inc.*, 192 AD3d 611, 146 NYS3d 27 (1st Dept 2021); see *Shakura T. v New York*, 116 AD3d 596, 983 NYS2d 791 (1st Dept 2014); *Morabito v MacArthur*, 70 AD3d 792, 894 NYS2d 110 (2d Dept 2010) (affirming dismissal of negligent supervision cause of action where primary assumption of risk established). Although the Court of Appeals affirmed the Appellate Division's order in *Roberts v Boys and Girls Republic, Inc.*, *supra*, the Court of Appeals did not discuss the viability of a negligent supervision cause of action in these circumstances. Applying a related analysis, some courts have held that the primary assumption of risk doctrine does not, by its terms, preclude liability where the lack of adequate supervision increased the risk of the activity beyond the risks otherwise assumed by participants, *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 918 NYS2d 661 (3d Dept 2011); *Royal v Syracuse*, 309 AD2d 1284, 765 NYS2d 560 (4th Dept 2003) (cheerleading); *Traficenti v Moore Catholic High School*, 282 AD2d 216, 724 NYS2d 24 (1st Dept 2001) (same).

In *Trupia ex rel. Trupia v Lake George Central School District*, 14 NY3d 393, 901 NYS2d 127, 927 NE2d 547, the Court of Appeals cautioned against an expansive application of primary assumption of risk to children's "horseplay" in schools and other organized settings that could eviscerate the institution's obligation to provide adequate supervision. The Court, however, stopped short of holding that the doctrine may never be applied to bar recovery on behalf of children who freely and knowingly engage in activities that are "unusually risky" and also "beneficial," *id.*

The doctrine of primary assumption of risk was held inapplicable to the plaintiff parent who fractured his hand while pushing his daughter on a swing that allegedly had been negligently installed, *Raldiris v Enlarged City School District of Middletown*, 179 AD3d 1111, 118 NYS3d 696 (2d Dept 2020).

E. Primary Assumption of Risk As Applied to Particular Activities

1. Football

The courts have recognized that injury is inherent in team competitive sports, particularly football, *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989); *Hunt v Skaneateles Cent. School Dist.*, 227 AD2d 939, 643 NYS2d 252 (4th Dept 1996); see *Ninivaggi v Nassau*, 177 AD3d 981, 113 NYS3d 178 (2d Dept 2019), leave to appeal granted, 35 NY3d 909, 125 NYS3d 386, 149 NE3d 80 (2020) (plaintiff assumed risk of stepping into "depression" or "hole"

while playing catch with football on multipurpose athletic field); *M.F. v Jericho Union Free School District*, 172 AD3d 1056, 100 NYS3d 337 (2d Dept 2019) (plaintiff football player observing practice assumed risk inherent in drill that blocking sled could veer into him); *Ciocchi v Mercy College*, 289 AD2d 362, 735 NYS2d 144 (2d Dept 2001) (participant in indoor football game assumed risk of collision with pole stored in gym). Thus, as a matter of law, a high school football player who voluntarily continued to play in a game against another school despite fatigue assumed the risk of injury, *Benitez v New York City Bd. of Education*, *supra*. In contrast, in *Henig v Hofstra University*, 160 AD2d 761, 553 NYS2d 479 (2d Dept 1990), where a football player was injured when he fell into a hole on the field, it was held that a jury question was presented as to whether the hole was “typical of the terrain upon which the game of football is normally played” or whether the hole was an unreasonable, unnecessary and unforeseen addition to the risks inherent in the sport.

An owner of a football field has discharged its duty of care when it makes the field’s conditions as safe as they appear to be, *Brown v New York*, 69 AD3d 893, 895 NYS2d 442 (2d Dept 2010). Thus, plaintiff, who was injured while playing touch football on defendant’s field, could not recover for the injuries sustained when he dove for a football and his knee struck a cement strip outside the sideline, since the strip was open and obvious and defendant was aware of its presence, *id*.

2. *Baseball, Softball and Stickball*

An experienced softball player playing first base assumes the risk that he or she may be injured by a sliding runner, *Rosenblatt v Kahn*, 245 AD2d 438, 666 NYS2d 666 (2d Dept 1997); see *F.T. v Loisaída, Inc.*, 192 AD3d 611, 146 NYS3d 27 (1st Dept 2021) (fact that base runner wore metal cleats did not create unassumed enhanced risk where such cleats were permitted by league rules and plaintiff had observed base runner’s cleats); *Robinson v Babylon*, 166 AD2d 434, 560 NYS2d 507 (2d Dept 1990) (assumption of risk precluded recovery by amateur softball player injured when base shifted under his foot causing him to collide with another player), or a thrown or struck ball during the game or the preliminary warm-up, *Steegmuller v Siegel*, 202 AD2d 855, 609 NYS2d 359 (3d Dept 1994); *Kennedy v Rockville Centre Union Free School Dist.*, 186 AD2d 110, 587 NYS2d 442 (2d Dept 1992); *O’Neill v Daniels*, 135 AD2d 1076, 523 NYS2d 264 (4th Dept 1987). Generally, a softball or baseball player assumes the risk of injury from sliding into a properly positioned base, see *Viola v Carmel Cent. School Dist.*, 95 AD3d 1206, 945 NYS2d 155 (2d Dept 2012). However, an inexperienced softball player may not appreciate the risk of injury as a result of sliding into a base, see *Hyde v North Collins Cent. School Dist.*, 83 AD3d 1557, 922 NYS2d 677 (4th Dept 2011). Risks that are commonly encountered or inherent in baseball, such as being struck by a ball or bat, are risks that various participants in the sport assume, see *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012); see *Weinberger v Solomon Schechter School of Westchester*, 102

AD3d 675, 961 NYS2d 178 (2d Dept 2013) (14-year-old high school freshman softball player with limited pitching experience did not assume risk of being struck by batted ball while pitching behind faulty “L-screen” from a decreased distance between her and the batter). Baseball, softball and stickball players also assume the risk of being struck by bats that have been swung or thrown, *Marlowe By Marlowe v Rush-Henrietta Cent. School Dist.*, 167 AD2d 820, 561 NYS2d 934 (4th Dept 1990), *aff’d*, 78 NY2d 1096, 578 NYS2d 872, 586 NE2d 55 (1991); *Shea v Sky Bounce Ball Co., Inc.*, 294 AD2d 486, 742 NYS2d 383 (2d Dept 2002); *Checchi v Socorro by Socorro*, 169 AD2d 807, 565 NYS2d 175 (2d Dept 1991); *Napoli v Mount Alvernia, Inc.*, 239 AD2d 325, 657 NYS2d 197 (2d Dept 1997). However, liability may result from the failure to provide proper protective equipment or follow sound coaching practices, *Parisi by Parisi v Harpursville Cent. School Dist.*, 160 AD2d 1079, 553 NYS2d 566 (3d Dept 1990) (failure to require use of face mask by catchers); see *Weinberger v Solomon Schechter School of Westchester*, *supra*.

Baseball and softball players assume the risks associated with some ball field conditions, including wet, spongy and slippery grounds, *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985); *Chiaromonte v Smithtown*, 192 AD3d 657, 143 NYS3d 100 (2d Dept 2021) (muddy field conditions); *Siegel v Albertus Magnus High School*, 153 AD3d 572, 60 NYS3d 202, 347 Ed Law Rep 530 (2d Dept 2017); *Giovinazzo v Mohawk Valley Community College*, 207 AD2d 980, 617 NYS2d 90 (4th Dept 1994); *Gallagher v North Hempstead*, 144 AD2d 637, 535 NYS2d 10 (2d Dept 1988) (field made slippery by goose droppings), holes scattered throughout the playing field, *Gahan v Mineola Union Free School Dist.*, 241 AD2d 439, 660 NYS2d 144 (2d Dept 1997); *Hoffman v New York*, 172 AD2d 716, 569 NYS2d 99 (2d Dept 1991); *Melko v Islip*, 172 AD2d 729, 569 NYS2d 100 (2d Dept 1991), and other field conditions that are common risks or readily apparent hazards, *Bruno v Hempstead*, 248 AD2d 576, 670 NYS2d 864 (2d Dept 1998) (in-ground sprinklers commonly found on softball fields); *Castello v Nassau*, 223 AD2d 571, 636 NYS2d 817 (2d Dept 1996) (protruding home plate readily observable by plaintiff); *Strauss v Oyster Bay*, 201 AD2d 553, 607 NYS2d 730 (2d Dept 1994) (uneven terrain); *Pascucci v Oyster Bay*, 186 AD2d 725, 588 NYS2d 663 (2d Dept 1992) (light pole located in the “fair” territory of a softball field; plaintiff had played softball at field); *Pichardo v North Patchogue Medford Youth Athletic Assoc., Inc.*, 172 AD2d 814, 569 NYS2d 186 (2d Dept 1991) (despite threatening weather, plaintiff continued to play and was struck by lightning). The primary assumption of risk doctrine encompasses risks involving “less than optimal [playing] conditions,” *Bukowski v Clarkson University*, 19 NY3d 353, 948 NYS2d 568, 971 NE2d 849 (2012). Thus, an experienced and knowledgeable college baseball player participating in an indoor practice assumed the risk of being struck by a line drive off the bat of a hitter to whom the player was pitching, even if the pitching backdrop and indoor lighting in the facility were less than optimal for baseball and protective screening was not provided, *id*; *Grady v Chenango Valley Central School District*, 190 AD3d 1218, 141 NYS3d

513 (3d Dept 2021) (high school baseball player assumed risk of being struck by errant ball during practice drill where multiple balls were simultaneously being thrown); *Legac v South Glens Falls Cent. School Dist.*, 150 AD3d 1582, 52 NYS3d 750 (3d Dept 2017) (experienced high school baseball player participating in indoor tryout assumed risk of being struck in face by baseball after unsuccessfully attempting to field ground ball even if conditions in gymnasium were less than optimal). However, the risk of being injured by a metal spike protruding from the ground is not, as a matter of law, a risk inherent in sliding into a base during a softball game, *Simmons v Smithtown Cent. School Dist.*, 272 AD2d 391, 707 NYS2d 646 (2d Dept 2000); *Roska v Cheektowaga*, 251 AD2d 984, 674 NYS2d 545 (4th Dept 1998). Where a tear or seam in the artificial turf of a softball field may have caused a concealed depression relative to the surrounding playing surface, there were issues of fact as to whether the plaintiffs' injuries resulted from concealed or unreasonably increased risks, *A.S. by Gizelle C. v New York*, 194 AD3d 463, 143 NYS3d 541 (1st Dept 2021).

3. *Basketball*

Basketball players assume the foreseeable risks inherent in playing on outdoor courts, *Steward v Clarkstown*, 224 AD2d 405, 638 NYS2d 125 (2d Dept 1996), as well as the risks from conditions that are open and obvious on both indoor and outdoor courts, *Green v New York*, 263 AD2d 385, 693 NYS2d 43 (1st Dept 1999); see *Trevett v Little Falls*, 6 NY3d 884, 816 NYS2d 738, 849 NE2d 961 (2006) (proximity of pole supporting backboard); *Sykes v Erie*, 94 NY2d 912, 707 NYS2d 374, 728 NE2d 973 (2000) (recessed drain on surface of court); *Secky v New Paltz Central School District*, 195 AD3d 1347 (3d Dept 2021) (playing basketball without using boundary lines of court); *Franco v 1200 Master Association, Inc.*, 177 AD3d 858, 112 NYS3d 200 (2d Dept 2019) (proximity of fence to court); *Perez v New York City Dept. of Educ.*, 115 AD3d 921, 982 NYS2d 577 (2d Dept 2014) (glass pane in entrance door to gymnasium located beyond baseline); *Brookstone v State*, 64 AD3d 1023, 883 NYS2d 347 (3d Dept 2009) (irregular playing surface); *Paone v Suffolk*, 251 AD2d 563, 674 NYS2d 761 (2d Dept 1998) (same); see *Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 641, 127 NYS3d 584 (2d Dept 2020) (gymnasium's wet floor caused by leaking roof not risk inherent in sport of basketball); *Samuels v Town Sports International, LLC*, 174 AD3d 429, 101 NYS3d 833 (1st Dept 2019) (question of fact as to whether accumulated dust on basketball court was risk inherent in sport of basketball or was open and obvious condition); *Allwood v CW Post College*, 190 AD2d 704, 593 NYS2d 310 (2d Dept 1993) (question of fact whether basketball plaintiff assumed risk of warped, uneven and puddled floor in dimly-lit indoor court). However, a basketball player does not assume the risk of an injury caused by a steep drop-off several inches from the edge of the playing area's asphalt surface, *Clark v State*, 245 AD2d 413, 666 NYS2d 209 (2d Dept 1997), by cracks on the court disguised by sealant, *Warren v Hempstead*, 246 AD2d 536, 667 NYS2d 389 (2d Dept 1998), or by a hole on the court concealed by vegetation, *Swan v New York*, 272 AD2d 394, 707 NYS2d 480 (2d Dept 2000).

4. *Tennis, Racquetball and Handball*

The risk of running into a wall is inherently part of playing and participating in tennis at an indoor facility, *Kazlow v New York*, 253 AD2d 411, 676 NYS2d 229 (2d Dept 1998), as is the risk of coming into contact with a tennis net, *Viniar v Oyster Bay*, 197 AD2d 683, 603 NYS2d 18 (2d Dept 1993); see *Bendig v Bethpage Union Free School Dist.*, 74 AD3d 1263, 904 NYS2d 731 (2d Dept 2010) (net winder handle protruding from net pole). The primary assumption of risk doctrine was applied to bar a wrongful death action where the decedent, while umpiring a tennis match involving “top-ranked” players in a major national tournament, was fatally injured as a result of being struck by a tennis ball, *Wertheim v U.S. Tennis Ass’n, Inc.*, 150 AD2d 157, 540 NYS2d 443 (1st Dept 1989). Likewise, a member of a high school tennis team participating in a jumping drill during team practice assumed the risk of a wet surface on a tennis court, since such a condition does not unreasonably increase the risk of injury, *Vecchione v Middle Country Cent. School Dist.*, 300 AD2d 471, 752 NYS2d 82 (2d Dept 2002). An 11-year-old playing handball on a public handball court assumed the risk of injury caused by an improperly placed ventilation grate that was situated flush with the wall against which the ball was thrown, since the grate was an open and obvious condition on the court and plaintiff was aware of the condition, *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194, 924 NYS2d 474 (2d Dept 2011). However, a torn or damaged net between adjacent tennis courts is, by its nature, not automatically an inherent risk of the sport of tennis, *Siegel v New York*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997).

A reasonable person of sufficient age and experience is expected to know that there is an apparent and foreseeable risk of cardiac arrest while participating in a strenuous sport such as racquetball, *Rutnik v Colonie Center Court Club Inc.*, 249 AD2d 873, 672 NYS2d 451 (3d Dept 1998). Similarly, a tennis umpire with a prior history of heart disease assumed the risk that his medical condition might be aggravated by his participation in a major national tournament, *Wertheim v U.S. Tennis Ass’n, Inc.*, 150 AD2d 157, 540 NYS2d 443 (1st Dept 1989).

5. *Bicycling*

The application of the primary assumption of risk doctrine to bicyclists injured as a result of defects in the riding surface has been somewhat problematic. In *Calise v New York*, 239 AD2d 378, 657 NYS2d 430 (2d Dept 1997), the doctrine was applied to bar recovery by a plaintiff whose bicycle struck an exposed tree root while he was riding on an unpaved dirt and rock path in a park, see *Rivera v Glen Oaks Village Owners, Inc.*, 41 AD3d 817, 839 NYS2d 183 (2d Dept 2007) (barring recovery by plaintiff whose bicycle struck hole in dirt trail in wooded area); *Goldberg v Hempstead*, 289 AD2d 198, 733 NYS2d 691 (2d Dept 2001) (barring recovery by plaintiff whose bicycle struck hole in dirt base path of baseball field). Further, the doctrine was held applicable to a plaintiff whose bicycle struck a pothole or rut in a closed

school parking area or driveway, *Restaino v Yonkers Bd. of Educ.*, 13 AD3d 432, 785 NYS2d 711 (2d Dept 2004), and to an “experienced” 14-year-old plaintiff who swerved to avoid a pedestrian after coming into contact with a non-continuous curb, *DeJesus v New York*, 29 AD3d 401, 815 NYS2d 502 (1st Dept 2006); but see *Moore v New York*, 29 AD3d 751, 816 NYS2d 131 (2d Dept 2006) (gap between a sewer grating and roadway that was not open and obvious not within class of risks assumed by bicyclist).

On the other hand, the Second Department has held that the primary assumption of risk doctrine is not applicable to bicyclists who were not engaged in competitive riding and who were injured when their bicycles struck defects in paved pathways in public parks or roads, *Caraballo v Yonkers*, 54 AD3d 796, 865 NYS2d 229 (2d Dept 2008); *Moore v New York*, 29 AD3d 751, 816 NYS2d 131 (2d Dept 2006); *Vestal v Suffolk*, 7 AD3d 613, 776 NYS2d 491 (2d Dept 2004); *Berfas v Oyster Bay*, 286 AD2d 466, 729 NYS2d 530 (2d Dept 2001). That court also declined to apply the doctrine to a plaintiff who was injured when his bicycle struck a raised concrete mound on a public road even though the plaintiff was an “avid” bicyclist participating in a noncompetitive, recreational ride with eight or nine other riders. Noting that the primary assumption of risk doctrine does not extend to all leisure activities and was not intended to relieve municipalities of their duty to maintain roadways in a safe condition, the Second Department has concluded that riding a bicycle in a paved public roadway for noncompetitive purposes normally does not constitute a sporting activity for purposes of applying the doctrine, *Cotty v Southampton*, 64 AD3d 251, 880 NYS2d 656 (2d Dept 2009); see *Fornuto v Nassau*, 149 AD3d 910, 52 NYS3d 435 (2d Dept 2017); *Weller v Colleges of the Senecas*, 217 AD2d 280, 635 NYS2d 990 (4th Dept 1995). However, mountain biking and other forms of off-road biking are more readily classified as sporting activities and therefore may be subject to the primary assumption of risk doctrine, *Cotty v Southampton*, *supra*; see *Mamati v New York Parks & Recreation*, 123 AD3d 671, 997 NYS2d 731 (2d Dept 2014) (motocross bicyclist assumed risk of voluntarily jumping his bicycle from one dirt mound to another on dirt bike trail). *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012), lends strong support to the Second Department’s position that the doctrine of primary assumption of risk does not apply to bicyclists who were not engaged in competitive riding.

6. *Cheerleading*

An experienced cheerleader who was injured while performing an assisted straddle jump during a varsity squad practice assumed the risk of injuries associated with that sport, *Weber v William Floyd School Dist.*, UFSD, 272 AD2d 396, 707 NYS2d 231 (2d Dept 2000); see *Jurgensen v Webster Cent. School Dist.*, 126 AD3d 1423, 5 NYS3d 663 (4th Dept 2015) (high school cheerleader assumed risk of performing stunts with teammate that cheerleader knew was injured); *Traficenti v Moore Catholic High School*, 282 AD2d 216, 724 NYS2d 24 (1st Dept 2001).

(high school cheerleader assumed the risk of performing stunts on a mat-less floor). However, a high school cheerleader did not assume the heightened risk of performing a lift without appropriate spotters, *Royal v Syracuse*, 309 AD2d 1284, 765 NYS2d 560 (4th Dept 2003). Similarly, where a high school coach delegated the responsibility of choosing and assigning routines to team captains, there was a triable question of fact as to whether there was a lack of adequate supervision that gave rise to a risk of harm beyond the risks ordinarily assumed by participants in cheerleading, *Traficenti v Moore Catholic High School*, *supra*; see *Ballou v Ravena-Coeymans-Selkirk School Dist.*, 72 AD3d 1323, 898 NYS2d 358 (3d Dept 2010) (high school cheerleader did not assume risk of inadequate supervision of practice).

7. *Volleyball*

A seventh grade volleyball player was held to have assumed the risk of being hit with a thrown or hit ball while walking off the court and the fact that the coach may have signaled the end of play did not alone unreasonably increase the risks associated with the sport, *Hochreiter v Diocese of Buffalo*, 309 AD2d 1216, 764 NYS2d 753 (4th Dept 2003). However, under such circumstances, defendants could still be held liable for negligent supervision, *id.*

8. *Soccer, Lacrosse and Rugby*

Being struck by a passed ball is a known risk inherent in lacrosse, see *Charles v Uniondale School Dist. Bd. of Educ.*, 91 AD3d 805, 937 NYS2d 275 (2d Dept 2012). However, in *Charles*, the court determined that a factual issue was present as to whether the defendant public high school unreasonably increased the risk of harm to the plaintiff by failing to provide him with head and face protection during a preseason high school lacrosse practice. In *Tepper v City of New Rochelle School Dist.*, 143 AD2d 133, 531 NYS2d 367 (2d Dept 1988), the court held that a jury question was presented as to whether the high school lacrosse coach was negligent in permitting plaintiff, a junior varsity player of slight build and very limited experience, to go “head-to-head” with a 260-pound senior varsity player who had substantially greater experience, see *McGrath v Shenendehowa Cent. School Dist.*, 76 AD3d 755, 906 NYS2d 399 (3d Dept 2010) (with regard to doctrine of primary assumption of risk, question of fact whether rut that allegedly caused plaintiff’s accident on lacrosse field was open and obvious or concealed). Similarly, since a participant in a sporting event does not assume risks that are unreasonably increased, a jury question was presented as to whether the risk of injury inherent in rugby was increased by the active participation of adult, physically larger counselors with younger campers, *Mauner v Feinstein*, 213 AD2d 383, 623 NYS2d 326 (2d Dept 1995). An experienced soccer player who participated in games knowing that there were drain covers scattered throughout the playing field assumed the risk of injuries resulting from that hazard, *Shelmerdine v Guilderland*, 223 AD2d 875, 636 NYS2d 213 (3d Dept 1996); see *Dann v Family Sports Complex, Inc.*, 123 AD3d 1177, 997 NYS2d 836 (3d Dept 2014)

(question of fact whether concrete footer on which plaintiff smashed his knee while playing indoor soccer was open and obvious). A collegiate soccer player who was struck in the head by a ball, but remained in the game and gave the coaches and referees no reason to believe he had sustained a concussion, assumed the risks of the sport, *Calderone v Molloy College*, 177 AD3d 692, 112 NYS3d 191 (2d Dept 2019). The commonly appreciated risks inherent in and arising out of soccer generally and flowing from participation on a middle school soccer team do not include the risk of running into a wall while racing against a teammate in a school hallway, *Braile v Patchogue Medford School Dist. of Town of Brookhaven*, 123 AD3d 960, 999 NYS2d 873 (2d Dept 2014).

9. *Skiing, Bobsledding, Tubing, Tobogganing*

In general, an experienced skier assumes the risks of personal injury caused by, among other things, terrain, weather conditions, ice, natural objects and man-made objects that are incidental to the provision or maintenance of a ski facility, all of which are inherent in the sport of downhill skiing, *Giordano v Shanty Hollow Corp.*, 209 AD2d 760, 617 NYS2d 984 (3d Dept 1994); *Calabro v Plattekill Mt. Ski Center, Inc.*, 197 AD2d 558, 602 NYS2d 655 (2d Dept 1993) (experienced skier assumed risk of visible dip in trail). Significantly, the Legislature has expressly “found” that “downhill skiing, like many other sports, contains inherent risks including, but not limited to, the risks of personal injury or death or property damage, which may be caused by variations in terrain or weather conditions; surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, tree root, stumps or other natural objects or man-made objects that are incidental to the provision of maintenance of a ski facility,” General Obligations Law § 18-101; see *Schorpp v Oak Mountain, LLC*, 143 AD3d 1136, 39 NYS3d 296 (3d Dept 2016) (depression in slope). The term “surface or subsurface,” as used in this provision, applies to all of the items listed after that term, *Painter v Peek’n Peak Recreation, Inc.*, 2 AD3d 1289, 769 NYS2d 678 (4th Dept 2003). Thus, subsurface ice such as a condition described as a “submerged ice divot” is one of the inherent risks of skiing that was recognized by the Legislature, *id.*

Based upon its findings regarding the risks inherent in skiing, the Legislature adopted a code of conduct applicable to downhill skiers and ski area operators to “minimize the risk of injury” and “promote safety,” *Painter v Peek’n Peak Recreation, Inc.*, 2 AD3d 1289, 769 NYS2d 678 (4th Dept 2003); see *id.* §§ 18-102 to -106. However, notwithstanding this legislatively-created code of conduct, the duties of skiers, lift passengers and ski operators are to be governed by the common law unless General Obligations Law Article 18 specifically provides otherwise, *id.* § 18-107. In *Bennett v Kissing Bridge Corp.*, 17 AD3d 990, 794 NYS2d 538 (4th Dept 2005), *aff’d*, 5 NY3d 812, 803 NYS2d 22, 836 NE2d 1144 (2005), the court held that the owner of a ski facility met its initial burden on its motion for summary dismissal of a skier’s claim by submitting evidence establishing, as a matter of law, that the skier’s accident

was caused by variations in terrain and ice, a condition that is expressly referred to in General Obligations Law § 18-101. The Bennett court further held that the injured skier failed to submit evidence sufficient to raise a question of fact as to whether a fence erected to serve as a warning to skiers created a dangerous condition over and above the usual dangers inherent in the sport.

The primary assumption of risk doctrine has been held to bar claims by skiers involving the ski operator's choices in placing or designing a trail or course, see *Braun v Davos Resort, Inc.*, 241 AD2d 533, 661 NYS2d 643 (2d Dept 1997) (skier who had previously used expert trail assumed risks associated with gradient and lack of fence); *Dicruttalo v Blaise Enterprises Inc.*, 211 AD2d 858, 621 NYS2d 199 (3d Dept 1995) (skier who had used slalom trail on three prior occasions assumed risk arising from placement of course close to edge of trail); *Nagawiecki v State*, 150 AD2d 147, 545 NYS2d 954 (3d Dept 1989) (plaintiff injured when, after losing control at excessive speed, she fell and was propelled into unpadded fence pole located outside limits of normal skiable terrain); see also *Tremblay v West Experience Inc.*, 296 AD2d 780, 745 NYS2d 311 (3d Dept 2002) (plaintiff assumed risks associated with placement of barrier at end of snow tubing run). The operator's duty is satisfied when the course is as safe as it appears to be, *Tremblay v West Experience Inc.*, *supra*. Other risks assumed by experienced skiers include the risk of injury resulting from the use of snowmaking equipment, *Bruno v Hunter Mountain Ski Bowl, Inc.*, 248 AD2d 660, 670 NYS2d 325 (2d Dept 1998), the risk of injury caused by another skier, *Zielinski v Farace*, 291 AD2d 910, 737 NYS2d 199 (4th Dept 2002); see *Martin v Fiutko*, 27 AD3d 1130, 811 NYS2d 250 (4th Dept 2006), or ski patroller, *Kaufman v Hunter Mountain Ski Bowl, Inc.*, 240 AD2d 371, 657 NYS2d 773 (2d Dept 1997), and the risk of encountering shadows which might conceal depressions in skiing terrain, *Ruepp v West Experience Inc.*, 272 AD2d 673, 706 NYS2d 787 (3d Dept 2000). However, a skier does not assume the risk of injury created by another skier's negligent conduct that is over and above the usual dangers that are inherent in skiing, *Clauss v Bush*, 79 AD3d 1397, 914 NYS2d 325 (3d Dept 2010) (triable issues present regarding whether defendant skier was skiing beyond his ability or lost control of his speed or direction, in violation of General Obligations Law § 18-105, and whether defendant skier's conduct subjected plaintiff to a risk over and above risks inherent in skiing).

The experience and skill of the skier are relevant factors in determining the risks assumed, *Schorpp v Oak Mountain, LLC*, 143 AD3d 1136, 39 NYS3d 296 (3d Dept 2016); *Sytner v State*, 223 AD2d 140, 645 NYS2d 654 (3d Dept 1996); *Roberts by Ladd v Ski Roundtop, Inc.*, 212 AD2d 768, 623 NYS2d 264 (2d Dept 1995). Thus, a 14-year-old skier who appreciates that rainfall causes the surface of slopes to become slippery assumes the risk of falling on a patch of ice caused by rainfall, *Pitkewicz v Boy Scouts of America, Inc.—Suffolk County Council*, 261 AD2d 462, 690 NYS2d 119 (2d Dept 1999). *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997), held that a bobsled-

der's claim was properly dismissed on assumption of risk grounds where the bobsledder had 20 years of bobsledding experience prior to the accident, had competed in Olympic games and was thoroughly familiar with the bobsled course, having raced it many times, and where the course did not present additional or heightened risks beyond those inherent in the sport, see *Martino v Sullivan's of Liberty, Inc.*, 282 AD2d 505, 722 NYS2d 884 (2d Dept 2001) (tobogganing).

Some risk of injury is inherent in entering, riding and exiting from a chairlift at a ski resort; however, the risk inherent in the use of such a device is not of such magnitude to eliminate all duty of care and thereby insulate the owner from claims of negligent maintenance and operation of the lift since that negligence may unduly enhance the level of the risk assumed, *Tone v Song Mountain Ski Center*, 113 AD3d 1126, 977 NYS2d 857 (4th Dept 2014); *Miller v Holiday Valley, Inc.*, 85 AD3d 1706, 925 NYS2d 785 (4th Dept 2011); *Morgan v Ski Roundtop Inc.*, 290 AD2d 618, 736 NYS2d 135 (3d Dept 2002). In both *Miller* and *Morgan*, the courts determined that triable issues of fact existed regarding whether the lift operators were negligent in operating the lifts.

10. *Ice and Roller Skating, and Hockey*

The primary assumption of risk doctrine has been applied to skaters, *Ziegelmeier v U.S. Olympic Committee*, 7 NY3d 893, 826 NYS2d 598, 860 NE2d 60 (2006); *Zambrana v New York*, 262 AD2d 87, 691 NYS2d 471 (1st Dept 1999), *aff'd*, 94 NY2d 887, 706 NYS2d 76, 727 NE2d 573 (2000); *Vaughan v Skate Key, Inc.*, 270 AD2d 103, 704 NYS2d 252 (1st Dept 2000). Thus, an individual playing "broom ball" assumed the risk of being injured by falling in an ice rink and sliding into a wooden divider while playing the game, *Adamczak v Leisure Rinks Southtown, Inc.*, 170 AD2d 951, 565 NYS2d 661 (4th Dept 1991). Further, a short-track Olympic speed skater who was aware of the "exact manner" in which the safety pads had been affixed to the skating rink's boards assumed the risk of injury resulting from the safety pads' placement, *Ziegelmeier v U.S. Olympic Committee*, *supra*. The doctrine does not apply to a rollerblader who was injured, while traversing a street, when she tripped and fell near defendant's driveway as a result of a dangerous premises condition, *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); see *Ashbourne v New York*, 82 AD3d 461, 918 NYS2d 88 (1st Dept 2011).

Ice and roller skaters assume the risk of being hit by out-of-control skaters, *Bleyer v Recreational Management Service Corp.*, 289 AD2d 519, 735 NYS2d 616 (2d Dept 2001); *Kleiner v Commack Roller Rink*, 201 AD2d 462, 607 NYS2d 142 (2d Dept 1994); *Lopez v Skate Key, Inc.*, 174 AD2d 534, 571 NYS2d 716 (1st Dept 1991). However, skaters do not assume the risk of being bowled over by reckless rink safety personnel, *Reid v Druckman*, 309 AD2d 669, 765 NYS2d 878 (1st Dept 2003). Where reckless behavior that is over and above the usual dangers inherent in the activity of skating is claimed to have caused the injury, the issue of whether the proprietor was negligent in supervising the skaters

turns on whether the proprietor had sufficient notice of the allegedly reckless conduct so as to permit it to prevent the injury through the exercise of adequate supervision, *Andriienko v Compass Group USA, Inc.*, 174 AD3d 558, 105 NYS3d 114 (2d Dept 2019); *Fader v Oyster Bay*, 113 AD3d 725, 978 NYS2d 877 (2d Dept 2014).

An experienced hockey player, who was participating in a practice session with his team, assumed the risk of being struck by a puck that was shot by another player, *Duffy v Suffolk County High School Hockey League, Inc.*, 289 AD2d 368, 734 NYS2d 613 (2d Dept 2001). Similarly, an experienced hockey player may assume the risk of being injured as a result of a “charge” or “cross-check” committed by another player, *Barton* by *Barton v Hapeman*, 251 AD2d 1052, 674 NYS2d 188 (4th Dept 1998); see *Filippazzo v Kormoski*, 75 AD3d 618, 905 NYS2d 276 (2d Dept 2010). An experienced hockey player in a locker room shortly after play had ceased may assume the risk of a teammate wearing skates stepping on the player’s foot, see *Litz v Clinton Cent. School Dist.*, 126 AD3d 1306, 5 NYS3d 636 (4th Dept 2015).

11. *Boxing and Martial Arts*

DiMarco v New York City Health and Hospitals Corp., 187 AD2d 479, 589 NYS2d 580 (2d Dept 1992), held that a skilled and experienced boxer who voluntarily participated in a boxing event was barred from asserting a claim of negligence in the absence of allegations of reckless or intentionally harmful conduct.

A 30-year-old participant in a martial arts class assumed the risk of landing incorrectly when tumbling in the manner he had been trained during his 15-month attendance at the school, *Beck v Scimeca*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997). Likewise, where there is no evidence that an elemental maneuver that plaintiff attempted to execute in her martial arts class was so unreasonably risky that plaintiff would not have realized that there was a risk of injury, summary judgment for defendants on assumption of risk grounds was properly awarded, *Chimerine v World Champion John Chung Tae Kwon Do Inst.*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997).

A high school student voluntarily participating in her school’s self-defense tournament who was injured during a bout when her opponent used an improper move was not barred under the doctrine of primary assumption of risk from asserting a negligence claim against the school where the risks of the improper move were concealed and unreasonably increased by the conduct of plaintiff’s physical education teacher, *Pierre v Ramapo Cent. School Dist.*, 124 AD3d 614, 2 NYS3d 510 (2d Dept 2015).

12. *Paintball or Splatball, and Target Shooting*

The risk of eye injury is inherent in splatball and paintball and, consequently, the doctrine of primary assumption of risk bars a partici-

pant from recovering for such injuries when it is shown that he or she was aware of the risk, *Cook v Komorowski*, 300 AD2d 1040, 752 NYS2d 475 (4th Dept 2002). However, a question of fact precluding summary judgment existed where it was unclear whether the injured plaintiff was aware of the risk of eye injury at the time of the accident, *Duquin v Chameli*, 68 AD3d 1813, 891 NYS2d 791 (4th Dept 2009).

Paintball guns, which use springs or air as the propelling mechanisms, are covered by Penal Law § 265.05, which prohibits the possession of such weapons by individuals under the age of 16, *Herdzik v Chojnacki*, 68 AD3d 1639, 892 NYS2d 724 (4th Dept 2009). Consequently, an adult who provides a paintball gun to an individual under 16 is guilty of a misdemeanor under Penal Law § 265.10(5) and, further, is negligent per se, *Herdzik v Chojnacki*, *supra*. Under those circumstances, the adult who provided the paintball gun to the under-16 infant may be held liable to a person injured as a result of the infant's use of the gun, *Herdzik v Chojnacki*, *supra*.

A plaintiff, who had extensive firearms experience, had previously participated in shooting competitions, and was aware of the potential for accidental injury assumed the risk of being shot by an accidentally discharged gun during a high speed competitive target shooting event at a gun range, *Makabali v Chilelli*, 195 AD3d 704, 145 NYS3d 405 (2d Dept 2021).

13. *Gymnastics, Exercise Apparatus and Weightlifting*

Plaintiff assumed the risk of injury when he swung on, and subsequently fell off, an exercise apparatus constructed over a concrete floor, *Marcano v New York*, 99 NY2d 548, 754 NYS2d 200, 784 NE2d 73 (2002). An experienced weightlifter assumes the risk that a heavily weighted bar might slip out of his control and injure him even in the presence of an attentive spotter, *Lee v Maloney*, 270 AD2d 689, 704 NYS2d 729 (3d Dept 2000). An experienced weight-lifter who chose to lift a barbell weighing approximately 500 pounds without a spotter and using a squat rack that was not bolted to the floor, assumed the risk of the injuries that resulted when the rack tipped over, *Williams v State*, 187 AD3d 1522, 131 NYS3d 461 (4th Dept 2020). Similarly, an adult participating in an outdoor exercise program assumes the risks inherent in swinging from a rope, including the risk of injury arising from the open and obvious absence of shock-absorbing material beneath the rope, *Sajkowski v Young Men's Christian Ass'n of Greater New York*, 269 AD2d 105, 702 NYS2d 66 (1st Dept 2000).

Primary assumption of risk may apply to the fitness activity of running on a treadmill depending on the skill and experience of the particular plaintiff, see *Ingram v Life Fitness*, 140 AD3d 628, 33 NYS3d 71 (1st Dept 2016) (doctrine of primary assumption of risk applied to long time user of treadmills who was familiar with their use and operation); *DiBenedetto v Town Sports Intern., LLC*, 118 AD3d 663, 987 NYS2d 102 (2d Dept 2014) (a frequent treadmill user who exercised at facility 4

days per week and used treadmill every time one was available, assumed the obvious and inherent risk of injuries); *Digiulio v Gran, Inc.*, 74 AD3d 450, 903 NYS2d 359 (1st Dept 2010), *aff'd*, 17 NY3d 765, 929 NYS2d 71, 952 NE2d 1064 (2011); but see *Corrigan v Musclemakers Inc.*, 258 AD2d 861, 686 NYS2d 143 (3d Dept 1999) (primary assumption of risk not applicable to unsupervised first time treadmill user). Moreover, in *Capuano v Rochester Institute of Technology*, 71 AD3d 1592, 897 NYS2d 822 (4th Dept 2010), the court held that the extent to which a person using a leg press machine in a fitness class assumed the risk of injury was an issue of culpable conduct similar to comparative fault and, thus, did not operate as a complete bar to recovery. Additionally, an individual engaged in weight-lifting does not assume the risk of injury resulting from unreasonably heightened risks, such as a trainer's direction to perform weight-training exercises that, in light of plaintiff's disclosed physical condition, were contraindicated, see *Layden v Plante*, 101 AD3d 1540, 957 NYS2d 458 (3d Dept 2012). Although a plaintiff voluntarily assumed the risks of properly supervised weight training, there was an issue of fact as to whether the defendant personal trainer unreasonably increased the risk of harm by instructing the plaintiff to exercise despite his complaint of elbow pain, *Qiao v Finn*, 189 AD3d 513, 133 NYS3d 793 (1st Dept 2020).

14. *Dancing*

A tap dancing student, who had taken weekly dance lessons for 15 years preceding the accident, assumed the risk of injury on a dance floor she knew to be slippery, *LaFond v Star Time Dance & Performing Arts Center*, 279 AD2d 509, 719 NYS2d 273 (2d Dept 2001); see *Spruck v Pollack*, 190 AD3d 875, 136 NYS3d 759 (2d Dept 2021) (dance student assumed risk of being kicked in head during rehearsal); *Meli v Star Power Nat. Talent Co.*, 283 AD2d 617, 725 NYS2d 92 (2d Dept 2001).

15. *Swimming and Other Water Sports*

A person who engages in water sports assumes those reasonably foreseeable risks that are inherent in that activity, *Garcia v New York*, 205 AD2d 49, 617 NYS2d 462 (1st Dept 1994); see *Salas v Lake Luzerne*, 296 AD2d 643, 745 NYS2d 108 (3d Dept 2002); *Best v Islip*, 265 AD2d 357, 696 NYS2d 228 (2d Dept 1999); see also *Ferrari v Bob's Canoe Rental, Inc.*, 143 AD3d 937, 39 NYS3d 522 (2d Dept 2016) (canoeing); *Loney v Adirondack River Outfitters, Inc.*, 307 AD2d 747, 762 NYS2d 555 (4th Dept 2003) (white water rafting). Thus, a person who engages in swimming in a pool during free swim assumes the risk of contact or an incidental collision with another person in the same lane, *Rueckert v Cohen*, 116 AD3d 1026, 983 NYS2d 894 (2d Dept 2014).

Where a plaintiff swimming official slipped on a wet condition on a pool deck that was allegedly caused by dripping condensation from an overhead pipe, the defendant failed to establish the applicability of the primary assumption of the risk doctrine, as the condition was not open and obvious and created a risk beyond that inherent in the sport of

swimming, *O'Brien v Asphalt Green, Inc.*, 193 AD3d 1061, 147 NYS3d 114 (2d Dept 2021).

16. *Horses*

Individuals who engage in horse-related activities assume the inherent risks of being injured by a large, strong animal that can be unpredictable, but the actual risks assumed will depend upon the particular plaintiff's familiarity with horses, *Deak v Bach Farms, LLC*, 34 AD3d 1212, 825 NYS2d 852 (4th Dept 2006) (licensed groomer and trainer, who did not have extensive riding experience and made that fact known to defendant when asked to exercise horse, did not assume risk of being thrown from horse with tendency to buck); *Rubenstein by Rubenstein v Woodstock Riding Club, Inc.*, 208 AD2d 1160, 617 NYS2d 603 (3d Dept 1994) (12-year-old who had taken lessons in handling, riding and showing horses knew not to walk behind horse); see *Georgiades v Nassau Equestrian Center at Old Mill, Inc.*, 134 AD3d 887, 22 NYS3d 467 (2d Dept 2015) (issue of fact whether infant assumed risk of falling from horse she was riding during lesson; question existed regarding whether instructor's conduct in insisting that infant perform particular maneuver infant was uncomfortable performing unreasonably increased infant's risk of injury); *Tilson v Russo*, 30 AD3d 856, 818 NYS2d 311 (3d Dept 2006) (experienced recreational horse rider assumed risk of being bitten as she approached horse with lead line); *Kinara v Jamaica Bay Riding Academy, Inc.*, 11 AD3d 588, 783 NYS2d 636 (2d Dept 2004) (horse kicking or acting in other unexpected manner is inherent, usual and ordinary risk of horseback riding; plaintiff, who had 15 years of horseback riding experience and knew horse was "wild," assumed risk of injury); *Smith v Hunting View Farm*, 265 AD2d 928, 695 NYS2d 802 (4th Dept 1999) (plaintiff's daughter, who was in advanced horse riding class, had competed in numerous horse shows, taught riding classes and had been warned that horses might kick her, assumed risk of being kicked in head while assisting in grooming technique that was new to her); *Lewis v Erie County Agr. Soc.*, 256 AD2d 1114, 684 NYS2d 733 (4th Dept 1998) (highly experienced person, engaged for decades in horse businesses, assumed risk of being kicked); see also *Lipari v Babylon Riding Center, Inc.*, 18 AD3d 824, 796 NYS2d 632 (2d Dept 2005) (novice horseback rider, although assuming risk of falling, did not assume heightened risk created by trail guides leaving him unattended at back of line of horses); but see *Lecznar v Sanford*, 265 AD2d 728, 697 NYS2d 186 (3d Dept 1999) (implied assumption of risk doctrine inapplicable to plaintiff injured while, during visit to stable, she attempted to lure her horse, which had escaped, back into stall); *Roe v Keane Stud Farm*, 261 AD2d 800, 690 NYS2d 336 (3d Dept 1999) (assisting horse onto trailer for transportation to training facility does not involve athletic or entertainment-related activity). An inherent risk in sporting events involving horses is injury due to the sudden and unintended actions of animals, including being thrown or falling, *Soloman v Taylor*, 91 AD3d 1180, 937 NYS2d 408 (3d Dept 2012) (experienced horse rider assumed risk of injury caused by fall from horse that was startled by two dogs). Critically, though, the doctrine of primary assumption of risk

will apply only if the plaintiff was engaged in an activity that was sponsored or otherwise supported by the defendant or if the plaintiff's injury occurred in a designated athletic or recreational venue, *Filer v Adams*, 106 AD3d 1417, 966 NYS2d 553 (3d Dept 2013).

The doctrine imposing strict liability on owners of animals with known "vicious propensities," see *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 (2004), is unavailable where a person engaged in a recreational or sporting activity involving animals is deemed to have assumed the risk of being injured by such animals, *Tilson v Russo*, 30 AD3d 856, 818 NYS2d 311 (3d Dept 2006).

A professional horse exercise rider assumed the risk of sliding on a wet indoor track, since the dangerous condition was "open and obvious" and, unlike in *Siegel v New York*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997), the condition was part of the track itself rather than an off-field hazard, *Joseph v New York Racing Ass'n, Inc.*, 28 AD3d 105, 809 NYS2d 526 (2d Dept 2006). A highly experienced professional exercise rider, who was aware of loose gravel on an asphalt road that intersected the dirt horse path on which he was riding a horse and appreciated the risks posed by that condition, assumed the risk of injury from the horse slipping on the condition, *Nigro v New York Racing Ass'n, Inc.*, 93 AD3d 647, 939 NYS2d 565 (2d Dept 2012); see *Toro v New York Racing Ass'n, Inc.*, 95 AD3d 999, 944 NYS2d 229 (2d Dept 2012). Likewise, in *Verro v New York Racing Ass'n, Inc.*, 142 AD2d 396, 536 NYS2d 262 (3d Dept 1989), the court held that a jockey assumed the risk of being injured by a horse breaking through the plastic track railing where such railing was commonly used at racetracks and there were other alleged dangers known to the jockey.

17. *Hiking*

A hiker assumes the risks inherent in recreational hiking, including the risk of injury arising from open and obvious physical features of advanced trails, *Bouchard v Smiley Bros., Inc.*, 258 AD2d 548, 685 NYS2d 289 (2d Dept 1999).

18. *Golf*

A resident of a house bordering on a golf course may be assuming the risk of injury from errant golf balls, *Nussbaum v Lacopo*, 27 NY2d 311, 317 NYS2d 347, 265 NE2d 762 (1970). A golfer owes a duty to use due care in striking the ball, but that duty is not breached simply because the golfer hits a bad shot or the ball does not travel the intended course, *Jenks v McGranaghan*, 30 NY2d 475, 334 NYS2d 641, 285 NE2d 876 (1972); *Nussbaum v Lacopo*, *supra*; *Krych v Bredenberg*, 172 AD3d 1884, 98 NYS3d 772 (4th Dept 2019); see *Anand v Kapoor*, 15 NY3d 946, 917 NYS2d 86, 942 NE2d 295 (2010). Thus, a person injured by an errant golf ball must affirmatively show that the golfer failed to use due care, for example, by showing that the golfer aimed so inaccurately as to unreasonably increase the risk of harm, *Rinaldo v McGovern*, 78

NY2d 729, 579 NYS2d 626, 587 NE2d 264 (1991); *Krych v Bredenberg*, supra; *Jackson v Livingston Country Club, Inc.*, 55 AD2d 1045, 391 NYS2d 234 (4th Dept 1977); see *Anand v Kapoor*, supra (golfer's failure to warn of his intent to strike his ball did not unreasonably increase the risks inherent in golf, including the risk that another golfer, searching for his own golf ball, would be struck by a ball shot in an unintended direction). However, even where the ball is accurately struck, a defendant may potentially be held liable for teeing off while the plaintiff is still in the fairway on the same hole, under the theory that prematurely striking the ball unreasonably increased the risk of hitting the plaintiff, see *Krych v Bredenberg*, supra.

A golfer owes no duty to warn persons who are not in the line of flight intended by the golfer, *Anand v Kapoor*, 15 NY3d 946, 917 NYS2d 86, 942 NE2d 295 (2010) (no duty to warn other golfer, who was searching for his own ball, struck by ball shot in unintended direction); *Rinaldo v McGovern*, 78 NY2d 729, 579 NYS2d 626, 587 NE2d 264 (1991) (no duty to warn owed to passengers in car on public road adjacent to golf course); *Nussbaum v Lacopo*, 27 NY2d 311, 317 NYS2d 347, 265 NE2d 762 (1970) (no duty to warn owed to occupant of nearby residence); *Defonce v K.S.B. Arrowwood Realty Corp.*, 207 AD2d 427, 615 NYS2d 87 (2d Dept 1994) (no duty to warn golf course employee not in intended line of flight).

An experienced golfer who had played on a particular course numerous times assumed the risk of injury from slipping on a wet railroad tie that lined a footpath, as such an accident was a reasonably foreseeable consequence of playing golf while the course was still wet from the morning dew, *Bryant v Brookhaven*, 135 AD3d 801, 23 NYS3d 358 (2d Dept 2016). Similarly, an experienced golfer assumed the risk of slipping on a wet wooden board at the top of a stairway used to access a tee box, *Conrad v Holiday Valley, Inc.*, 187 AD3d 1520, 132 NYS3d 198 (4th Dept 2020). The absence of anti-slip guards on the portion of the stairway where the plaintiff slipped did not create an issue of fact, *id.*

However, the doctrine of primary assumption of risk does not apply to bar recovery by a would-be sporting participant injured in the parking lot of a sporting facility before commencement of the intended recreational or sporting activity, *Hawkes v Catatonk Golf Club Inc.*, 288 AD2d 528, 732 NYS2d 132 (3d Dept 2001). Moreover, the doctrine is inapplicable where defendant created a dangerous condition over and above the usual dangers inherent in golf, *Shapiro v Amsterdam*, 96 AD3d 1211, 946 NYS2d 700 (3d Dept 2012) (above-grade concrete retaining wall at front of tee box that was obscured by grass created hazard to golfers teeing-off).

Assumption of risk applies to a 12-year-old inexperienced golfer who was struck in the head with a golf club while instructing an 11-year-old how to swing a golf club, *Griffin v Lardo*, 247 AD2d 825, 668 NYS2d 837 (4th Dept 1998). The risk of injury in such circumstances is obvious and, by voluntarily participating in the activity, the 12-year-old

assumed the risk of injury despite her age and inexperience, *id.* Similarly, where plaintiff's 11-year-old son was hit in the head with a golf club as he stood behind his 12-year-old cousin who was taking a practice swing, plaintiff's claim against the cousin was barred by primary assumption of the risk, *Havens v Kling*, 277 AD2d 1017, 715 NYS2d 812 (4th Dept 2000). Golfers are held to a common appreciation of the risk of injury arising from the use of golf carts, *Brust v Town Of Caroga*, 287 AD2d 923, 731 NYS2d 542 (3d Dept 2001) (plaintiff struck by golf cart).

A golfer, as well as one otherwise participating in a golfing event, assumes the risk of injury from a cart used improperly on a golf course, *Valverde v Great Expectations, LLC*, 131 AD3d 425, 15 NYS3d 329 (1st Dept 2015).

19. *Bowling*

As a matter of law, bowlers do not assume the risk of slipping on oil deposited by a lane-oiling machine that has been dragged across the approach area, *Kappes v Cohoes Bowling Arena, Inc.*, 2 AD3d 1034, 768 NYS2d 251 (3d Dept 2003).

20. *Jogging, Running and Rollerblading*

As a general rule, application of primary assumption of risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues, *Custodi v Amherst*, 20 NY3d 83, 957 NYS2d 268, 980 NE2d 933 (2012); see *Trupia ex rel. Trupia v Lake George Central School Dist.*, 14 NY3d 392, 901 NYS2d 127, 927 NE2d 547 (2010). The Custodi Court held that the doctrine of primary assumption of risk does not apply to a rollerblader who tripped and fell near the end of a driveway as a result of dangerous premises condition because the person was not rollerblading in a venue designated for that purpose, was not engaged in a competition, and was not participating in a sponsored activity. The Court noted, in dictum, that sidewalk defects and dangerous premises conditions are not inherent risks assumed by joggers or runners who sustain injuries while traversing sidewalks and streets, *Custodi v Amherst*, *supra*.

21. *Wrestling*

A high school student who voluntarily participates in organized wrestling activities, e.g., wrestling practice or a match, assumes the risks that are inherent in that sport, such as the risk of sustaining an injury when an opponent executes a "take-down" move, the risk of injury from being thrown to the mat or floor by an opponent, and the risk of injury from jogging during practice, see *Rawson v Massapequa Union Free School Dist.*, 251 AD2d 311, 674 NYS2d 388 (2d Dept 1998); *Walcott*

v Lindenhurst Union Free School Dist., 243 AD2d 558, 662 NYS2d 931 (2d Dept 1997); Egger v St. Dominic High School, 238 AD2d 542, 657 NYS2d 85 (2d Dept 1997); Edelson v Uniondale Union Free School Dist., 219 AD2d 614, 631 NYS2d 391 (2d Dept 1995); see also Musante v Oceanside Union Free School Dist., 63 AD3d 806, 881 NYS2d 446 (2d Dept 2009) (experienced high school wrestler assumed risk of colliding with wall situated near edge of mat). Improperly taped or secured mats that create a tripping hazard may unreasonably increase the risk of injury inherent in wrestling, Philippou v Baldwin Union Free School Dist., 105 AD3d 928, 963 NYS2d 701 (2d Dept 2013); see Rispoli v Long Beach Union Free School Dist., 111 AD3d 690, 975 NYS2d 107 (2d Dept 2013) (referee's failure to stop match when wrestlers entered into particular position did not unreasonably increase plaintiff's risk of injury from falling to mat where position was potentially dangerous for plaintiff's opponent, not plaintiff himself). The doctrine of primary assumption of risk does not bar an action for personal injuries sustained by a student while participating in a mandatory wrestling exercise in a compulsory physical education class, Stoughtenger v Hannibal Cent. School Dist., 90 AD3d 1696, 935 NYS2d 430 (4th Dept 2011).

22. *Go-Cart Riding*

In riding a go-cart, a plaintiff assumes the risks inherent in that activity, including the risk that the go-cart may bump into or otherwise collide with objects, such as other go-carts, Garnett v Strike Holdings LLC, 131 AD3d 817, 15 NYS3d 786 (1st Dept 2015); see Loewenthal v Catskill Funland, Inc., 237 AD2d 262, 654 NYS2d 169 (2d Dept 1997).

E. Primary Assumption of Risk as Applied to Spectators

In suits against participants in a game and owners of sports venues, spectators generally will be held to have assumed the risks inherent in the game, including the risk of being struck, Sutfin v Scheuer, 145 AD2d 946, 536 NYS2d 320 (4th Dept 1988), *aff'd*, 74 NY2d 697, 543 NYS2d 379, 541 NE2d 408 (1989); Kreil v Niagara, 8 AD3d 1001, 778 NYS2d 601 (4th Dept 2004) (spectator at hammer throw competition assumed risk of being struck by hammer, absent evidence that hammer thrower engaged in reckless, intentional or other risk-enhancing conduct not inherent in sport); see Bereswill v National Basketball Ass'n, Inc., 279 AD2d 292, 719 NYS2d 231 (1st Dept 2001) (photographer willingly assumed risk of being injured by a player diving out of bounds when he continued to work from his courtside spot); see also Smero v Saratoga Springs, 160 AD3d 1169, 75 NYS3d 120 (3d Dept 2018) (question of fact as to whether hockey rink failed to provide adequate screening where goals were repositioned for practice in "cross-ice fashion" in locations with no safety netting); Correa v New York, 66 AD3d 573, 890 NYS2d 461 (1st Dept 2009) (question of fact as to whether ball park owner satisfied its duty to provide adequate screening where plaintiff alleged that foul ball that struck him went through "window" in netting for use by television camera).

Baseball spectators and other nonparticipants assume the risk of

injuries associated with players swinging bats on the sidelines while warming up for the game, *Roberts v Boys and Girls Republic, Inc.*, 51 AD3d 246, 850 NYS2d 38 (1st Dept 2008), *aff'd*, 10 NY3d 889, 861 NYS2d 603, 891 NE2d 719 (2008). A spectator occupying an unprotected area of a baseball stadium assumed the risk of being struck by a baseball that had been casually tossed to fans as a souvenir, since it is not unusual for a player to toss a ball into the stands, *Pira v Sterling Equities, Inc.*, 16 AD3d 396, 790 NYS2d 551 (2d Dept 2005). *Sutfin v Scheuer*, 145 AD2d 946, 536 NYS2d 320 (4th Dept 1988), *aff'd*, 74 NY2d 697, 543 NYS2d 379, 541 NE2d 408 (1989), held that plaintiff, a 15-year-old boy, who was an experienced baseball player, assumed the risk of being struck by a mis-thrown ball when he placed himself in the line of an ongoing game of catch between his friends, even though he was not actively watching the game at the time of the accident. Similarly, recovery was denied to a parent who was injured while walking through the grounds on which a soccer tournament was being held, even though his son's game had already ended, *Sutton v Eastern New York Youth Soccer Ass'n, Inc.*, 8 AD3d 855, 779 NYS2d 149 (3d Dept 2004).

In terms of the duty to provide protective screening, the proprietor of a baseball park "need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest [S]uch screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game," *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981); *Tarantino v Queens Ballpark Co., LLC*, 123 AD3d 1105, 1 NYS3d 216 (2d Dept 2014) (proprietor who provided screening behind home plate had no additional duty to protect against risk of injury from foul ball that entered luxury suite that was not at field level); *Procopio v Saugerties*, 20 AD3d 860, 799 NYS2d 316 (3d Dept 2005) (proprietor who provided screening behind home plate had no additional duty to install screening to protect spectator who was standing at concession stand situated near bullpen); see *Clapman v New York*, 63 NY2d 669, 479 NYS2d 515, 468 NE2d 697 (1984); *Davidoff v Davidoff v Metropolitan Baseball Club, Inc.*, 61 NY2d 996, 475 NYS2d 367, 463 NE2d 1219 (1984); *Wade-Keszev v Niskayuna*, 4 AD3d 732, 772 NYS2d 401 (3d Dept 2004) (proprietor who has provided screening behind home plate had no additional duty to install screens or netting above fence running along first base line to protect spectators who might be walking toward the bathroom in that area); see also *Starke v Smithtown*, 155 AD2d 526, 547 NYS2d 383 (2d Dept 1989).

Where the question of protective screening for spectators arises in a case involving a sport other than baseball, plaintiff must demonstrate that the "practical realities" of the sport in question differ from those of baseball and that, therefore, the proprietor's duty to provide protective screening is greater or less than the duty discussed in *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981); see *Gilchrist v Troy*, 67 NY2d 1034, 503 NYS2d 717, 494 NE2d

1382 (1986); *Smero v Saratoga Springs*, 160 AD3d 1169, 75 NYS3d 120 (3d Dept 2018); *Rosa v Nassau*, 153 AD2d 618, 544 NYS2d 652 (2d Dept 1989). For example, unlike baseball fields, outdoor soccer fields typically have no protective screening or fencing, “presumably because the ball is larger and moves slower,” *Sutton v Eastern New York Youth Soccer Ass’n, Inc.*, 8 AD3d 855, 779 NYS2d 149 (3d Dept 2004) (placement of shade tent 30 or 40 yards behind goal not an enhanced risk); see *Honohan v Turrone*, 297 AD2d 705, 747 NYS2d 543 (2d Dept 2002). The doctrine of primary assumption applies to bystanders and spectators who place themselves in close proximity to a qualified activity, particularly where the bystander or spectator had viable alternatives to his or her own location, *M.F. v Jericho Union Free School District*, 172 AD3d 1056, 100 NYS3d 337 (2d Dept 2019). Further, a plaintiff alleging that the proprietor did not provide a sufficient number of protected seats must demonstrate a causal relationship between the claimed negligence and plaintiff’s injury. Such a relationship was not shown where plaintiff chose to stand in an unprotected area and did not claim that he had been prevented from standing in a protected area, *Gilchrist v Troy*, *supra*. If all appropriate safety measures have been taken by a facility for the protection of spectators at a hockey game, plaintiff can only recover if he or she proves that the errant puck was intentionally shot into the stands, *Shelton v Madison Square Garden Corp.*, 249 AD2d 151, 671 NYS2d 727 (1st Dept 1998).

In contrast to the rule for operators of baseball venues, the proprietors of automobile race venues are held to a high degree of care, *Smith v Lebanon Valley Auto Racing Inc.*, 194 AD2d 946, 598 NYS2d 858 (3d Dept 1993). Such proprietors must provide adequate safeguards against reasonably foreseeable dangers to spectators and must enforce observation of such safeguards and precautions, both by participants and spectators, *id.* Thus, the limitations on the duty to provide protective screening that were recognized in *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981), were held inapplicable in a case where a spectator at an automobile race was struck by a jagged stone set in motion by a race car, *Cortwright v Brewerton Intern. Speedway, Inc.*, 145 AD2d 297, 539 NYS2d 599 (4th Dept 1989). Because the danger of a stone flying from the racetrack is a constant threat not limited to any particular area of the track, it was error to instruct the jury that defendant only had to provide protection at the areas of greatest danger, *id.*

Notably, regardless of the scope of the duty to provide protection for spectators, the duty applies only to the owner or operator of the sports facility and does not extend to other entities, such as the teams playing at the facility, where the entities do not own, operate or exercise control over the facility, *Rosa v Nassau*, 153 AD2d 618, 544 NYS2d 652 (2d Dept 1989).

V. Other Considerations

The burden of pleading and proving the defense of assumption of

risk must be borne by defendant, CPLR 1412; 3018(b); *Arbegas v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985); *Dowd v New York, O. & W. Ry. Co.*, 170 NY 459, 63 NE 541 (1902); *Weller v Colleges of the Senecas*, 217 AD2d 280, 635 NYS2d 990 (4th Dept 1995). Furthermore, in charging the jury, the court should instruct that defendant's negligence should be considered before plaintiff's negligence and comparative fault, *Carrero v General Fork Lift Co., Inc.*, 36 AD3d 577, 828 NYS2d 176 (2d Dept 2007). Where plaintiff's negligence and implied assumption of risk are both jury issues, the jury should be instructed to consider plaintiff's fault in its totality and assign a single percentage to that fault, *Smith v Lebanon Valley Auto Racing Inc.*, 194 AD2d 946, 598 NYS2d 858 (3d Dept 1993); *Ciserano v Sforza*, 130 AD2d 618, 515 NYS2d 548 (2d Dept 1987); *McCabe v Easter*, 128 AD2d 257, 516 NYS2d 515 (3d Dept 1987). It is essential that special verdicts be used, see PJI 1:97 and 2:36, which should be adapted to the particular case.

Assumption of risk is a defense to a claim based on strict liability, *Smith v Sapienza*, 115 AD2d 723, 496 NYS2d 538 (2d Dept 1985). However, the doctrine of primary assumption of risk has no application to claims asserted under Labor Law §§ 200 and 241(6), *Lorefice v Reckson Operating Partnership, L.P.*, 269 AD2d 572, 703 NYS2d 507 (2d Dept 2000); *Walter v State*, 235 AD2d 623, 651 NYS2d 704 (3d Dept 1997); see *Lucas v KD Development Const. Corp.*, 300 AD2d 634, 752 NYS2d 718 (2d Dept 2002), although has been applied to an employee's common-law claim that the owner of a baseball stadium breached its non-delegable duty to provide workers with a safe place to work, *Correa v New York*, 66 AD3d 573, 890 NYS2d 461 (1st Dept 2009).

PJI 2:55A. Express Assumption of Risk—Pre-Occurrence Warning

Defendant claims that before the plaintiff [decedent] [*state the activity: (e.g., mounted the donkey, participated in the game)*], the plaintiff [decedent] was told that (he, she) was participating in the activity at (his, her) own risk and knew what the risks were (e.g. from a warning, from personal observation). The plaintiff denies that the defendant told (him, her, decedent) that (he, she, decedent) was participating at (his, her) own risk and denies knowing what the risks were. The defendant has the burden of proving that the statements were made to the (plaintiff, decedent) and that (he, she) knew the risks. If you find that the statements were made and that the (plaintiff, decedent) knew the risks, then your verdict will be in favor of the defendant. If you find that the statements were not

made or that the (plaintiff, decedent) did not know the risks, then you must consider whether the plaintiff [decedent] assumed the risk of injury in accordance with the instructions I will now give you.

Comment

The above charge is based upon *Arbegast v Board of Educ. of South New Berlin Cent. School*, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365 (1985), discussed in the Comment to PJI 2:55 and *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985). *Arbegast* was a case subject to comparative negligence principles in which the plaintiff was told by the defendant that she would be proceeding at her own risk and what those risks were. The Court in *Arbegast* ruled that, by proceeding to engage in the activity, the plaintiff must be held to have “expressly” assumed the risk of injury and may not recover. In *Maddox v New York*, supra, the Court commented that *Arbegast* involved a plaintiff who had been informed of the risk of injury and what those risks were. Thus, *Arbegast* does not appear to apply to a case where the plaintiff was not aware of, and was not advised of, any particular risk, see *Long v State*, 158 AD2d 778, 551 NYS2d 369 (3d Dept 1990). Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff, *Maddox v New York*, supra; *Kennedy v Rockville Centre Union Free School Dist.*, 186 AD2d 110, 587 NYS2d 442 (2d Dept 1992).

The above charge may be adapted for use in particular factual situations where the defendant claims that plaintiff expressly assumed the risk of injury. Even if the jury finds that there was no express assumption of risk, and a recovery is not therefore precluded, the jury may find that there was an implied assumption of risk which would diminish plaintiff's damages. In such cases, after the above charge is given, PJI 2:55 should also be used. Where there is no evidence to support a finding of express assumption of risk, it is error to charge that a finding that plaintiff assumed the risk would bar recovery, *Resnick v Griboetz*, 66 NY2d 729, 496 NYS2d 998, 487 NE2d 908 (1985).

Assumption of risk, whether express or implied, is not applicable to a child under four who, as a matter of law, is incapable of being held responsible for his or her actions and plaintiff is entitled to have the jury so instructed, *Smith v Sapienza*, 115 AD2d 723, 496 NYS2d 538 (2d Dept 1985).

As to the enforceability of exculpatory agreements, see PJI 2:10A.

The duties of ski area operators and alpine (downhill) skiers are set out in considerable detail in General Obligations Law Article 18. The statute and accompanying regulations require that the ski area operator post the general surface conditions of each slope, which includes not-

ing the presence of any icy patches or bare spots, *Sytner v State*, 223 AD2d 140, 645 NYS2d 654 (3d Dept 1996). Although the legislation does not expressly limit the prosecution of actions against ski area operators by injured skiers, it defines the duties owed by ski area operators and by skiers. GOL Article 18 establishes a statutory standard of care to be followed by ski area operators. See PJI 2:25 for a charge and comment as to violation of statutory standard of care. Perhaps more significantly, the statute imposes duties upon skiers with respect to the risks inherent in skiing. One of the inherent risks of skiing is injury resulting from the use of snowmaking equipment, *Bruno v Hunter Mountain Ski Bowl, Inc.*, 248 AD2d 660, 670 NYS2d 325 (2d Dept 1998); see *Bennett v Kissing Bridge Corp.*, 17 AD3d 990, 794 NYS2d 538 (4th Dept 2005), *aff'd*, 5 NY3d 812, 803 NYS2d 22, 836 NE2d 1144 (2005) (sliding on ice, falling and striking a tree are inherent risks in downhill skiing). In adopting GOL Article 18, the Legislature found that there are inherent risks of injury, death, and property damage in downhill skiing and that it is “necessary and appropriate that skiers become apprised of, and understand, the risks inherent in the sport of skiing so that they may make an informed decision of whether or not to participate in skiing notwithstanding the risks,” GOL § 18-101. In light of the statutory requirement that ski area operators advise skiers of inherent risks and that skiers familiarize themselves with such warnings, see GOL § 18-106, the principles of the *Arbegasst* case, 65 NY2d 161, 490 NYS2d 751, 480 NE2d 365, as to the legal effect of pre-occurrence warnings are directly implicated, *McKenney v Dominick*, 190 AD2d 1021, 593 NYS2d 644 (4th Dept 1993).

Full compliance with General Obligations Law §§ 18-103 and 18-106 does not preclude the application of the common law duty to warn of dangerous conditions, *Sytner v State*, 223 AD2d 140, 645 NYS2d 654 (3d Dept 1996). Therefore, where a particular hazardous condition is specifically addressed by the statute, the statute controls, but in all other instances, the common law still applies, *id.*

PJI 2:56. Risk Assumed Under Direction of a Superior

If you find that [describe condition complained of] was dangerous and that the plaintiff knew and fully appreciated that it was dangerous, but that in exposing (himself, herself) to it, (he, she) was proceeding pursuant to the direction of (his, her) [state title of superior’s position], then you must decide whether it was reasonable under all of the circumstances as you find them to have existed at the time and place of the occurrence for the plaintiff to have complied with that direction. If you find that the plaintiff acted reasonably in complying with the direction, (he, she) did not assume the risk. If, however, you find that the plaintiff did not act rea-

sonably in complying, then (he, she) will be deemed to have assumed the risk.

Comment

The above instruction is based in part on *Broderick v Cauldwell-Wingate Co.*, 301 NY 182, 93 NE2d 629 (1950) (master and servant); *Forkash v New York*, 27 AD2d 831, 277 NYS2d 827 (1st Dept 1967) (softball player and umpire); *Adler v Shell Transp. Corp.*, 26 AD2d 625, 272 NYS2d 683 (2d Dept 1966) (truck driver and helper); *Hefelev v New York*, 25 AD2d 142, 267 NYS2d 946 (1st Dept 1966) (social worker and supervisor); see *Smullen v New York*, 28 NY2d 66, 320 NYS2d 19, 268 NE2d 763 (1971) (city inspector and subcontractor's employee); *Bellefeuille v City and County Sav. Bank*, 49 AD2d 323, 374 NYS2d 781 (3d Dept 1975), *aff'd*, 40 NY2d 879, 389 NYS2d 345, 357 NE2d 1000 (1976) (window washer and employer); *Petretti v Jefferson Valley Racquet Club, Inc.*, 246 AD2d 583, 668 NYS2d 221 (2d Dept 1998) (tennis instructor and novice student); *Lowe v State*, 194 AD2d 898, 599 NYS2d 639 (3d Dept 1993) (correctional facility and inmate); *Porter v Avlis Contracting Corp.*, 57 AD2d 222, 394 NYS2d 226 (2d Dept 1977) (citing PJI), as well as on the cases cited in PJI 2:55; see also *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989); *Verduce v Board of Higher Educ. in City of New York*, 8 NY2d 928, 204 NYS2d 168, 168 NE2d 838 (1960) (teacher and pupil), on dissenting opinion therein; but see *Roots v Claremont Riding Academy, Inc.*, 20 AD2d 536, 245 NYS2d 172 (1st Dept 1963), *aff'd*, 14 NY2d 827, 251 NYS2d 475, 200 NE2d 457 (1964) (horse riding school and student). The above charge should be used in conjunction with PJI 2:55 with respect to implied assumption of risk.

To sustain a finding that the risk was assumed under compulsion, plaintiff is generally required to establish both that there was a direction by a superior to do the act and that there was an economic or other compulsion that impelled compliance with the direction, *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (1989); *Bereswill v National Basketball Ass'n, Inc.*, 279 AD2d 292, 719 NYS2d 231 (1st Dept 2001); see *Pfeifer v Musiker Student Tours, Inc.*, 280 AD2d 266, 720 NYS2d 121 (1st Dept 2001) (fifteen year old plaintiff, while on student tour operated by defendant, was compelled by her counselors, over her protestations, to ride bicycle even though she got off bike three times); *Gleason v Holman Contract Warehousing Inc.*, 263 AD2d 913, 694 NYS2d 230 (3d Dept 1999).

Whether the direction or assurance comes from plaintiff's foreman or an employee of the defendant is not material, *Boerio v Haiss Motor Trucking Co.*, 7 AD2d 228, 181 NYS2d 823 (1st Dept 1959). The rule does not apply to a defendant who leased a defective truck to plaintiff's employer and gave plaintiff no direction, *Gugliemini v Conigliaro*, 35 AD2d 524, 313 NYS2d 189 (2d Dept 1970), *aff'd*, 29 NY2d 930, 329 NYS2d 321, 280 NE2d 95 (1972). Considering the penalties which may be imposed for not following orders in a prison environment, it is not

unreasonable for an inmate to proceed as directed by prison authorities even if he or she thereby ignores a danger which should have been foreseen, *Lowe v State*, 194 AD2d 898, 599 NYS2d 639 (3d Dept 1993).

Although an employee who is injured while following the directions of a superior may not be chargeable with negligence as a matter of law, it remains a jury question as to whether the employee acted reasonably under the circumstances, *Broderick v Cauldwell-Wingate Co.*, 301 NY 182, 93 NE2d 629 (1950); *Pesce v New York*, 147 AD2d 537, 537 NYS2d 613 (2d Dept 1989). Thus, it is error to instruct the jury that it must not find plaintiff was at fault as a matter of law, *Pesce v New York*, *supra*.

Among the circumstances to be taken into consideration in determining whether plaintiff acted reasonably are whether the direction expressly or impliedly constituted an assurance of safety and whether it included a threat of loss of employment or opportunity, see *Culver v Gloo*, 27 AD2d 698, 276 NYS2d 969 (4th Dept 1967); *Hefelev New York*, 25 AD2d 142, 267 NYS2d 946 (1st Dept 1966). Generally, however, these are questions of fact, *Hefelev New York*, *supra*. The same principle applies to the relationship between an instructor and a student, *Fabricius v Broome*, 24 AD3d 853, 804 NYS2d 510 (3d Dept 2005); *Petretti v Jefferson Valley Racquet Club, Inc.*, 246 AD2d 583, 668 NYS2d 221 (2d Dept 1998) (tennis instructor and novice student).

E. RES IPSA LOQUITUR

PJI 2:65. Res Ipsa Loquitur

As you have been told, disputed facts in a lawsuit must be proved by evidence. Direct evidence is evidence of what a witness saw, heard or did, or other evidence that, if believed by you, proves a fact. Circumstantial evidence is evidence of a fact that does not directly prove a fact in dispute but permits a reasonable inference that the fact exists.

As you have heard, (*plaintiff AB*) claims that (*defendant CD*) was negligent. CD denies that (*he/she/it*) was negligent. In this case, the law allows AB to present evidence from which you as the jury are permitted, but are not required, to infer negligence. The law recognizes that some occurrences would not ordinarily happen without negligence, and thus negligence may be inferred from the occurrence itself.

In order for you to infer that CD was negligent from the happening of [*describe the occurrence*], you must find by a preponderance of the evidence all three of the following:

First, that [*the occurrence*] is the kind of event that ordinarily does not occur in the absence of negligence.

Second, that [*the occurrence*] was caused by something within the exclusive control of CD, as I will describe to you further.

Third, you must determine that [*the occurrence*] was not due solely to any action on the part of AB, as I will describe to you further.

Thus, you must first determine whether, based on the evidence, [*describe the occurrence*] generally would not have occurred absent some negligent conduct. You must then also determine whether the [*state the injury-causing instrumentality in*

this case] was within CD's exclusive control. With respect to control, there is no fixed or rigid rule. Rather, the evidence must provide you with a rational basis to conclude that the cause of [*describe the occurrence*] was such that CD was responsible. This requirement does not mean that the possibility of other causes must be eliminated completely, but only that the greater probability is that CD is responsible. Finally, you must determine that [the occurrence] was not due solely to any action on the part of AB. This does not mean that AB must be completely fault-free. Rather, as to this element, the inference of CD's negligence may not be drawn where the evidence of AB's fault completely negates the inference of CD's negligence or where the inference of CD's negligence is no more likely a cause of [*the occurrence*] than AB's own conduct.

Comment

Caveat: Some cases have added as a fourth requirement to a *res ipsa loquitur* charge that "evidence as to the true explanation of the [occurrence] must be more readily accessible to the defendant than to the plaintiff," *Cornacchia v Mount Vernon Hosp.*, 93 AD2d 851, 461 NYS2d 348 (2d Dept 1983); see *Fogal v Genesee Hosp.*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973). This factor has not been cited in more recent cases.

Based on *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); *Ebanks v New York City Transit Authority*, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987); *Burgess v Otis Elevator Co.*, 114 AD2d 784, 495 NYS2d 376 (1st Dept 1985), *aff'd*, 69 NY2d 623, 511 NYS2d 227, 503 NE2d 692 (1986); *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986); *Abbott v Page Airways, Inc.*, 23 NY2d 502, 297 NYS2d 713, 245 NE2d 388 (1969); *Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 280 NYS2d 385, 227 NE2d 304 (1967); *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455 (1941); *De Simone v Inserra Supermarkets Inc.*, 207 AD2d 615, 615 NYS2d 528 (3d Dept 1994).

I. In General

If a plaintiff's proof establishes the three conditions enumerated in the charge, a *prima facie* case of negligence exists, and plaintiff is entitled to have this *res ipsa loquitur* charge given to the jury, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997);

see *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Ebanks v New York City Transit Authority*, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987); *George Foltis, Inc. v New York*, 287 NY 108, 38 NY2d 455 (1941).

Plaintiff may also present direct evidence of specific acts of defendant's negligence, and such evidence does not necessarily deprive the plaintiff of the benefit of a *res ipsa loquitur* charge. The "mere fact that the plaintiff seeks to bolster his [or her] case by introducing specific evidence of the defendant's negligence should not compel the plaintiff to forego reliance on the rule of *res ipsa loquitur*," *Abbott v Page Airways, Inc.*, 23 NY2d 502, 297 NYS2d 713, 245 NE2d 388 (1969); see *Elsawi v Saratoga Springs City School District*, 179 AD3d 1186, 114 NYS3d 526 (3d Dept 2020); *Rossetti v Board of Educ. of Schalmont Central School Dist.*, 277 AD2d 668, 716 NYS2d 460 (3d Dept 2000). Thus, the court is permitted to charge *res ipsa loquitur* and "provided there's sufficient evidence on the specific claims of negligence to carry them to the jury, on those claims as well," *Abbott v Page Airways, Inc.*, *supra*; see *Rossetti v Board of Educ. of Schalmont Central School Dist.*, *supra*; *Kerber v Sarles*, 151 AD2d 1031, 542 NYS2d 94 (4th Dept 1989). However, the plaintiff is not entitled to a *res ipsa loquitur* charge if the direct evidence of defendant's negligence introduced by the plaintiff refutes or negates the inference that might have been drawn by the jury from application of *res ipsa loquitur*, *Abbott v Page Airways, Inc.*, *supra*; *Rossetti v Board of Educ. of Schalmont Central School Dist.*, *supra* (plaintiff's proof of negligence at trial centered primarily, if not exclusively, on direct evidence of defendant's negligence and thereby negated inference of negligence, making *res ipsa loquitur* charge inappropriate).

If the occurrence that resulted in plaintiff's injury could have happened without anyone's negligence, a charge of *res ipsa loquitur* is not appropriate, see *Anderson v Skidmore College*, 94 AD3d 1203, 941 NYS2d 787 (3d Dept 2012), *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 852 NYS2d 27 (1st Dept 2007) (without cause of action for negligence, there is no viable cause of action to charge *res ipsa loquitur*); *Cortes v Central Elevator, Inc.*, 45 AD3d 323, 845 NYS2d 259 (1st Dept 2007) (plaintiff's fall while exiting elevator could have occurred in absence of negligence and could have been caused by plaintiff's misstep); *Braithwaite v Equitable Life Assur. Soc. of U.S.*, 232 AD2d 352, 648 NYS2d 628 (2d Dept 1996) (plaintiff's injury after misstepping upon entering elevator could have happened without negligence on anyone's part).

Res ipsa loquitur is an evidentiary doctrine, *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003), not a separate theory of liability, and thus is merely a "common-sense application of the probative value of circumstantial evidence," *Abbott v Page Airways, Inc.*, 23 NY2d 502, 297 NYS2d 713, 245 NE2d 388 (1969). *Res ipsa loquitur* therefore represents an application of the ordinary rules pertaining to circumstantial evidence in negligence cases stemming

from occurrences having particular characteristics, *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986). When the doctrine is properly invoked, the jury is permitted to draw an inference of negligence solely from the happening of the accident based on the theory that “certain occurrences contain within themselves a sufficient basis for an inference of negligence,” *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455 (1941). The *res ipsa loquitur* doctrine is actually “nothing more than a brand of circumstantial evidence,” *Morejon v Rais Const. Co.*, 7 NY3d 203, 818 NYS2d 792, 851 NE2d 1143 (2006) (containing extensive discussion of history of *res ipsa loquitur* doctrine in New York); see *Ezzard v One East River Place Realty Co., LLC*, 129 AD3d 159, 8 NYS3d 195 (1st Dept 2015). Since *res ipsa loquitur* is not a separate cause of action, plaintiff’s failure to plead it does not bar the doctrine’s use where supported by the facts, *Smith v Consolidated Edison Co. of New York, Inc.*, 104 AD3d 428, 961 NYS2d 73 (1st Dept 2013); *Weeden v Armor Elevator Co., Inc.*, 97 AD2d 197, 468 NYS2d 898 (2d Dept 1983).

The doctrine may be invoked only where the unexplained circumstances of the injury-producing event justify the inference of negligence, *Breese v Hertz Corp.*, 25 AD2d 621, 267 NYS2d 703 (1st Dept 1966) (citing PJI); see *Abbott v New Rochelle Hosp. Medical Center*, 141 AD2d 589, 529 NYS2d 352 (2d Dept 1988); *Monroe v New York*, 67 AD2d 89, 414 NYS2d 718 (2d Dept 1979) (plaintiff’s specific and overwhelming proof established cause of accident and thus no need for inference created by *res ipsa loquitur*).

Thus, the evidentiary doctrine is typically, but not exclusively, invoked when the actual or specific cause of an accident is unknown, and *res ipsa loquitur* allows the jury in certain circumstances to infer negligence merely from the happening of an event and the defendant’s relation to it, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); *Smith v Sommer*, 189 AD3d 906, 137 NYS3d 99 (2d Dept 2020); *Kuhns v Millard Fillmore Hospitals*, 296 AD2d 839, 744 NYS2d 787 (4th Dept 2002); *Pavon v Rudin*, 254 AD2d 143, 679 NYS2d 27 (1st Dept 1998); see *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Bernard v Bernstein*, 126 AD3d 833, 3 NYS3d 426 (2d Dept 2015). The doctrine may be applied even where some of the circumstances of the occurrence are known, as long as the actual or specific cause of the occurrence remains unknown, *Bonura v KWK Associates, Inc.*, 2 AD3d 207, 770 NYS2d 5 (1st Dept 2003); see *Elsawi v Saratoga Springs City School District*, 179 AD3d 1186, 114 NYS3d 526 (3d Dept 2020) (proffer of expert proof of likely cause of accident did not preclude plaintiff from relying on doctrine of *res ipsa loquitur*).

Because circumstantial evidence and inferences therefrom are the cornerstones of the doctrine, *res ipsa loquitur* has been utilized in medical malpractice actions in which an injury to an anesthetized patient occurs during surgery in an area of the body remote from the operative site, see *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792

NE2d 151 (2003); *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020); *Frank v Smith*, 127 AD3d 1301, 6 NYS3d 754 (3d Dept 2015); *Backus v Kaleida Health*, 91 AD3d 1284, 937 NYS2d 773 (4th Dept 2012); *DiGiacomo v Cabrini Medical Center*, 21 AD3d 1052, 803 NYS2d 587 (2d Dept 2005); *Schmidt v Buffalo General Hosp.*, 278 AD2d 827, 718 NYS2d 514 (4th Dept 2000); *Ceresa v Karakousis*, 210 AD2d 884, 620 NYS2d 646 (4th Dept 1994); *Mack v Lydia E. Hall Hosp.*, 121 AD2d 431, 503 NYS2d 131 (2d Dept 1986); *Fogal v Genesee Hosp.*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973), or where a foreign body has been unintentionally left at the site of an operation, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); see *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013).

The inference is available where common knowledge indicates that the occurrence was occasioned by negligence, *Schoch v Dougherty*, 122 AD2d 467, 504 NYS2d 855 (3d Dept 1986); *Fogal v Genesee Hosp.*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973), but that inference cannot be based on speculation or conjecture, see *Manley v New York Tel. Co.*, 303 NY 18, 100 NE2d 113 (1951). When an accident is one that may naturally occur from causes other than a defendant's negligence, an inference of defendant's negligence is not fair or reasonable, see *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955); *Anderson v Skidmore College*, 94 AD3d 1203, 941 NYS2d 787 (3d Dept 2012); *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 852 NYS2d 27 (1st Dept 2007); *Cortes v Central Elevator, Inc.*, 45 AD3d 323, 845 NYS2d 259 (1st Dept 2007); *Braithwaite v Equitable Life Assur. Soc. of U.S.*, 232 AD2d 352, 648 NYS2d 628 (2d Dept 1996). *Res ipsa loquitur* may not be invoked if plaintiff fails to establish the probability that the occurrence could not have happened in the absence of negligence, *Mochen v State*, 57 AD2d 719, 396 NYS2d 113 (4th Dept 1977); *Rodriguez v State*, 50 AD2d 985, 376 NYS2d 685 (3d Dept 1975); *Pipers v Rosenow*, 39 AD2d 240, 333 NYS2d 480 (2d Dept 1972); *Barry v State*, 27 AD2d 593, 275 NYS2d 778 (3d Dept 1966).

To rely on *res ipsa loquitur*, however, the plaintiff need not conclusively eliminate the possibility of all other explanations or inferences for the injury, see *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); *Smith v Sommer*, 189 AD3d 906, 137 NYS3d 99 (2d Dept 2020); *Bernard v Bernstein*, 126 AD3d 833, 3 NYS3d 426 (2d Dept 2015); *Roman v Board of Educ. of New York*, 9 AD3d 305, 780 NYS2d 5 (1st Dept 2004); *Bonura v KWK Associates, Inc.*, 2 AD3d 207, 770 NYS2d 5 (1st Dept 2003); *Pavon v Rudin*, 254 AD2d 143, 679 NYS2d 27 (1st Dept 1998). All that is needed is evidence from which the jury can reasonably infer that on the whole it is "more likely than not" that there was negligence associated with the cause of the event than there was not, *Kambat v St. Francis Hosp.*, *supra*; *Ezzard v One East River Place Realty Co., LLC*, 129 AD3d 159, 8 NYS3d 195 (1st Dept 2015); *Brumberg v Cipriani USA, Inc.*, 110 AD3d 1198, 973 NYS2d 401 (3d Dept 2013); *Backus v Kaleida Health*, 91 AD3d 1284, 937 NYS2d 773 (4th Dept 2012); *Norton v Albany County Airport Authority*, 52

AD3d 871, 859 NYS2d 296 (3d Dept 2008); *Banca Di Roma v Mutual of America Life Ins. Co., Inc.*, 17 AD3d 119, 793 NYS2d 341 (1st Dept 2005); *Bonura v KWK Associates, Inc.*, supra; *Pavon v Rudin*, supra; see *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013) (possibility of other causes need not be altogether eliminated, but likelihood must be so reduced that greater probability lies at defendant's door); *Morgan v Solomon*, 305 AD2d 982, 758 NYS2d 458 (4th Dept 2003) (*res ipsa loquitur* instruction required where injury-producing instrumentality had been securely attached for 24 years and suddenly fell on plaintiff); *Di Santo v Westchester*, 210 AD2d 628, 619 NYS2d 852 (3d Dept 1994) (plaintiff not entitled to *res ipsa loquitur* charge when she did not show what caused her to fall on wet tarmac and thus was unable to establish that occurrence was type of event that ordinarily does not occur absent someone's negligence).

II. Elements of Res Ipsa Loquitur

In order for the doctrine of *res ipsa loquitur* to apply, three elements must be established:

- 1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence;
- 2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
- 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

James v Wormuth, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013); *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); *Ebanks v New York City Transit Authority*, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987); *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986); *Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 280 NYS2d 385, 227 NE2d 304 (1967). Once plaintiff's proof establishes a *prima facie* showing of these three elements, the plaintiff is entitled to a *res ipsa loquitur* charge given to the jury, and thus the jury is permitted to infer negligence from the mere fact of the occurrence, *Kambat v St. Francis Hosp.*, supra; see *States v Lourdes Hosp.*, supra; *Bernard v Bernstein*, 126 AD3d 833, 3 NYS3d 426 (2d Dept 2015). These three elements will be examined in turn.

A. Event Generally Does Not Occur Absent Negligence

In the typical *res ipsa loquitur* case, the jury can reasonably draw upon past experience common to the community for the conclusion that the adverse event generally would not occur absent negligent conduct, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); see *Brink v Anthony J. Costello & Son Development, LLC*,

66 AD3d 1451, 886 NYS2d 301 (4th Dept 2009) (door mounted on hinges generally would not fall when opened absent negligence); *Diovisalvo v Woodlawn Cemetery, Inc.*, 241 AD2d 348, 659 NYS2d 286 (1st Dept 1997) (no expert testimony needed for jury to conclude that sudden dislodging of crypt cover would not happen without someone's negligence). In certain *res ipsa loquitur* cases, such as in medical malpractice actions, the common knowledge and everyday experience of lay jurors may be inadequate to support the inference, *Kambat v St. Francis Hosp.*, *supra*; see *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013); *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Leone v United Health Services Inc.*, 282 AD2d 860, 723 NYS2d 260 (3d Dept 2001). There is consensus, however, that a narrow category of factually simple medical malpractice cases requires no expert to enable the jury to reasonably conclude that the accident would not happen without negligence, *Kambat v St. Francis Hosp.*, *supra*.

A common example of this factor is where a surgeon unintentionally leaves a sponge or foreign object inside the plaintiff's body, *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997); see *Delaney v Champlain Valley Physicians Hosp. Medical Center*, 232 AD2d 840, 648 NYS2d 761 (3d Dept 1996); see also *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013). In *Kambat*, the Court of Appeals held that a lay jury was not required to hear expert testimony to conclude that, in the absence of negligence, an eighteen-by-eighteen inch laparotomy pad is not ordinarily discovered inside a patient's abdomen following a hysterectomy. Therefore, plaintiff's undisputed proof that this occurred satisfied the first requirement of *res ipsa loquitur*, *Kambat v St. Francis Hosp.*, *supra*. Similarly, the infliction of a third-degree burn on the rear area of plaintiff's right upper thigh during orthoscopic knee surgery is an event that the jury could reasonably infer would not occur in the absence of negligence, *Babits v Vassar Brothers Hosp.*, 287 AD2d 670, 732 NYS2d 46 (2d Dept 2001).

In *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003), the Court of Appeals concluded that it is proper to allow the use of expert medical testimony to inform the jury's decision on this first element of *res ipsa loquitur*. The Court held that expert testimony may properly be used to help the jury "bridge the gap" between its own common knowledge, which does not encompass the specialized knowledge and experience necessary to reach a conclusion that the occurrence would not normally take place in the absence of negligence, and the common knowledge of physicians, which does, see *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020) (injury to distal sciatic nerve following total knee revision); *Smith v Sommer*, 189 AD3d 906, 137 NYS3d 99 (2d Dept 2020) (*res ipsa* charge properly given to jury where plaintiff's expert testified that, in first time funduplication procedure, injury to vagus nerve does not normally occur if physician performs the proper surgical sequence).

Even though the first factor has been established, for the doctrine

to apply plaintiff must still establish the other requirements of *res ipsa loquitur*, i.e., exclusive control by the defendant and that the injury-producing event was not due to any voluntary action by the plaintiff, *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Bernard v Bernstein*, 126 AD3d 833, 3 NYS3d 426 (2d Dept 2015); see *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013). It should be noted that *res ipsa loquitur* applies in the context of a medical malpractice action based upon a misplaced foreign object when the object is unintentionally left in a patient following an operative procedure, not when plaintiff's theory of the case was that the doctor negligently chose to leave the foreign object, in which case plaintiff is required to prove negligence by direct evidence, *James v Wormuth*, *supra*.

B. Control

The exclusive control requirement, as generally understood, is to ensure that the evidence must afford a rational basis for concluding that the cause of the injury-producing event was probably such that the defendant was responsible for any negligence connected with it, *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986); *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020). The purpose is simply to eliminate within reason all explanations for the cause of the injury other than the defendant's negligence, see *id.* The requirement does not mean that the possibility of other causes and defendants must be eliminated completely, "but only that their likelihood must be so reduced that the greater probability lies at defendant's door," *Dermatossian v New York City Transit Authority*, *supra*.

As with all the elements of *res ipsa loquitur*, it is generally for the jury to decide whether the defendant was in control of the instrumentality and thus was negligent, see *Pollock v Rapid Indus. Plastics Co., Inc.*, 113 AD2d 520, 497 NYS2d 45 (2d Dept 1985); *Mikel v Flatbush General Hospital*, 49 AD2d 581, 370 NYS2d 162 (2d Dept 1975).

"Control" is not an absolutely rigid concept nor is it a literal one and, therefore, a *prima facie* case is made out by evidence of possession and control of such a character that the probability that the negligent act was caused by someone other than defendant is so remote that it is fair to infer that defendant is the negligent party, *Durso v Wal-Mart Stores, Inc.*, 270 AD2d 877, 705 NYS2d 157 (4th Dept 2000); *Finocchio v Crest Hollow Club at Woodbury, Inc.*, 184 AD2d 491, 584 NYS2d 201 (2d Dept 1992); *Nesbit v New York City Transit Authority*, 170 AD2d 92, 574 NYS2d 179 (1st Dept 1991); *Kowalski v Loblaw's, Inc.*, 61 AD2d 340, 402 NYS2d 681 (4th Dept 1978); see generally *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986). In sum, it is not necessary for plaintiff to rule out all other possible causes or culpable defendants, only to show that those other causes or culpable parties are less likely, *Elsawi v Saratoga*

Springs City School District, 179 AD3d 1186, 114 NYS3d 526 (3d Dept 2020); Crawford v New York, 53 AD3d 462, 863 NYS2d 11 (1st Dept 2008); Pavon v Rudin, 254 AD2d 143, 679 NYS2d 27 (1st Dept 1998); see James v Wormuth, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013); Dermatossian v New York City Transit Authority, *supra*; Banca Di Roma v Mutual of America Life Ins. Co., Inc., 17 AD3d 119, 793 NYS2d 341 (1st Dept 2005).

It is not necessary that there be a single person in control of the instrumentality for the rule to apply, Chang v F.W. Woolworth Co., Inc., 196 AD2d 708, 601 NYS2d 904 (1st Dept 1993); Butti v Rollins, 133 AD2d 205, 519 NYS2d 14 (2d Dept 1987). For example, the *res ipsa loquitur* doctrine may be charged in elevator accident cases in which both the owner of the building and the elevator maintenance company have “exclusive control” over the portion of the elevator in question, DiPilato v H. Park Cent. Hotel, L.L.C., 17 AD3d 191, 795 NYS2d 518 (1st Dept 2005); Myron v Millar Elevator Industries, Inc., 182 AD2d 558, 582 NYS2d 201 (1st Dept 1992); Duke v Duane Broad Co., 181 AD2d 589, 581 NYS2d 767 (1st Dept 1992); see Singh v United Cerebral Palsy of New York City, Inc., 72 AD3d 272, 896 NYS2d 22 (1st Dept 2010) (*res ipsa loquitur* doctrine applicable against owner where automatic door maintenance company did not have exclusive contract); Rodriguez v Serge Elevators Co., Inc., 99 NY2d 587, 757 NYS2d 809, 787 NE2d 1155 (2003) (plaintiff’s inability to identify in which of two service elevators she was riding was not fatal to her *res ipsa loquitur* claim because no dispute existed that defendant exclusively maintained both elevators); but see Chambers v Tilden Towers Housing Co., 177 AD3d 413, 113 NYS3d 27 (1st Dept 2019) (element of exclusive control absent where owner ceded all responsibility for maintenance and repair to elevator service contractor); Hodges v Royal Realty Corp., 42 AD3d 350, 839 NYS2d 499 (1st Dept 2007) (*res ipsa loquitur* doctrine not applicable since owner ceded complete control of maintenance and operation of elevator to management company and thus no inference could be drawn of owner’s negligence). Moreover, the doctrine applies even where only one of the two persons in joint control is sued, Corcoran v Banner Super Market, Inc., 19 NY2d 425, 280 NYS2d 385, 227 NE2d 304 (1967).

As a species of circumstantial proof, *res ipsa loquitur* does not depend on a showing that the instrumentality causing the harm was within the defendant’s exclusive control; it is enough that the degree of dominion be such that the defendant can be identified with probability as the party responsible for the injury produced, Draper v State, 196 AD3d 744, 151 NYS3d 218 (3d Dept 2021); Quinn v State, 61 AD2d 850, 401 NYS2d 926 (3d Dept 1978). Thus, in cases where a plaintiff was injured when a chair belonging to the defendant suddenly collapsed under the plaintiff’s weight, the plaintiff’s temporary possession of the chair does not negate the inference that its sudden collapse, under normal usage, was most likely caused by the defendant’s negligence, Draper v State, 196 AD3d 744, 151 NYS3d 218 (3d Dept 2021); Finocchio v Crest Hollow Club at Woodbury, Inc., 184 AD2d 491, 584 NYS2d 201 (2d Dept 1992).

Generally, in a multiple-defendant action in which a plaintiff relies on *res ipsa loquitur*, a plaintiff is not required to identify the negligent actor, especially a plaintiff in a medical malpractice case who has been anesthetized, *Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 137 NYS3d 814 (3d Dept 2020); *Schmidt v Buffalo General Hosp.*, 278 AD2d 827, 718 NYS2d 514 (4th Dept 2000); *Fogal v Genesee Hosp.*, 41 AD2d 468, 344 NYS2d 552 (4th Dept 1973); see *Frank v Smith*, 127 AD3d 1301, 6 NYS3d 754 (3d Dept 2015); *Backus v Kaleida Health*, 91 AD3d 1284, 937 NYS2d 773 (4th Dept 2012); *DiGiacomo v Cabrini Medical Center*, 21 AD3d 1052, 803 NYS2d 587 (2d Dept 2005). However, where it appears that the instrumentality causing the injury could have been under the control of any one of a number of persons, each of whom is independent of the other, and none of them subject to the control or direction of the other, the doctrine may not be invoked unless there is some evidence to enable the jury to identify the negligent actor, *Dermatosian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986); *Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 280 NYS2d 385, 227 NE2d 304 (1967); *Rondeau v Georgia Pacific Corp.*, 29 AD3d 1066, 814 NYS2d 775 (3d Dept 2006); *Raimondi v New York Racing Ass'n*, 213 AD2d 708, 624 NYS2d 273 (2d Dept 1995); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992). For example, in *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013), the Court of Appeals stated that whether the defendant-doctor was in control of the operation did not address the question of whether the doctor was in exclusive control of the instrumentality giving rise to the patient's injury, since several other non-defendant individuals participated in the medical procedure in which the instrumentality was inserted, and thus plaintiff failed to produce evidence that eliminated within reason all explanations for the injury other than defendant's negligence.

With respect to an instrumentality that is controlled by the defendant but is handled by the public, the appropriate target of inquiry is whether the instrumentality itself was generally handled by the public, not whether the public used the larger object to which the instrumentality was attached, *Pavon v Rudin*, 254 AD2d 143, 679 NYS2d 27 (1st Dept 1998); see *Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 896 NYS2d 22 (1st Dept 2010) (*res ipsa loquitur* doctrine applicable against owner where motion sensor located on top of automatic swinging door malfunctioned, since public unlikely to have contact with it). Thus, *res ipsa loquitur* does not apply where the allegedly defective instrumentality, the "safe edge" on an elevator door, was designed to come into contact with the public and was subject to potentially damaging misuse or vandalism, *De Sanctis v Montgomery Elevator Co., Inc.*, 304 AD2d 936, 758 NYS2d 419 (3d Dept 2003); see *Barkley v Plaza Realty Investors, Inc.*, 149 AD3d 74, 49 NYS3d 105 (1st Dept 2017). Similarly, supermarket merchandise, which is handled by self-service customers, is not in the exclusive control of the storekeeper, and therefore *res ipsa loquitur* is not applied in cases against supermarkets involving falling objects or foreign substances on the floor, *Ruggiero v Waldbaums Supermarkets, Inc.*, 242 AD2d 268, 661

NYS2d 37 (2d Dept 1997); *Cameron v H. C. Bohack Co.*, 27 AD2d 362, 280 NYS2d 483 (2d Dept 1967), see Comment to PJI 2:91. Likewise, since a passenger grab handle on a bus is continuously available for use by all bus passengers, *res ipsa loquitur* is not available to a plaintiff who is injured by the handle, *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986). For similar reasons, a passenger injured by defective steps of a public escalator located in a subway station may not invoke *res ipsa loquitur*, *Ebanks v New York City Transit Authority*, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987); see also *Petro v New York Life Ins. Co.*, 277 AD2d 213, 715 NYS2d 725 (2d Dept 2000) (*res ipsa loquitur* inapplicable where elevator not within exclusive control of defendants). *Res ipsa loquitur* does not apply to the collapse of a porch of a residence where the porch was defectively designed and constructed prior to defendant's ownership and defendant did not make any major alterations, *Crosby v Stone*, 137 AD2d 785, 525 NYS2d 332 (2d Dept 1988); see *Davis v Vantage Homes, Inc.*, 146 AD2d 879, 536 NYS2d 864 (3d Dept 1989). Nor does *res ipsa loquitur* apply to a glass window that fell from an apartment building, since the owner of the building was not in possession of the apartment from which the window fell and the tenant of the apartment was out of the country at the time of the accident and played no role in the installation and cleaning of the window, *Veltri v Stahl*, 155 AD2d 287, 547 NYS2d 49 (1st Dept 1989); see *Harp v O'Neil*, 256 AD2d 912, 681 NYS2d 842 (3d Dept 1998). *Res ipsa loquitur* did not apply to a burst gasoline hose at a self-service gas station, since the hose was continuously available to customers, *Troisi v Merit Oil Co.*, 208 AD2d 615, 617 NYS2d 347 (2d Dept 1994). Where a trade show display fell on the plaintiff, *res ipsa loquitur* did not apply to the contractor that constructed the display, delivered it, and departed the convention center prior to the accident, *Alonso v Reed Elsevier, PLC*, 187 AD3d 427, 131 NYS3d 339 (1st Dept 2020). Therefore, evidence that third parties had access to the instrumentality destroys the premise supporting the inference of negligence of the one normally in control of the instrumentality, unless there is further evidence that the third parties did nothing to cause the injury, *De Witt Properties, Inc. v New York*, 44 NY2d 417, 406 NYS2d 16, 377 NE2d 461 (1978); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992); see *James v Wormuth*, 21 NY3d 540, 974 NYS2d 308, 997 NE2d 133 (2013).

In contrast, *res ipsa loquitur* will be applied, even as to supermarkets with respect to exploding bottles, when the element of control by the storekeeper may fairly be inferred, see *Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 280 NYS2d 385, 227 NE2d 304 (1967); *Cameron v H. C. Bohack Co.*, 27 AD2d 362, 280 NYS2d 483 (2d Dept 1967), and it will be applied with respect to a stool left by a landlord in the basement for tenants' use, *Nosowitz v 75-76 Polk Ave. Corp.*, 34 AD2d 648, 310 NYS2d 255 (2d Dept 1970); to glass shelves affixed to the walls of the stockroom of defendant's store, *Silberman v Lazarowitz*, 130 AD2d 736, 515 NYS2d 837 (2d Dept 1987); and to a self-service elevator that defendant was responsible to maintain, *Buell v SPS Properties*, 166 AD2d 925, 560 NYS2d 579 (4th Dept 1990); see also

Chang v F.W. Woolworth Co., Inc., 196 AD2d 708, 601 NYS2d 904 (1st Dept 1993) (res ipsa loquitur applied where defect in escalator was unlikely to have been caused by vandalism). Res ipsa loquitur also has been applied to the fall of a display item in a department store where the item was not offered for sale and was located five feet above floor level, Ciciarelli v Ames Dept. Stores, Inc., 162 AD2d 996, 557 NYS2d 787 (4th Dept 1990); see Durso v Wal-Mart Stores, Inc., 270 AD2d 877, 705 NYS2d 157 (4th Dept 2000) (res ipsa loquitur applied where 19 boxes fell from overhead riser six feet above floor).

When plaintiff establishes the element of control, it has been held that a defendant's notice of a defect may be inferred under res ipsa loquitur and accordingly the plaintiff need not offer evidence of actual or constructive notice, see Lococo v Mater Cristi Catholic High School, 142 AD3d 590, 37 NYS3d 134 (2d Dept 2016); Ezzard v One East River Place Realty Co., LLC, 129 AD3d 159, 8 NYS3d 195 (1st Dept 2015); Levinstim v Parker, 27 AD3d 698, 815 NYS2d 596 (2d Dept 2006); Parsons v State, 31 AD2d 596, 295 NYS2d 383 (3d Dept 1968).

C. Plaintiff's Conduct

Closely related to the condition of exclusive control by the defendant is the third element that requires the plaintiff to establish that the injury-producing event must not have been "due to any voluntary action or contribution on the part of the plaintiff," Kambat v St. Francis Hosp., 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997). Contributory negligence as a bar to a plaintiff's recovery was eliminated in 1975 with the enactment of CPLR 1411, which allows for comparative fault. It has been suggested that the advent of comparative fault logically eliminates the third requirement since comparative fault, by its nature, converts the plaintiff's contributory fault from its traditional function as barring liability into one of merely reducing damages. However, in Dermatossian v New York City Transit Authority, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986), the Court, in a footnote, explicitly declined to express any view on this question. Since Dermatossian v New York City Transit Authority, supra, the Court of Appeals and each Department of the Appellate Division have often repeated this third element, Morejon v Rais Const. Co., 7 NY3d 203, 818 NYS2d 792, 851 NE2d 1143 (2006); Kambat v St. Francis Hosp., supra; Ebanks v New York City Transit Authority, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987); Romero v Xcellent Car Wash & Express Lube, 171 AD3d 584 98 NYS3d 588 (1st Dept 2019); Dengler v Posnick, 83 AD3d 1385, 920 NYS2d 524 (4th Dept 2011); Ever Win, Inc. v 1-10 Industry Associates, LLC, 74 AD3d 735, 905 NYS2d 196 (2d Dept 2010); Rondeau v Georgia Pacific Corp., 29 AD3d 1066, 814 NYS2d 775 (3d Dept 2006). It has been held that the proper application of this element, rendering res ipsa loquitur inapplicable, is when the evidence of plaintiff's fault completely negates the inference of defendant's negligence, or when the inference of defendant's negligence is "no more likely a causative agent [of the injury-producing event] than plaintiff's own conduct," De Simone v Inserra Supermarkets Inc., 207 AD2d 615, 615 NYS2d 528 (3d Dept 1994).

Notwithstanding the restrictive language still utilized by courts after the adoption of comparative negligence, *res ipsa loquitur* has been upheld even when plaintiff has been found comparatively negligent, see *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007). In *Burgess v Otis Elevator Co.*, 114 AD2d 784, 495 NYS2d 376 (1st Dept 1985), *aff'd*, 69 NY2d 623, 511 NYS2d 227, 503 NE2d 692 (1986), the Appellate Division held that *res ipsa loquitur* was properly charged where plaintiff had no control over the misleveling of the elevator even though plaintiff, who was injured when she stumbled while exiting the elevator, was held partially at fault.

In applying this third factor, the courts consequently seem to draw a distinction between a plaintiff's actions that have affected the injury-producing instrumentality and those actions of the plaintiff that may have been negligent and for which the plaintiff was found comparatively at fault for the accident. Thus, in one case a jury was properly charged on *res ipsa loquitur* when the plaintiff was struck by a 1,000-pound bale that fell from defendant's loading dock, *Beadleston v American Tissue Corp.*, 41 AD3d 1074, 839 NYS2d 283 (3d Dept 2007). Even though plaintiff had voluntarily walked into an area that he knew was dangerous, and thus was found comparatively negligent, there was no evidence that he moved, touched or otherwise caused the bale to fall on him, *id.*; see *Pavon v Rudin*, 254 AD2d 143, 679 NYS2d 27 (1st Dept 1998) (doors mounted on pivot hinges do not generally fall in absence of negligence and mere act of opening door does not make accident plaintiff's fault or put the door under plaintiff's control); *Brink v Anthony J. Costello & Son Development, LLC*, 66 AD3d 1451, 886 NYS2d 301 (4th Dept 2009) (same); see also *Miller v Schindler Elevator Corp.*, 308 AD2d 312, 763 NYS2d 826 (1st Dept 2003) (plaintiff entitled to rely on *res ipsa loquitur* doctrine even though she may have activated emergency stop switch in response to sudden drop of elevator).

III. Effect of Res Ipsa Loquitur

As noted above, the application of *res ipsa loquitur* doctrine does not create a presumption of negligence, *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455 (1941); see *Morejon v Rais Const. Co.*, 7 NY3d 203, 818 NYS2d 792, 851 NE2d 1143 (2006); *Ezzard v One East River Place Realty Co., LLC*, 129 AD3d 159, 8 NYS3d 195 (1st Dept 2015). A proper invocation of *res ipsa loquitur* simply means that the plaintiff has made a *prima facie* case of negligence entitling the case to go to the jury, *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 414 NYS2d 540 (1st Dept 1979). *Res ipsa loquitur* creates merely a permissive inference of negligence from the circumstances of the injury-producing event, *Morejon v Rais Const. Co.*, *supra*; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997). The defendant has no burden of rebuttal, *Davis v Goldsmith*, 19 AD2d 514, 240 NYS2d 148 (1st Dept 1963). Even in the absence of rebuttal, the jury is not bound to draw the inference of negligence, *Kambat v St. Francis Hosp.*, *supra*; *Braun v Consolidated Edison Co. of New York*, 31

AD2d 165, 296 NYS2d 61 (1st Dept 1968), *aff'd*, 26 NY2d 825, 309 NYS2d 356, 257 NE2d 901 (1970); *Chisholm v Mobil Oil Corp.*, 45 AD2d 776, 356 NYS2d 699 (3d Dept 1974); *Simmons v Stiles*, 43 AD2d 417, 353 NYS2d 257 (3d Dept 1974); *Benson v Bohack Food Markets*, 33 AD2d 908, 307 NYS2d 529 (2d Dept 1970); *Hatch v King*, 33 AD2d 879, 307 NYS2d 515 (4th Dept 1969). However, the defendant may offer evidence to rebut the inference that the doctrine raises, *States v Lourdes Hosp.*, *supra*; *Ezzard v One East River Place Realty Co., LLC*, *supra* (defendant is free to rebut inference by presenting different facts or otherwise arguing that jury should not apply inference in particular case).

Since the doctrine of *res ipsa loquitur* is a form of circumstantial evidence that merely provides a permissible inference of negligence rather than a presumption, its application may serve as a basis for an award of summary judgment to plaintiff only in “the rarest of cases” where “the plaintiff’s circumstantial proof is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable,” *Morejon v Rais Const. Co.*, 7 NY3d 203, 818 NYS2d 792, 851 NE2d 1143 (2006); *Barney-Yeboah v Metro-North Commuter R.R.*, 25 NY3d 945, 6 NYS3d 549, 29 NE3d 896 (2015); see *Romero v Xcellent Car Wash & Express Lube*, 171 AD3d 584 98 NYS3d 588 (1st Dept 2019); *Emlaw v Clark*, 26 AD3d 790, 809 NYS2d 352 (4th Dept 2006) (summary judgment based on *res ipsa loquitur* appropriate only where *prima facie* proof so convincing that inference of negligence inescapable and un rebutted); *Thomas v New York University Medical Center*, 283 AD2d 316, 725 NYS2d 35 (1st Dept 2001); *Harmon v U.S. Shoe Corp.*, 262 AD2d 1010, 692 NYS2d 566 (4th Dept 1999) (summary judgment granted against defendant who failed to rebut plaintiff’s *res ipsa loquitur* showing); *Smith v Moore*, 227 AD2d 854, 642 NYS2d 393 (3d Dept 1996); *Farina v Pan American World Airlines, Inc.*, 116 AD2d 618, 497 NYS2d 706 (2d Dept 1986) (summary judgment on liability granted to plaintiff where airline failed to explain why airplane went off runway while attempting to land); *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 414 NYS2d 540 (1st Dept 1979). In those cases where conflicting inferences may be drawn, the choice of inference must be made by the jury, *States v Lourdes Hosp.*, 100 NY2d 208, 762 NYS2d 1, 792 NE2d 151 (2003); *Kambat v St. Francis Hosp.*, 89 NY2d 489, 655 NYS2d 844, 678 NE2d 456 (1997). While the plaintiff no longer needs to show the absence of comparative fault on a motion for summary judgment, *Rodriguez v New York*, 31 NY3d 312, 76 NYS3d 898, 101 NE3d 366 (2018), it has been held that a plaintiff moving for summary judgment on a *res ipsa loquitur* theory will not succeed if the plaintiff fails to establish as a matter of law that defendant’s negligence—rather than the plaintiff’s own negligence—caused the injury-producing event, *Romero v Xcellent Car Wash & Express Lube*, *supra* (plaintiff entered restricted area of defendant’s property without permission and fell into uncovered drain).

F. PROXIMATE CAUSE

PJI 2:70. Proximate Cause—In General

An act or omission is regarded as a cause of an injury [in bifurcated trial, substitute: accident or occurrence] if it was a substantial factor in bringing about the injury [in bifurcated trial, substitute: accident or occurrence], that is, if it had such an effect in producing the injury [in bifurcated trial, substitute: accident or occurrence] that reasonable people would regard it as a cause of the injury [in bifurcated trial, substitute: accident or occurrence]. [The remainder of the charge should only be provided where there is evidence of comparative fault or concurrent causes.] There may be more than one cause of an injury [in bifurcated trial, substitute: accident or occurrence], but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.

Comment

Caveat 1: In most cases care should be taken to use the phrases “a cause” and “a substantial factor” and to avoid the use of the phrases “the cause” and “that cause” in order to prevent the erroneous implication that there can be only one proximate cause, see *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 693 NYS2d 493, 715 NE2d 495 (1999), note 2 (citing PJI); *Fox v Tedesco*, 15 AD3d 538, 789 NYS2d 742 (2d Dept 2005); *Ohdan v New York*, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000) (citing PJI); *Galioto v Lakeside Hosp.*, 123 AD2d 421, 506 NYS2d 725 (2d Dept 1986) (citing PJI); *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986) (citing PJI); see also *Burlington Ins. Co. v NYC Transit Authority*, 29 NY3d 313, 57 NYS3d 85, 79 NE3d 477 (2017) (citing PJI); *Winderman v Brooklyn/McDonald Ave. Shoprite Associates, Inc.*, 85 AD3d 1018, 925 NYS2d 637 (2d Dept 2011); *Gregory v Cortland Memorial Hosp.*, 21 AD3d 1305, 802 NYS2d 579 (4th Dept 2005) (citing PJI); *Kadyszewski v Ellis Hosp. Ass’n*, 192 AD2d 765, 595 NYS2d 841 (3d Dept 1993). The use of the phrase “the cause” has been held to be reversible error, *Capicchioni v Morrissey*, 205 AD2d 959, 613 NYS2d 499 (3d Dept 1994); see *Lieb Gott v New York*, 213 AD2d 606, 624 NYS2d 252 (2d Dept 1995). In a bifurcated case involving more than one culpable party, it may be advisable to use the language similar to that contained in *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980) (“It was plaintiff’s burden to show that defendant’s conduct was a substantial causative

factor in the sequence of events that led to . . . injury”). In the Second Department, or in a case involving a bifurcated trial, the word “occurrence” should be substituted for the word “injury,” *DiCesare v Glasgow*, 295 AD2d 1007, 743 NYS2d 646 (4th Dept 2002); 22 NYCRR 202.42.

Caveat 2: Causation is relevant both to liability and to damages, *Oakes v Patel*, 20 NY3d 633, 965 NYS2d 752, 988 NE2d 488 (2013). For example, in a medical malpractice case, liability cannot be established unless it is shown that the defendant’s malpractice was a substantial factor in causing the plaintiff’s injury, *id.* But even where liability is established, the plaintiff may recover only for those injuries and related damages proximately caused by the malpractice, *id.* More specifically, where the plaintiff had a pre-existing condition, the plaintiff is not entitled to recover for injuries that the pre-existing condition would have caused even in the absence of malpractice, *id.*

Caveat 3: In *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016), the Court of Appeals observed that, “[t]ypically, the question of whether a particular act of negligence is a substantial cause of the plaintiff’s injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences” (internal quotation marks omitted). The principal issue in *Hain* was intervening cause, see PJI 2:12.

Based on *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980) (“It was plaintiff’s burden to show that defendant’s conduct was a substantial causative factor in the sequence of events that led to . . . injury”); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); *Dunham v Canisteo*, 303 NY 498, 104 NE2d 872 (1952); *Waterman v State*, 19 AD2d 264, 241 NYS2d 314 (4th Dept 1963), *aff’d*, 14 NY2d 793, 251 NYS2d 30, 200 NE2d 212 (1964); *Ortiz v Kinoshita & Co.*, 30 AD2d 334, 292 NYS2d 48 (1st Dept 1968); *Bacon v Celeste*, 30 AD2d 324, 292 NYS2d 54 (1st Dept 1968); *Rugg v State*, 284 App Div 179, 131 NYS2d 2 (3d Dept 1954); see *Brown v State*, 31 NY3d 514 (2018); *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013); *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Stone v Williams*, 64 NY2d 639, 485 NYS2d 42, 474 NE2d 250 (1984); *Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162, 434 NE2d 231 (1982); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Ventricelli v Kinney System Rent A Car, Inc.*, 45 NY2d 950, 411 NYS2d 555, 383 NE2d 1149 (1978); *Margolin v Friedman*, 43 NY2d 982, 404 NYS2d 553, 375 NE2d 734 (1978); see also *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016) (“the burden of proving proximate causation . . . falls squarely on plaintiffs”); *Rivera v New York City Health and Hospitals Corp.*, 72 NY2d 1021, 534 NYS2d 923, 531 NE2d 644 (1988) (where plaintiff claimed that hospital was negligent in failing to record his sui-

cidental tendencies in documents accompanying his transfer to psychiatric center, hospital entitled to instruction that it must be exonerated if psychiatric center discharged plaintiff before reading the transfer forms); *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); *Clune v Moore*, 142 AD3d 1330, 38 NYS3d 852 (4th Dept 2016) (citing PJI); *Cohen v Bugatch*, 121 AD2d 426, 503 NYS2d 124 (2d Dept 1986) (citing PJI); *Mack v Altmans Stage Lighting Co., Inc.*, 98 AD2d 468, 470 NYS2d 664 (2d Dept 1984) (citing PJI); see generally *Prosser and Keeton, Torts*, 5th ed., §§ 41 et seq., p. 63; *Restatement, Torts 2d*, § 431 and Comment at § 433. For a discussion of proximate cause principles, see *White v Diaz*, 49 AD3d 134, 854 NYS2d 106 (1st Dept 2008) (analyzing liability for double parking on urban street); see also *Grant v Nembhard*, 94 AD3d 1397, 943 NYS2d 272 (3d Dept 2012).

The phrase “proximate cause” is not used in this charge because the word “proximate” is frequently confusing to the lay juror and is scarcely descriptive of the “substantial factor” concept. “Proximate,” although descriptive of policy in dealing with proximity in space and time, see *Bird v St. Paul Fire & Marine Ins. Co.*, 224 NY 47, 120 NE 86 (1918); *Hoffman v King*, 160 NY 618, 55 NE 401 (1899), does not communicate causation. “Legal cause” has been used by the Court of Appeals in several cases, see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016) (“proximate, or legal, cause”); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980) (“The concept of proximate cause or more appropriately, legal cause . . .”); *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980) (“legal or proximate cause”); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976) (“legally cognizable cause,” “causally connected,” “no such legal connection”); see also *Burlington Ins. Co. v NYC Transit Authority*, 29 NY3d 313, 57 NYS3d 85, 79 NE3d 477 (2017); *Restatement 2nd Torts*, Ch 16; *Prosser and Keeton, Torts*, 5th ed., §§ 41 et seq., p. 263; 4 *Harper, James and Gray, the Law of Torts*, 2d ed., ch xx. The use of the term “proximate cause” instead of the preferred term, “substantial factor”, does not constitute reversible error, *Martonick v Pudiak*, 285 AD2d 935, 727 NYS2d 829 (3d Dept 2001).

It is error for the court to fail to include on a verdict sheet an interrogatory requiring the jury to conclude, prior to awarding damages, that the plaintiff’s injuries were proximately caused by the injury producing event, *Siagha v Salant Jerome, Inc.*, 271 AD2d 274, 706 NYS2d 634 (1st Dept 2000). For examples of cases in which such interrogatories were approved in light of the courts’ correct instructions on the need to find both negligence and causation, see *Brewster v Prince Apartments, Inc.*, 264 AD2d 611, 695 NYS2d 315 (1st Dept 1999).

If the evidence supports a finding that there was more than one proximate cause and the court intends to charge proximate cause (PJI 2:70) and apportionment (PJI 2:75), it should also charge concurrent causes (PJI 2:71), *Kalam v K-Metal Fabrications, Inc.*, 286 AD2d 603, 730 NYS2d 299 (1st Dept 2001). With respect to concurrent causes and

intervening causes, see PJI 2:71 and PJI 2:72; as to the causation problems that arise when a plaintiff suffers successive injuries, see PJI 2:305, PJI 2:306 and PJI 2:307. As to unavoidable accident, see Comment to PJI 2:10.

The foregoing charge is for use in cases other than those predicated upon a statute creating a liability that would not exist but for the statute. As to causal relationship in such a statutory situation, see Introductory Statement preceding PJI 2:25; as to violations of a statute which establishes negligence, see Comment to PJI 2:26. As to FELA cases see PJI 2:180; *CSX Transp., Inc. v McBride*, 131 SCt 2630 (2011).

The issue of whether a defendant's negligence was a proximate cause of an accident is separate and distinct from the negligence determination, *Rodriguez v Budget Rent-A-Car Systems, Inc.*, 44 AD3d 216, 841 NYS2d 486 (1st Dept 2007); *Ohdan v New York*, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000). A defendant may act negligently without that negligence constituting a proximate cause of the accident, id.

Proximate Cause Defined

The traditional definition of proximate cause was "that which, in a natural and continuous sequence, unbroken by any new cause, produces that event (complained of), and without which that event would not have occurred," *Laidlaw v Sage*, 158 NY 73, 52 NE 679 (1899); see *Burlington Ins. Co. v NYC Transit Authority*, 29 NY3d 313, 57 NYS3d 85, 79 NE3d 477 (2017); *Martinez v Lazaroff*, 66 AD2d 874, 411 NYS2d 955 (2d Dept 1978), *aff'd*, 48 NY2d 819, 424 NYS2d 126, 399 NE2d 1148 (1979); *Pagan v Goldberger*, 51 AD2d 508, 382 NYS2d 549 (2d Dept 1976). The difficulty with such verbiage for lay jurors is apparent and has led to use of the oversimplification that "the plaintiff cannot recover unless the jury finds that the incident would not have occurred but for the negligence of the defendant." The "but for" rule is, however, inconsistent with accepted substantive rules of tort law. Thus, it is elementary that when either act of negligence of two independent wrongdoers may be found to be a direct cause of injury, either wrongdoer is, or both wrongdoers are, responsible for the whole injury, *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); *Slater v Mersereau*, 64 NY 138 (1876); see *Jones v New York*, 57 AD2d 429, 395 NYS2d 10 (1st Dept 1977), yet neither would be held under the "but for" rule since the injury would have occurred in any event through the negligence of the other. Likewise, the rule would relieve from liability a negligent actor if the same harm might have been sustained had the actor not been negligent; yet the law is clear that that fact may be considered in fixing damages but does not relieve from liability, *Dunham v Canisteo*, 303 NY 498, 104 NE2d 872 (1952). Finally, it would permit a finding of causation when defendant's act merely furnished the condition or occasion upon which plaintiff's injuries were received but did not put in motion the agency by which the injuries were inflicted; the law is clear that in such a case there is no liability, *Rivera v New York*, 11 NY2d 856, 227 NYS2d 676, 182 NE2d 284 (1962); see *Hain v Jamison*,

28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016) (citing PJI); *Stone v Williams*, 64 NY2d 639, 485 NYS2d 42, 474 NE2d 250 (1984); *Ventricelli v Kinney System Rent A Car, Inc.*, 45 NY2d 950, 411 NYS2d 555, 383 NE2d 1149 (1978); *Margolin v Friedman*, 43 NY2d 982, 404 NYS2d 553, 375 NE2d 734 (1978); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); *Barnes v Fix*, 63 AD3d 1515, 880 NYS2d 795 (4th Dept 2009); *Lee v New York City Housing Authority*, 25 AD3d 214, 803 NYS2d 538 (1st Dept 2005); *Penovich v Schoeck*, 252 AD2d 799, 676 NYS2d 253 (3d Dept 1998) (defendant's failure to remove an accumulation of ice from roof of house was not proximate cause of plaintiff's fall from roof while performing job himself) (citing PJI); *Hersman v Hadley*, 235 AD2d 714, 651 NYS2d 754 (3d Dept 1997) (citing PJI); *Quiroz v Leslie Edelman of N.Y., Inc.*, 224 AD2d 509, 638 NYS2d 154 (2d Dept 1996) (sale of firearm merely furnished condition for homicide and was not proximate cause); *Ocera v Zito*, 212 AD2d 681, 622 NYS2d 800 (2d Dept 1995); *Benaquista v Municipal Housing Authority of City of Schenectady*, 212 AD2d 860, 622 NYS2d 129 (3d Dept 1995) (quoting PJI); see also *Prosser and Keeton, Torts*, 5th ed § 41 ("When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause of the event.").

Substantial Factor

The pattern charge, on the authority of the New York cases cited, adopts the substantial factor test of the Restatement, see *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); see also *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016). Although, since its adoption by the American Law Institute in 1934, that test has found acceptance in a number of jurisdictions, 4 *Harper, James and Gray*, 2d ed. *Law of Torts*, § 20.6, it does not provide a universal formula, see *Derdiarian v Felix Contracting Corp.*, *supra*. As Dean Prosser suggests [*Prosser and Keeton, Torts*, 5th ed § 41], as applied to the fact of causation alone it is of considerable assistance, but with respect to policy considerations, such as foreseeability or intervening cause, which go to limit liability once causation is found, it can have the effect of obscuring the issue and leaving to the jury matters that should be decided by the court, see also *Ventricelli v Kinney System Rent A Car, Inc.*, 45 NY2d 950, 411 NYS2d 555, 383 NE2d 1149 (1978); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); *Martinez v Lazaroff*, 66 AD2d 874, 411 NYS2d 955 (2d Dept 1978), *aff'd*, 48 NY2d 819, 424 NYS2d 126, 399 NE2d 1148 (1979); *Pagan v Goldberger*, 51 AD2d 508, 382 NYS2d 549 (2d Dept 1976). As to foreseeability see PJI 2:12, PJI 2:72, and *Prosser and Keeton, Torts* (5th ed) § 43; as to intervening cause see PJI 2:72.

"Substantial" is defined by Restatement, Second, *Torts*, § 431, Comment a, as "conduct (which) has such an effect in producing the harm as to lead reasonable [people] to regard it as a cause," and that definition

has been approved in *Ortiz v Kinoshita & Co.*, 30 AD2d 334, 292 NYS2d 48 (1st Dept 1968); *Bacon v Celeste*, 30 AD2d 324, 292 NYS2d 54 (1st Dept 1968); see *Wild v Catholic Health System*, 21 NY3d 951, 969 NYS2d 846, 991 NE2d 704 (2013) (citing PJI); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980). Although the pattern charge thus states a correct principle of law, it will be more readily understood by lay jurors if the principle is expanded upon and related to the facts of the particular case. The law must not only be stated accurately but “be reduced to terms likely to be understood by the jury,” *Bacon v Celeste*, *supra*.

Proximate cause is a uniquely fact-specific determination and, depending on the nature of the case, a variety of factors may be relevant in assessing causation, *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016). Such factors include, among other things: the foreseeability of the event resulting in injury; the passage of time between the originally negligent act and the intervening act; the spatial gap, if any, between the original act and the intervening act; whether the original act of negligence was a completed occurrence or was ongoing at the time of the intervening act; whether and, if so, what other forces combined to bring about the harm; as well as public policy considerations regarding the scope of liability, *id* (citing PJI); see *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Mack v Altmans Stage Lighting Co., Inc.*, 98 AD2d 468, 470 NYS2d 664 (2d Dept 1984) (citing PJI); *Pagan v Goldberger*, 51 AD2d 508, 382 NYS2d 549 (2d Dept 1976); see also *Williams v State*, 18 NY3d 981, 946 NYS2d 81, 969 NE2d 197 (2012) (proximate cause analysis incorporates test of temporal duration that asks if occurrence of injury was tied to alleged negligent act or omission within reasonable lapse of time). The relevance of each factor will vary depending upon the factual circumstances presented, but the most significant inquiry in the proximate cause analysis is often that of foreseeability, *Hain v Jamison*, *supra*.

Analysis of the facts in a given case along the foregoing lines will sometimes lead to the conclusion that there is no fact issue to be presented to the jury, see *Arrastia v Sbordone*, 225 AD2d 375, 638 NYS2d 659 (1st Dept 1996); *Nastasi v State*, 55 AD2d 724, 389 NYS2d 175 (3d Dept 1976). When, however, it is concluded that there is an issue for jury determination, the instruction to the jury should relate the concepts of time, degree of connection and space to the facts of the case and not simply state them as concepts.

The facts presented are of critical significance. In *Ventricelli v Kinney System Rent A Car, Inc.*, 45 NY2d 950, 411 NYS2d 555, 383 NE2d 1149 (1978), plaintiff parked a defective vehicle in a legal parking space on a city street and was injured when a car parked behind him suddenly lurched forward. The Court held that, as a matter of law, it was not foreseeable that the plaintiff would be struck while his vehicle was parked in such a “relatively ‘safe place.’” In contrast, in *Betancourt v Manhattan Ford Lincoln Mercury, Inc.*, 195 AD2d 246, 607 NYS2d

924 (1st Dept 1994), where decedent had to pull his defective car onto the shoulder of an unlit, commercially traveled interstate highway in the dead of winter in the early morning hours, and was struck by a tractor trailer, Ventricelli was distinguished and it was held that the issue of foreseeability was for the jury to decide. In *Gordils v Audobon Equities, Ltd.*, 291 AD2d 318, 738 NYS2d 49 (1st Dept 2002), issues of fact existed as to whether plaintiff's use of a fire escape as a means of ingress to apartment was a foreseeable consequence of defendant's failure to maintain the building intercom system.

Evidence of Causation

Given the unique nature of the inquiry in each case, proximate cause is generally an issue of fact for the jury, *Turturro v City of New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Newman v RCPI Landmark Properties, LLC*, 28 NY3d 1032, 42 NYS3d 668, 65 NE3d 698 (2016). Where the evidence as to the cause of the incident which injured plaintiff is undisputed and only one conclusion may be drawn from the facts, whether defendant's act or omission was a proximate cause of the injury is for the court and not the jury, *Howard v Poseidon Pools, Inc.*, 72 NY2d 972, 534 NYS2d 360, 530 NE2d 1280 (1988); *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986); *Stone v Williams*, 64 NY2d 639, 485 NYS2d 42, 474 NE2d 250 (1984); *Atkinson v Oneida*, 59 NY2d 840, 464 NYS2d 747, 451 NE2d 494 (1983); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); *Rivera v New York*, 11 NY2d 856, 227 NYS2d 676, 182 NE2d 284 (1962); *Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 64 NYS3d 22 (1st Dept 2017); *Kovit v Estate of Hallums*, 261 AD2d 442, 690 NYS2d 82 (2d Dept 1999); see *Parvi v Kingston*, 41 NY2d 553, 394 NYS2d 161, 362 NE2d 960 (1977); *Martinez v Lazaroff*, 66 AD2d 874, 411 NYS2d 955 (2d Dept 1978), *aff'd*, 48 NY2d 819, 424 NYS2d 126, 399 NE2d 1148 (1979); *Dillard v New York City Housing Authority*, 112 AD3d 504, 977 NYS2d 226 (1st Dept 2013); but see *Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 569 NYS2d 337, 571 NE2d 645 (1991).

When there is evidence of a possible cause of the incident for which defendant would not be responsible, plaintiff, in order to recover, must demonstrate to the jury that defendant's act was a proximate cause of his injury, *Wragge v Lizza Asphalt Const. Co.*, 17 NY2d 313, 270 NYS2d 616, 217 NE2d 666 (1966); *Taylor v Yonkers*, 105 NY 202, 11 NE 642 (1887); *Pipp v Guthrie Clinic, Ltd.*, 80 AD3d 1014, 915 NYS2d 376 (3d Dept 2011); *Rugg v State*, 284 App Div 179, 131 NYS2d 2 (3d Dept 1954). That showing need not, however, be made with absolute certitude nor exclude every other possible cause of injury, *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Spett v President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 278 NYS2d 826, 225 NE2d 527 (1967); *Wragge v Lizza Asphalt Const. Co.*, 17 NY2d 313, 270 NYS2d 616, 217 NE2d 666 (1966); *Galioto v Lakeside Hosp.*,

123 AD2d 421, 506 NYS2d 725 (2d Dept 1986); *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986) (citing PJI) (both holding that charge should avoid erroneous implication that there can be only one proximate cause); *Jackson v Ludlow Marine Corp.*, 47 AD2d 737, 365 NYS2d 216 (1st Dept 1975); see *Gayle v New York*, 92 NY2d 936, 680 NYS2d 900, 703 NE2d 758 (1998); *Ayotte v Gervasio*, 186 AD2d 963, 589 NYS2d 372 (3d Dept 1992), (citing PJI) *aff'd*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 (1993); *Tyrell v Pollak*, 163 AD3d 1232, 80 NYS3d 706 (3d Dept 2018). Rather, the proof must render those other causes sufficiently “remote” or “technical” to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence, *Gayle v New York*, *supra*; see *Darrisaw v Strong Memorial Hosp.*, 16 NY3d 729, 917 NYS2d 95, 942 NE2d 305 (2011), *aff'g* 74 AD3d 1769, 902 NYS2d 286; *Tyrell v Pollak*, *supra*; see also *Montas v JJC Const. Corp.*, 20 NY3d 1016, 963 NYS2d 164, 985 NE2d 1225 (2013) (where it is just as likely that accident was caused by debris from project defendant did not control as by debris from project defendant did control, any determination by jury as to the cause of the accident would be based upon sheer speculation). Therefore, it is sufficient that facts and circumstances are shown from which causation may be reasonably inferred, *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (1998); *Derdiarian v Felix Contracting Corp.*, *supra*; *Boite v New York*, 22 NY2d 817, 292 NYS2d 912, 239 NE2d 653 (1968); *Slaybough v Nathan Littauer Hosp.*, 202 AD2d 773, 608 NYS2d 745 (3d Dept 1994); *Spano v Onondaga*, 135 AD2d 1091, 523 NYS2d 310 (4th Dept 1987); *Locilento v John A. Coleman Catholic High School*, 134 AD2d 39, 523 NYS2d 198 (3d Dept 1987); *Koester v State*, 90 AD2d 357, 457 NYS2d 655 (4th Dept 1982); see *Pagan v Goldberger*, 51 AD2d 508, 382 NYS2d 549 (2d Dept 1976); but see *Atkinson v Oneida*, 59 NY2d 840, 464 NYS2d 747, 451 NE2d 494 (1983); as by proving the dangerous condition of a stairway and the fact that plaintiff fell on the stairway, although the exact place of the fall is not shown, *Gramm v State*, 28 AD2d 787, 281 NYS2d 235 (3d Dept 1967), *aff'd*, 21 NY2d 1025, 291 NYS2d 7, 238 NE2d 498 (1968); *Kelsey v Port Authority of New York and New Jersey*, 52 AD2d 801, 383 NYS2d 347 (1st Dept 1976); *Prosser and Keeton, Torts*, 5th ed. § 42; *Restatement, Second, Torts* § 433B, Comment b.

A plaintiff's inability to identify the cause of a fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused plaintiff's injuries would be based on speculation, *Torres v Board of Education of City of New York*, 175 AD3d 1584, 109 NYS3d 346 (2d Dept 2019); *Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 64 NYS3d 22 (1st Dept 2017); *Smith v Maloney*, 91 AD3d 1259, 936 NYS2d 791 (3d Dept 2012); *Califano v Maple Lanes*, 91 AD3d 896, 938 NYS2d 140 (2d Dept 2012); *Siegel v New York*, 86 AD3d 452, 928 NYS2d 1 (1st Dept 2011); see *Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189, 772 NYS2d 59 (1st Dept 2004). The rationale for this rule is that if a plaintiff cannot identify the cause of a fall, it is just as likely that the fall could have been caused by some factor for which the defendant is not responsible, e.g., misstep by plaintiff or loss of balance,

Torres v Board of Education of City of New York, *supra*; Califano v Maple Lanes, *supra*; Oettinger v Amerada Hess Corp., 15 AD3d 638, 790 NYS2d 693 (2d Dept 2005). To satisfy the requirement that he or she identify the cause of a fall, the plaintiff must identify the defect or hazard itself; mere identification of the approximate location of the accident is insufficient, see Siegel v New York, *supra*. Plaintiff need not identify the defect or hazard at the time of the accident, see Tomaino v 209 East 84th Street Corp., 72 AD3d 460, 900 NYS2d 245 (1st Dept 2010); see also Taveras v 1149 Webster Realty Corp., 134 AD3d 495, 23 NYS3d 162 (1st Dept 2015), *aff'd* 28 NY3d 958, 38 NYS3d 516, 60 NE3d 411 (2016). Rather, plaintiff can identify the defect or hazard after the accident occurs, provided there is evidence that, at the time plaintiff identified the defect or hazard, the defect or hazard was in the same condition as it was at the time of the accident, see Tomaino v 209 East 84th Street Corp., *supra*; see also Brumm v St. Paul's Evangelical Lutheran Church, 143 AD3d 1224, 41 NYS3d 559 (3d Dept 2016).

"Proximate cause is almost invariably a factual issue. As a general proposition extraordinary intervening acts which are not foreseeable in the normal course of events may serve as a basis for ruling, as a matter of law, that the chain of causation has been broken," Monell v New York, 84 AD2d 717, 444 NYS2d 70 (1st Dept 1981); see Pontello v Onondaga, 94 AD2d 427, 464 NYS2d 891 (4th Dept 1983). In certain circumstances, the issues of negligence and proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause, Karsdon v Barringer, 20 AD3d 551, 799 NYS2d 548 (2d Dept 2005); Kovit v Estate of Hallums, 261 AD2d 442, 690 NYS2d 82 (2d Dept 1999); see Skowronski v Mordino, 4 AD3d 782, 771 NYS2d 625 (4th Dept 2004).

When a plaintiff is walking on a sidewalk adjacent to a building and approaches a barricaded portion of the sidewalk, plaintiff can do one of three things: walk out in the street around the obstruction, cross the street when traffic permits, or turn back and proceed in another direction, O'Neill v Port Jervis, 253 NY 423, 171 NE 694 (1930); Fonzi v Beishline, 270 AD2d 912, 705 NYS2d 470 (4th Dept 2000). In such circumstances, if plaintiff is struck by a car when crossing the street, the issue of whether defendant's breach of the duty to provide a pedestrian walkway was a proximate cause of the accident is for jury resolution, Fonzi v Beishline, *supra*; see DiNatale v State Farm Mut. Auto. Ins. Co., 5 AD3d 1123, 774 NYS2d 233 (4th Dept 2004).

A police accident report made by a police officer who was not an eye witness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question, Shehab v Powers, 150 AD3d 918, 54 NYS3d 104 (2d Dept 2017); Aetna Cas. & Sur. Co. v Island Transp. Corp., 233 AD2d 157, 649 NYS2d 675 (1st Dept 1996).

When faced with a motion for summary judgment on proximate cause grounds, a plaintiff need not prove proximate cause by a

preponderance of the evidence, which is plaintiff's burden at trial, *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (1998). Instead, to withstand a motion for summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries, *id*; see *Carmen P. by Maria P. v PS & S Realty Corp.*, 259 AD2d 386, 687 NYS2d 96 (1st Dept 1999).

PJI 2:71. Proximate Cause—Concurrent Causes

There may be more than one cause of an injury. Where the independent and negligent acts or omissions of two or more parties cause injury to another, each of those negligent acts or omissions is regarded as a cause of that injury provided that it was a substantial factor in bringing about that injury.

Comment

Based on *Forte v Albany*, 279 NY 416, 18 NE2d 643 (1939); *De Haen v Rockwood Sprinkler Co. of Massachusetts*, 258 NY 350, 179 NE 764 (1932); *Sweet v Perkins*, 196 NY 482, 90 NE 50 (1909); *Slater v Mersereau*, 64 NY 138 (1876); *Laible v New York Cent. & H.R.R. Co.*, 13 App Div 574, 43 NYS 1003 (4th Dept 1897), *aff'd*, 162 NY 621, 57 NE 1114 (1900); *Henderson v Waldbaums*, 149 AD2d 461, 539 NYS2d 795 (2d Dept 1989); *Vinogradov v Clicquot Club Co.*, 55 AD2d 489, 391 NYS2d 18 (3d Dept 1977); *Petru v Hertz Corp.*, 36 AD2d 704, 319 NYS2d 199 (1st Dept 1971); *Hill v Edmonds*, 26 AD2d 554, 270 NYS2d 1020 (2d Dept 1966); see *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016) (citing PJI); *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554 n. 2, 693 NYS2d 493, 715 NE2d 495 (1999) (citing PJI); *Crane v Long Island College Hospital*, 43 NY2d 984, 404 NYS2d 842, 375 NE2d 1231 (1978); *Margolin v Friedman*, 43 NY2d 982, 404 NYS2d 553, 375 NE2d 734 (1978); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); *Ayotte v Gervasio*, 186 AD2d 963, 589 NYS2d 372 (3d Dept 1992), *aff'd*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 (1993); *Reyes v Arco Wentworth Management Corp.*, 83 AD3d 47, 919 NYS2d 44 (2d Dept 2011) (Labor Law § 200 claims); *Ohdan v New York*, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000) (citing PJI).

The pattern charge contemplates circumstances under which the plaintiff's injury resulted from the negligent act of two or more tortfeasors, *Rodriguez v Budget Rent-A-Car Systems, Inc.*, 44 AD3d 216, 841 NYS2d 486 (1st Dept 2007). Thus, it does not apply and need not be given in an action arising from a rear-end collision involving only two vehicles where the accident was not caused by a confluence of negligence by multiple tortfeasors, *id*.

Where there are concurrent proximate causes of the injury, only

one of which is the result of negligence, the negligent actor may be held liable, *Ring v Cohoes*, 77 NY 83 (1879); *Capo v Desmond*, 137 AD2d 780, 525 NYS2d 327 (2d Dept 1988) (citing PJI); see *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Stratton v Miller*, 32 AD2d 687, 299 NYS2d 869 (3d Dept 1969). Even where the several causative acts didn't concur precisely in time, each negligent actor is liable where the acts concurred in producing the injury, *Hawkes v Goll*, 256 App Div 940, 9 NYS2d 924 (2d Dept 1939), *aff'd*, 281 NY 808, 24 NE2d 484 (1939), and when a non-tortious act concurs with a tortious act to produce an injury, the tortious actor is liable for the injury, *Bell v New York City Health & Hospitals Corp.*, 90 AD2d 270, 456 NYS2d 787 (2d Dept 1982); *Di Sabato v Soffes*, 9 AD2d 297, 193 NYS2d 184 (1st Dept 1959); *Foiles v Marco*, 262 App Div 1024, 30 NYS2d 234 (2d Dept 1941). The court must make clear that the defendant is not exonerated by the negligence of another if defendant's negligence was a substantial factor in causing the injury, *Thompson v Korn*, 48 AD2d 1007, 368 NYS2d 923 (4th Dept 1975); *Freyer v Gangi*, 42 AD2d 832, 346 NYS2d 179 (4th Dept 1973) (citing PJI); *LaGattuta v Central Hudson Gas & Elec. Corp.*, 40 AD2d 686, 336 NYS2d 186 (2d Dept 1972); see *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016) (mere fact other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of injury).

If the evidence supports a finding that there was more than one proximate cause and the court intends to charge proximate cause (PJI 2:70) and apportionment (PJI 2:275), it should also charge concurrent causes (PJI 2:71), *Kalam v K-Metal Fabrications, Inc.*, 286 AD2d 603, 730 NYS2d 299 (1st Dept 2001).

The above charge is applicable where the act of a third party, even though criminal, might reasonably have been foreseen when defendant's negligence occurred, *Stratton v Miller*, 32 AD2d 687, 299 NYS2d 869 (3d Dept 1969); *Abbott v New York Public Library*, 263 App Div 314, 32 NYS2d 963 (1st Dept 1942); *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick and Fayette, Seneca County*, 179 Misc 333, 39 NYS2d 103 (Sup 1941), *aff'd*, 264 App Div 943, 36 NYS2d 438 (4th Dept 1942), *aff'd*, 289 NY 800, 47 NE2d 50 (1943); see *Benenson v National Surety Co.*, 260 NY 299, 183 NE 505 (1932); PJI 2:72.

In cases involving a landlord's alleged failure to protect persons on their premises from criminal activity, see Comment, PJI 2:90, the First Department has held that a targeted (as opposed to a random) attack is a superseding cause cutting off the landlord's liability, *Roldan v New York City Housing Authority*, 171 AD3d 418, 97 NYS3d 122 (1st Dept 2019); *Estate of Faughey ex rel. Adam v New 56-79 IG Associates, L.P.*, 149 AD3d 418, 52 NYS3d 12 (1st Dept 2017); *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 907 NYS2d 189 (1st Dept 2010), whereas the Second Department has held that, regardless of whether the attack was targeted or random, issues of fact preclude summary judgment where inadequate security was a concurrent contributing cause, *Scurry*

v New York City Housing Authority, 193 AD3d 1, 140 NYS3d 255 (2d Dept 2021).

Where the negligence of one defendant merely provided the occasion or the condition for the occurrence of the accident, such negligence is not considered a proximate cause of the injury, *Margolin v Friedman*, 43 NY2d 982, 404 NYS2d 553, 375 NE2d 734 (1978); *Sheehan v New York*, 40 NY2d 496, 387 NYS2d 92, 354 NE2d 832 (1976); see *Ocera v Zito*, 212 AD2d 681, 622 NYS2d 800 (2d Dept 1995); see *Williams v New York City Transit Authority*, 175 AD3d 581, 107 NYS3d 366 (2d Dept 2019).

Where, however, either of two actors, only one of whom is negligent, may have been the cause of plaintiff's injury, plaintiff has not made out a case against either unless plaintiff establishes which actor negligently caused the injury, *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 14 NE2d 828 (1938); *Wolf v American Tract Soc.*, 164 NY 30, 58 NE 31 (1900); see *Montas v JJC Const. Corp.*, 20 NY3d 1016, 963 NYS2d 164, 985 NE2d 1225 (2013) (where it is just as likely that accident was caused by debris from project defendant did not control as by debris from project defendant did control, any determination by jury as to the cause of the accident would be based upon sheer speculation); on the other hand, if an injury is caused by the negligence of one of two negligent actors, but it cannot be determined which actor caused the injury, both may be liable, *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989); *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 492 NYS2d 584, 482 NE2d 63 (1985); *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982) (citing PJI); *Silver v Sportsstuff, Inc.*, 130 AD3d 907, 14 NYS3d 421 (2d Dept 2015); *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, 250 AD2d 49, 679 NYS2d 21 (1st Dept 1998). In *Bichler v Eli Lilly and Co.*, supra, a DES case, defendant who was an active participant in concerted tortious conduct was held liable even if the particular defendant did not actually commit the act that injured the plaintiff, see *Prosser and Keaton on Torts* (5th ed) § 41, pp. 270–272; see also *Prough v Olmstead*, 210 AD2d 603, 619 NYS2d 404 (3d Dept 1994); *Herman v Wesgate*, 94 AD2d 938, 464 NYS2d 315 (4th Dept 1983). In *Kaufman v Eli Lilly and Co.*, supra, the Court attributed that aspect of *Bichler* to defendant's failure to preserve the issue for appellate review and left open the question of whether "concerted action" is an appropriate theory of liability.

In *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989), the Court rejected the application of concerted action unless the evidence shows that all defendants had an understanding, express or tacit, to participate in a common plan to commit a tortious act. *Hymowitz* did hold, however, that manufacturers of DES are each severally liable, to the extent of their respective shares of the national market, for injuries sustained by a plaintiff who cannot identify the manufacturer of the drug which actually caused injury.

Where there are successive acts in which it is possible to determine

which act caused which injury, see PJI 2:305, PJI 2:306 and PJI 2:307. Note that *res ipsa loquitur* may apply in an action involving multiple defendants, see Comment to PJI 2:65.

PJI 2:72. Proximate Cause—Intervening Causes

The defendant claims that (he, she) is not responsible for the plaintiff's injuries because the injuries were caused by (AB, a third person). If you find that the defendant was negligent but that the plaintiff's injuries were caused by the act of (AB) you may still find the defendant responsible for the plaintiff's injuries, if you also find that a reasonably prudent person in the defendant's situation, before the defendant allegedly committed (his, her) act of negligence, would have foreseen that an act of the kind committed by (AB) would be a probable result of the defendant's negligence. If you find that a reasonably prudent person would not have foreseen an act of the kind committed by (AB) as a probable consequence of the defendant's negligence, then the defendant is not responsible for the plaintiff's injuries and plaintiff may not recover.

Comment

Based on *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962); *Rosebrock v General Electric Co.*, 236 NY 227, 140 NE 571 (1923); *Gralton v Oliver*, 277 App Div 449, 101 NYS2d 109 (3d Dept 1950), *aff'd*, 302 NY 864, 100 NE2d 49 (1951); *Sider v General Electric Co.*, 203 App Div 443, 197 NYS 98 (4th Dept 1922), *aff'd*, 238 NY 64, 143 NE 792 (1924); see *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993); *Mercado v Vega*, 77 NY2d 918, 569 NYS2d 595, 572 NE2d 36 (1991) (citing PJI); *Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 569 NYS2d 337, 571 NE2d 645 (1991); *Kriz v Schum*, 75 NY2d 25, 550 NYS2d 584, 549 NE2d 1155 (1989); *Ziecker v Orchard Park*, 75 NY2d 761, 551 NYS2d 898, 551 NE2d 99 (1989); *Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988); *Stone v Williams*, 64 NY2d 639, 485 NYS2d 42, 474 NE2d 250 (1984); *Santiago v New York City Housing Authority*, 63 NY2d 761, 480 NYS2d 321, 469 NE2d 839 (1984); *Danielenko v Kinney Rent A Car, Inc.*, 57 NY2d 198, 455 NYS2d 555, 441 NE2d 1073 (1982); *Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Saugerties Bank v Delaware & Hudson Co.*, 236 NY 425, 141 NE 904 (1923); *Billsborrow v Dow Chemical, U.S.A.*, 177 AD2d 7,

579 NYS2d 728 (2d Dept 1992); *Bikowicz v Sterling Drug, Inc.*, 161 AD2d 982, 557 NYS2d 551 (3d Dept 1990) (citing PJI); *Mack v Altmans Stage Lighting Co., Inc.*, 98 AD2d 468, 470 NYS2d 664 (2d Dept 1984); *Stratton v Miller*, 32 AD2d 687, 299 NYS2d 869 (3d Dept 1969); PJI 2:305; PJI 2:306; PJI 2:307.

Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed, *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980). In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence, *id.* If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus, *id.*

As noted above, when a question of proximate cause involves an intervening act, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence, *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980). Where an intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, can the act break the causal nexus, *Hain v Jamison*, *supra*; *Mazella v Beals*, *supra*; *Derdiarian v Felix Contracting Corp.*, *supra*. Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed, *Hain v Jamison*, *supra*; *Derdiarian v Felix Contracting Corp.*, *supra*. The mere fact that another person shares some responsibility for the plaintiff's harm does not absolve the defendant from liability, as there may be more than one proximate cause of an injury, *Hain v Jamison*, *supra*; *Mazella v Beals*, *supra*; see PJI 2:70.

Proximate cause is a uniquely fact-specific determination and, depending on the nature of the case, a variety of factors may be relevant in assessing causation, *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016). Such factors include, among other things: the foreseeability of the event resulting in injury; the passage of time between the originally negligent act and the intervening act; the spatial gap, if any, between the original act and the intervening act; whether the original act of negligence was a completed occurrence or was ongoing at the time of the intervening act; whether and, if so, what other forces combined to bring about the harm; as well as public policy considerations regarding the scope of liability, *id.* (citing PJI); see *Williams v State*, 18 NY3d 981, 946 NYS2d 81, 969 NE2d 197 (2012); *Mack v Altmans Stage Lighting Co., Inc.*, 98 AD2d 468, 470 NYS2d 664 (2d Dept 1984) (citing PJI); *Pagan v Goldberger*, 51 AD2d 508, 382 NYS2d 549 (2d Dept 1976). The relevance of each factor will vary depending

upon the factual circumstances presented, but the most significant inquiry in the proximate cause analysis is often that of foreseeability, *Hain v Jamison*, *supra*.

As to foreseeability, see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016) (fact issue whether motorist's actions in exiting her vehicle and entering roadway to assist stray calf were foreseeable consequences of farm's alleged negligence in allowing calf to wander and failing to retrieve it); *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57 NE3d 1083 (2016) (foreseeable both that decedent, who committed suicide, would seek treatment by other medical professionals and that such treatment could potentially be ineffective); *Egan v A.J. Const. Corp.*, 94 NY2d 839, 702 NYS2d 574, 724 NE2d 366 (1999) (granting summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims where plaintiff's act of jumping out of stalled elevator six feet above lobby floor after elevator doors had been opened manually was an unforeseeable superseding cause of accident); *Amatulli v Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 569 NYS2d 337, 571 NE2d 645 (1991) (in-ground installation of above-ground pool by landowner and contractor, contrary to instructions from manufacturer, may have contributed to plaintiff's illusion that pool was of a depth sufficient for diving and, thus, precluded finding that plaintiff's dive was an unforeseeable, superseding event as a matter of law); *Kriz v Schum*, 75 NY2d 25, 550 NYS2d 584, 549 NE2d 1155 (1989) (use by one plaintiff of a swimming pool slide to belly-slide head first into a shallow pool and a dive off the top of such a slide into shallow pool by another plaintiff were not, as a matter of law, unforeseeable, intervening acts which would "break the causal nexus" to the conduct of the landowners, pool manufacturer, and pool slide manufacturer); *Ziecker v Orchard Park*, 75 NY2d 761, 551 NYS2d 898, 551 NE2d 99 (1989) (dive by plaintiff, who was not aware of the depth of the water at the point he would reach on his dive, was not reckless and, therefore, did not constitute a superseding act absolving defendant landowner from liability); *Lynch v Bay Ridge Obstetrical and Gynecological Associates, P.C.*, 72 NY2d 632, 536 NYS2d 11, 532 NE2d 1239 (1988) (where physician negligently failed to detect plaintiff's pregnancy before prescribing drug potentially harmful to fetus and plaintiff thereafter underwent an abortion, fact issue presented as to whether abortion was a "foreseeable" or "normal" consequence of situation created by physician); *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980) (where defendant failed to take proper precautions to protect workers in excavation, defendant liable for injuries caused when another's vehicle went out of control and injured plaintiff worker); *Feldman v Port Authority of New York*, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021) (intentional act of decedent jumping from footpath of bridge foreseeable); *Perlov v Port Authority of New York and New Jersey*, 189 AD3d 1624, 139 NYS3d 324 (2d Dept 2020) (same); *Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 112 NYS3d 383 (4th Dept 2019) (it was reasonably foreseeable that plaintiff whose job was to ensure safe and efficient transport of materials would take it upon himself to pick of loose piece of duct work that had fallen onto roadway); *Abraham v Chelsea Piers Management, Inc.*, 121 AD3d 439, 993 NYS2d 317 (1st Dept 2014) (complaint

dismissed where decedent unforeseeably trespassed onto locked premises while intoxicated before entering river and drowning), affd 26 NY3d 963, 17 NYS3d 672, 39 NE3d 473 (2015); *Quintana v New York City Housing Authority*, 91 AD3d 578, 937 NYS2d 581 (1st Dept 2012) (complaint dismissed where plaintiff unforeseeably walked over mound of snow outside crosswalk instead of using cleared crosswalk); see also PJI 2:12. The fact that other individuals have acted in a similar fashion in similar circumstances does not render a party's conduct probable or foreseeable, *Ohdan v New York*, 268 AD2d 86, 706 NYS2d 419 (1st Dept 2000).

Unless plaintiffs' conduct or plaintiffs' contact with a third person was so extraordinary and unforeseeable as to constitute an intervening cause, an intervening cause charge should not be submitted to the jury, *Fishman v Beach*, 237 AD2d 705, 654 NYS2d 854 (3d Dept 1997); *Root v Feldman*, 185 AD2d 409, 585 NYS2d 834 (3d Dept 1992). To speak of an intervening "cause" is misleading, for the problem is not one of causation but of policy concerning limitation of responsibility, *Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Prosser and Keeton, Torts*, (5th ed) § 44. The issue is, at what point is a defendant, whose negligent act or omission has contributed to an injury, to be relieved of liability by reason of the fact that after the act or omission a new and independent cause comes into operation.

Cases holding that intervening acts break the chain of causation, as a matter of law, have one of two distinguishing features, *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016). In some, the risk created by the original negligence was not the risk that materialized into harm, i.e., the intervening act was unforeseeable, *id.* In other cases, even if there was some similarity between the risk created and the actual harm, the defendant's acts of negligence had ceased, and merely fortuitously placed the plaintiff in a location or position in which a separate instance of negligence acted independently upon the plaintiff to produce harm, *id.* These scenarios are reviewed below.

First, if the new cause is set in operation by defendant's original wrongful conduct and is not independent of it, defendant is not relieved of responsibility, *Jackson v New York City Housing Authority*, 214 AD2d 605, 624 NYS2d 720 (2d Dept 1995). The inquiry must always be whether the injury was produced by a self-operating, intermediary cause disconnected from the primary fault, *Milwaukee & St. P.R. Co. v Kellogg*, 94 US 469 (1876).

Second, although the intervening act is independent, defendant will not be relieved of liability if the intervening act is one that naturally flows from the original, wrongful act or could reasonably have been foreseen, *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016) (fact issue whether motorist's actions in exiting her vehicle and entering roadway to assist stray calf were normal and foreseeable consequences of farm's alleged negligence in allowing calf to wander and failing to retrieve it); *Mazella v Beals*, 27 NY3d 694, 37 NYS3d 46, 57

NE3d 1083 (2016) (evidence established causal nexus between physician's professional negligence and decedent's suicide, notwithstanding that decedent received treatment from other medical professionals after physician last saw him; it was foreseeable both that decedent would seek treatment by other medical professionals and that such treatment could potentially be ineffective); *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 606 NYS2d 127, 626 NE2d 912 (1993) (plaintiff's injuries were a foreseeable result of defendant's failure to provide plaintiff with a safe scaffold or ladder while he sandblasted railroad cars, and such failure was a substantial factor leading to plaintiff's fall and the injuries he sustained; that injuries were occasioned by an allegedly defective sandblaster used in the process is not of such an "extraordinary nature" to constitute an intervening cause thus relieving defendant of responsibility for the injury under Labor Law § 240(1)); *Milks v McIver*, 264 NY 267, 190 NE 487 (1934) (defendant causing physical injury responsible for aggravation of the injury by negligent physician); *Feldman v Port Authority of New York*, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021) (intentional act of decedent jumping from footpath of bridge foreseeable); *Perlov v Port Authority of New York and New Jersey*, 189 AD3d 1624, 139 NYS3d 324 (2d Dept 2020) (same); *Dillard v New York City Housing Authority*, 112 AD3d 504, 977 NYS2d 226 (1st Dept 2013) (plaintiff's use of hazardous pedestrian walkway steps foreseeable even though alternate paths that were clear of snow available); *Comeau v Wray*, 241 AD2d 602, 659 NYS2d 347 (3d Dept 1997) (plaintiff's use of defective stairs was not an intervening act of negligence because it was foreseeable that plaintiff would be using stairs while delivering supplies); see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904, 490 NE2d 823 (1986); *Bolte v New York*, 22 NY2d 817, 292 NYS2d 912, 239 NE2d 653 (1968); *Cartee v Saks Fifth Ave.*, 277 App Div 606, 101 NYS2d 761 (1st Dept 1951), *aff'd*, 303 NY 832, 104 NE2d 375 (1952) (reasonable foresight, not prophetic vision, is the measure of responsibility); *Williams v Beemiller, Inc.*, 103 AD3d 1191, 962 NYS2d 834 (4th Dept 2013) (issue of fact present regarding whether it was reasonably foreseeable that defendant's acts of supplying large quantities of guns to a gun trafficking ring for resale to the criminal market would result in the shooting of an innocent victim); *Morang by Morang v Burnett*, 216 AD2d 835, 628 NYS2d 863 (3d Dept 1995) (possessor of fireworks and owner of premises where fireworks display occurred not relieved of liability for failure to properly supervise hazardous event by claim that another adult intentionally fired a fireworks missile towards the infant plaintiff); *Betancourt v Manhattan Ford Lincoln Mercury, Inc.*, 195 AD2d 246, 607 NYS2d 924 (1st Dept 1994) (issue of fact as to whether accident, in which automobile renter was struck by passing vehicle after being forced to pull car onto shoulder of highway due to engine problems, was reasonably foreseeable consequence of rental company's negligence in placing defective automobile into stream of commerce); *Rotz v New York*, 143 AD2d 301, 532 NYS2d 245 (1st Dept 1988) (injury caused by stampeding audience at open air concert); *Foley v State*, 265 App Div 682, 41 NYS2d 256 (4th Dept 1943) (where state failed to replace a burned-out bulb in a traffic light, it was reasonably foreseeable that an accident would occur at the intersection; acts of the drivers of the cars not necessarily a superseding cause).

Therefore, when the intervening, intentional, reckless or criminal act of another is itself a foreseeable harm that shapes the duty imposed, a defendant failing to guard against such conduct will not be relieved of liability when the act occurs, see *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Bell v Board of Educ. of the City of New York*, 90 NY2d 944, 665 NYS2d 42, 687 NE2d 1325 (1997); *Kush by Marszalek v Buffalo*, 59 NY2d 26, 462 NYS2d 831, 449 NE2d 725 (1983); see also *Lisa I. v Manikas*, 188 AD3d 1392, 135 NYS3d 510 (3d Dept 2020) (issue of fact as whether rape of child at sleepover by defendant's relative was foreseeable); *Williams v Beemiller, Inc.*, 103 AD3d 1191, 962 NYS2d 834 (4th Dept 2013); *Fowler v Yonkers Gospel Mission*, 67 AD3d 635, 889 NYS2d 603 (2d Dept 2009). In *Bell*, plaintiff was raped after her class left a field trip at a park without her and she began to walk home alone. The Court held that the criminal act was not an unforeseeable superseding event absolving the defendant school board from liability as a matter of law, since a rational jury hearing the trial testimony could have determined that the foreseeable result of the danger created by defendant's alleged lack of supervision was the type of injury that had occurred, *Bell v Board of Educ. of the City of New York*, supra. Likewise, where the defendant was alleged to have negligently failed to install suicide prevention barriers on a bridge, a decedent's intentional act of jumping from the bridge did not relieve the defendant from liability because such act was the foreseeable harm that shaped the duty imposed upon the defendant, *Feldman v Port Authority of New York*, 194 AD3d 137, 144 NYS3d 701 (1st Dept 2021).

This is so even though the intervening act is a deliberate but innocent one, *Wagner v International Ry. Co.*, 232 NY 176, 133 NE 437 (1921) (wrongdoer responsible to one who attempts a rescue); *McMorrow v Trimper*, 149 AD2d 971, 540 NYS2d 106 (4th Dept 1989), aff'd, 74 NY2d 830, 546 NYS2d 340, 545 NE2d 630 (1989) (plaintiff, passenger got out of vehicle after accident and jumped over guardrail to avoid approaching vehicle); *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick and Fayette, Seneca County*, 179 Misc 333, 39 NYS2d 103 (Sup 1941), aff'd, 264 App Div 943, 36 NYS2d 438 (4th Dept 1942), aff'd, 289 NY 800, 47 NE2d 50 (1943) (pupil injured by car passing stopped school bus; school, which had assumed the duty of providing safe conduct of pupils across highway, held liable); *Quiquin v Fitzgerald*, 146 AD2d 894, 536 NYS2d 874 (3d Dept 1989) (jury question as to whether negligence of driver of taxi in proceeding onto highway despite obstructed view was such "an extraordinary, unforeseeable act as to break the causal chain" to the negligence of bus driver in stopping bus in such a position as to obstruct the view of the other driver); *Catanese v Whitlow*, 59 AD2d 1057, 399 NYS2d 816 (4th Dept 1977) (violation of VTL § 1210(a) "a link in the causative chain leading to plaintiff's damages"); *Guaspari v Gorsky*, 36 AD2d 225, 319 NYS2d 708 (4th Dept 1971), (fact that thief stole car in which defendant left key in violation of VTL § 1201(a) does not relieve owner of liability), or a criminal act, *Matter of Guardian Cas. Co.*, 253 App Div 360, 2 NYS2d 232 (1st Dept 1938), aff'd, 278 NY 674, 16 NE2d 397 (1938) (car and taxi collided and then became wedged against stoop, decedent killed by a stone loosened

by the impact which fell when, without negligence, the taxi was removed from its position against the stoop); *Abbott v New York Public Library*, 263 App Div 314, 32 NYS2d 963 (1st Dept 1942) (library patron stabbed by a derelict who had previously assaulted others, library which took no precautions held responsible); see *Henderson v Waldbaums*, 149 AD2d 461, 539 NYS2d 795 (2d Dept 1989) (supermarket aware that suppliers' delivery practice created strong likelihood of injury to supermarket customers); *Muhaymin v Negron*, 86 AD2d 836, 447 NYS2d 457 (1st Dept 1982) (defendant knew of dangerous condition in apartment occupied by plaintiff and other young children); *Masone v Gianotti*, 54 AD2d 269, 388 NYS2d 322 (2d Dept 1976) (defendant knew that child played with air rifle, held liable for failing to put rifle out of reach); *Sherman v Concourse Realty Corp.*, 47 AD2d 134, 365 NYS2d 239 (2d Dept 1975) (tenant assaulted and robbed by intruder, landlord, who had notice of other crimes and failed to repair lobby door locks, may be liable); but see *Iannelli v Powers*, 114 AD2d 157, 498 NYS2d 377 (2d Dept 1986); *Restatement, 2nd Torts*, § 449.

For a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree, see *Carlock v Westchester Lighting Co.*, 268 NY 345, 197 NE 306 (1935) (lighting company liable where it strung wires too close to building, a workman raised the wires on a wooden strut, and a rainstorm caused them to fall to position in which decedent stepped upon them and was electrocuted); *Michaels v New York Cent. R. Co.*, 30 NY 564 (1864) (carrier liable for merchandise damaged by flood where merchandise improperly stored); *Sawicki v GameStop Corp.*, 106 AD3d 979, 966 NYS2d 447 (2d Dept 2013); *Fulgum v Cortlandt*, 2 AD3d 775, 770 NYS2d 416 (2d Dept 2003); *Cangialosi v Hallen Const. Corp.*, 282 AD2d 565, 723 NYS2d 387 (2d Dept 2001); *Tel Oil Co. Inc. v Schenectady*, 278 AD2d 571, 718 NYS2d 410 (3d Dept 2000).

This rule imposing liability on the original tortfeasor applies even though without an intervening act there would have been no injury, *Foley v State*, 265 App Div 682, 41 NYS2d 256 (4th Dept 1943); see *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016) (city that negligently failed to implement traffic calming devices was liable for injury to pedestrian struck by speeding motorist, whose reckless and criminal conduct was foreseeable); *Kush by Marszalek v Buffalo*, 59 NY2d 26, 462 NYS2d 831, 449 NE2d 725 (1983) (school that negligently fails to secure dangerous chemical against unsupervised access by children is liable when an injury occurs and it is reasonably foreseeable that the chemical might be stolen by children); *Gardner v Fleckenstein*, 3 NY2d 812, 166 NYS2d 10, 144 NE2d 649 (1957); and even though no injury would have resulted had a third party not failed to perform some act or duty imposed by law, *Miller v Board of Education, Union Free School Dist. No. 1, of Town of Albion*, 291 NY 25, 50 NE2d 529 (1943) (failure of Board to repair fire escape door would not have resulted in injury had teacher provided supervision of plaintiff's play; Board liable notwithstanding teacher failed to perform her duty); *O'Connor by O'Connor v Pecoraro*, 141 AD2d 443, 529 NYS2d 780 (1st

Dept 1988) (driver of vehicle who parked in “no parking” area may be liable for injuries sustained by child who was injured when a second vehicle struck defendant’s parked car); *Clinton v New York*, 140 AD2d 404, 528 NYS2d 108 (2d Dept 1988) (hospital that negligently allowed patient to retain suture scissors liable for injuries sustained when patient used the scissors to stab another patient); *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988) (common carrier may be held liable where child fell while sitting on allegedly defectively designed stairway railing after being brushed by another youth who was climbing the stairs); see also *Kingsland v Erie County Agr. Soc.*, 298 NY 409, 84 NE2d 38 (1949) (plaintiff injured by fireworks bomb left exposed on defendant’s grounds and taken home by plaintiff’s brother; question for jury whether plaintiff’s mother’s failure to dispose of it constituted an intervening cause); Restatement, 2d Torts, § 452; but see *Brazell v Board of Educ. of Niskayuna Public Schools*, 161 AD2d 1086, 557 NYS2d 645 (3d Dept 1990) (surreptitious theft of chemicals by student from a supervised classroom held a superseding force absolving school district from liability for student’s injury); *Pizzola v State*, 130 AD2d 796, 515 NYS2d 129 (3d Dept 1987) (no liability for injuries sustained by student who was “traying” or sledding where State was not on notice of dangerous condition).

Owners of improperly parked vehicles may be held liable to plaintiff injured by negligent drivers of other vehicles, depending upon the determinations by the trier of fact of the issues of foreseeability and proximate cause unique to the particular case, *Boehm v Telfer*, 250 AD2d 975, 672 NYS2d 959 (3d Dept 1998). This rule is not limited to statutory violations but also applies to circumstances evidencing ordinary negligence, *id.* Therefore, where an improperly parked truck caused defendant to make a wide right turn resulting in a collision with plaintiff’s vehicle, the owner of the truck could be held liable to the plaintiff and the defendant, even in the absence of sufficient proof of statutory violations, *id.*

The issue of whether the intervening act relieves a defendant of liability is generally for the jury, *Turturro v New York*, 28 NY3d 469, 45 NYS3d 874, 68 NE3d 693 (2016); *Morris v Lenox Hill Hosp.*, 232 AD2d 184, 647 NYS2d 753 (1st Dept 1996), *aff’d*, 90 NY2d 953, 665 NYS2d 399, 688 NE2d 255 (1997); *Jackson v New York City Housing Authority*, 214 AD2d 605, 624 NYS2d 720 (2d Dept 1995); *Perez v Peekskill*, 214 AD2d 552, 624 NYS2d 639 (2d Dept 1995); *Prata v National R. R. Passenger Corp.*, 70 AD2d 114, 420 NYS2d 276 (1st Dept 1979) (proximate cause usually a jury question in explosion cases); see *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016); *Powers v 31 E 31 LLC*, 123 AD3d 421, 998 NYS2d 23 (1st Dept 2014) (jury question whether plaintiff’s act of climbing out window and walking out onto setback roof while intoxicated was superseding cause of injuries sustained when plaintiff fell into airshaft); *Shutak v Handler*, 190 AD2d 345, 599 NYS2d 24 (1st Dept 1993) (jury question as to whether plaintiff’s attempt to remove water bubble on ceiling was normal and foreseeable response to imminent threat of harm posed by ceiling’s

condition); *Bikowicz v Sterling Drug, Inc.*, 161 AD2d 982, 557 NYS2d 551 (3d Dept 1990) (jury question as to whether illegal refilling of prescriptions by pharmacy at plaintiff's behest constituted a superseding event absolving defendant physicians from liability for prescribing drugs to which plaintiff became addicted); *Pesce v New York*, 147 AD2d 537, 537 NYS2d 613 (2d Dept 1989) (jury question as to whether plaintiff's conduct, in standing as directed on top of hi-lo vehicle being operated on a public street, was superseding cause of injuries sustained when vehicle struck a pothole, causing plaintiff's injuries).

Third, if the defendant's wrongful conduct does not cause the intervening act, but simply furnishes the condition or gives rise to the occasion by which an injury is made possible, and the intervening act is not foreseeable, defendant will not be held liable, *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 798 NYS2d 715, 831 NE2d 960 (2005) (third-party act of pushing decedent into window sufficiently extraordinary to supersede any negligence by building owner in failing to outfit window with tempered glass or safety bars); *Boltax v Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660, 490 NE2d 527 (1986) (negligence in allowing trespasser to gain entry to pool not proximate cause of injury sustained when trespasser dove into shallow water); *Santiago v New York City Housing Authority*, 63 NY2d 761, 480 NYS2d 321, 469 NE2d 839 (1984) (defendant's failure to repair door to project building not proximate cause of plaintiff being shot; "extraordinary and unforeseeable as a matter of law"); *Danielenko v Kinney Rent A Car, Inc.*, 57 NY2d 198, 455 NYS2d 555, 441 NE2d 1073 (1982) (defendant car rental agency held not liable because planting of bomb by third party in car rented to plaintiff was unforeseeable); *Ventricelli v Kinney System Rent A Car, Inc.*, 45 NY2d 950, 411 NYS2d 555, 383 NE2d 1149 (1978) (defendant supplied automobile with defective trunk lock; plaintiff, trying to close trunk, was injured when another automobile ran into rear of defendant's car; defendant not liable); *Dunn v State*, 29 NY2d 313, 327 NYS2d 622, 277 NE2d 647 (1971) (although defendant was negligent in permitting the escape of a mental patient, the latter's finding and driving a car was an intervening cause of the death of intestate precluding liability); *Rivera v New York*, 11 NY2d 856, 227 NYS2d 676, 182 NE2d 284 (1962) (defendant, whose neglect of the plumbing resulted in a bathtub filling with hot water, not liable for injury to plaintiff whose wet boot caused him to slip into the tub when he balanced on the curved edge of the tub while trying to reach the light cord); *Gralton v Oliver*, 277 App Div 449, 101 NYS2d 109 (3d Dept 1950), *aff'd*, 302 NY 864, 100 NE2d 49 (1951) (defendant driver negligently collided with another vehicle; plaintiff, assisting in disengaging the cars, was injured when another automobile ran into the rear of defendant's car; defendant not liable); *Raldiris v Enlarged City School District of Middletown*, 179 AD3d 1111, 118 NYS3d 696 (2d Dept 2020) (defendant's alleged negligent installation of swingset merely furnished the occasion for plaintiff's injury of his hand while pushing daughter on swing); *Bavisotto v Doldan*, 175 AD3d 891, 107 NYS3d 533 (4th Dept 2019) (defendants merely furnished occasion for accident where guest poured kerosene onto active fire, which sprayed onto plaintiff and caused injuries);

Williams v New York City Transit Authority, 175 AD3d 581, 107 NYS3d 366 (2d Dept 2019) (even assuming defendant's employees were negligent in failing to search train for passengers before bringing it into relay tunnel, such negligence merely furnished the occasion for decedent's fall from train); *Estate of Morgana v Staten Island Hotel*, 140 AD3d 1113, 35 NYS3d 193 (2d Dept 2016) (defendant not liable for death of decedent, who climbed on to and jumped from roof of defendant's hotel); *Hurlburt v Noble Environmental Power, LLC*, 128 AD3d 1518, 9 NYS3d 509 (4th Dept 2015) (truck driver's inattentiveness created occasion for plaintiff to stand behind moving bulldozer but did not cause him to do so or stay in its path); *Riccio v Kid Fit, Inc.*, 126 AD3d 873, 5 NYS3d 521 (2d Dept 2015) (defendants' employees' alleged negligence in disposing of caps to sterno cannisters merely furnished occasion for plaintiff to sustain burn injury when she carried chafing tray to which cannister was attached; sole proximate cause of accident was plaintiff's negligence in carrying tray and cannister close to her body); *Lee v New York City Housing Authority*, 25 AD3d 214, 803 NYS2d 538 (1st Dept 2005) (alleged negligence in failing to maintain fence that would prevent softball from leaving field not proximate cause of injury sustained by fifteen-year-old ballplayer when he was struck by an automobile while retrieving ball that had rolled on to adjacent street); *Feng v Metropolitan Transp. Authority*, 285 AD2d 447, 727 NYS2d 470 (2d Dept 2001) (defendant not liable for injuries sustained by infant plaintiff, who was standing immediately next to active train tracks facing away from oncoming train); *Clark v New York City Housing Authority*, 277 AD2d 338, 717 NYS2d 216 (2d Dept 2000) (alleged failure to maintain garbage area of housing complex could not serve as a basis for imposing liability for plaintiff's injuries sustained when struck with refuse thrown by third party); *Ramirez v Velarde*, 248 AD2d 697, 670 NYS2d 332 (2d Dept 1998) (hurling of stick by infant plaintiff's friend constituted superseding cause, which attenuated any alleged negligence by defendant landowners); *Libby by Libby v Waldbaum's Inc.*, 240 AD2d 547, 658 NYS2d 454 (2d Dept 1997) (alleged negligence of contractors in failing to properly secure construction site could not serve as basis for liability for injuries infant plaintiff sustained when his clothing caught fire at site; conduct of plaintiff and his friends in entering site through hole in fence, lighting propane torch and deliberately kicking over bucket of flammable liquid constituted superseding cause of accident); *Wright v New York City Transit Authority*, 221 AD2d 431, 633 NYS2d 393 (2d Dept 1995) (permitting cab door and window of train to remain open merely furnished the condition for event where plaintiff subway passenger placed his head outside window of train while it was moving); *Rodriguez v Gutierrez*, 217 AD2d 692, 630 NYS2d 531 (2d Dept 1995) (failure to erect protective barrier around outside of delicatessen could not serve as basis for imposing liability for patron's injuries sustained when struck by car inside of delicatessen); *Garcia v New York*, 205 AD2d 49, 617 NYS2d 462 (1st Dept 1994) (negligence in allowing trespasser to gain entry to pool and in failing to supervise activity not proximate cause of drowning by intoxicated swimmer); *Mix v South Seneca Cent. School Dist.*, 197 AD2d 855, 602 NYS2d 467 (4th Dept 1993) (school district's alleged negligent inspection and mainte-

nance of playground could not serve as basis for liability for infant plaintiff's injuries; throwing of screwdriver at plaintiff by another infant on playground constituted superseding cause of incident); *Moss v New York Telephone Co.*, 196 AD2d 492, 600 NYS2d 759 (2d Dept 1993) (defendant telephone company's alleged negligence in the placement of a terminal box near window through which intruder gained entry into plaintiff's home was not the proximate cause of her injuries but merely furnished the condition for the event's occurrence); *McKenna v Garcia*, 189 AD2d 756, 592 NYS2d 414 (2d Dept 1993) (owner not liable where plaintiff's automobile left roadway and struck boulder on defendant's property where the paved portion of the road was sufficiently wide for safe public passage, making travel beyond those limits neither contemplated nor foreseeable); *Harris v New York City Housing Authority*, 187 AD2d 362, 589 NYS2d 883 (1st Dept 1992) (owner not liable to victims of shooting occurring outside of building with weapon previously secreted within the building); *Williams v Envelope Transit Corp.*, 186 AD2d 797, 589 NYS2d 345 (2d Dept 1992) (no causal link between defendant's stalled taxi and plaintiff's injury inflicted when plaintiff's car was struck after he had stopped to determine if he could render assistance to operator of defendant taxi); *Belinda L.G. v Fresh Air Fund*, 183 AD2d 430, 583 NYS2d 378 (1st Dept 1992) (assault not reasonably foreseeable); *Elardo v Oyster Bay*, 176 AD2d 912, 575 NYS2d 526 (2d Dept 1991) (premises owner not liable for injuries sustained by child trespasser struck by object thrown by another child trespasser); *Alberti v Rydill*, 152 AD2d 520, 543 NYS2d 463 (2d Dept 1989) (premises owner not liable, as a matter of law, for injuries sustained by motorist whose car left the roadway and struck a tree stump located two or three feet from the roadway); *Persons v Cross*, 146 AD2d 892, 536 NYS2d 597 (3d Dept 1989) (plaintiff's conduct in running off end of retaining wall on farm property while chasing cows late at night over dark and unknown terrain was unforeseeable); *O'Britis v Peninsula Gulf Course*, 143 AD2d 123, 531 NYS2d 364 (2d Dept 1988) (premises owner not liable for injuries sustained by child trespasser who was hit with roofing shingle thrown by another child trespasser); *Campbell v Step/Lind Restaurant Corp.*, 143 AD2d 111, 531 NYS2d 576 (2d Dept 1988) (tavern owner not liable for sudden shooting of one patron by another); *Fornaro by Fornaro v Kerry by Kerry*, 139 AD2d 561, 527 NYS2d 61 (2d Dept 1988) (alleged negligence of school district in allowing older and younger students to board same bus not a proximate cause of injuries sustained by younger student when hit in face by rock thrown by older student; alleged negligence of town in maintaining roadway, which was the source of the rock, also not a proximate cause of injuries); *Gonzalez by Gonzalez v Pius*, 138 AD2d 453, 525 NYS2d 868 (2d Dept 1988) (landlord's failure to supply stove not proximate cause of injury sustained by tenant's child scalded with hot oil from electric frying pan); *Ulysse v Nelsk Taxi, Inc.*, 135 AD2d 528, 522 NYS2d 162 (2d Dept 1987) (defendant taxi driver who failed to leave keys in car during repairs not liable for burns sustained by mechanic during attempted "hot-wire" start); *Grandy v Bavaro*, 134 AD2d 957, 521 NYS2d 956 (4th Dept 1987); *Scott v Mead*, 132 AD2d 755, 517 NYS2d 320 (3d Dept 1987) (defendant motorist who drove into a ditch not liable to passenger who fell while obtaining a tool

to extricate the vehicle and was injured by a stick or sapling protruding from the ground); *Mannion v Lizza Industries, Inc.*, 127 AD2d 567, 511 NYS2d 366 (2d Dept 1987) (negligence in failing to control traffic at construction site not proximate cause of injury sustained by plaintiff struck by car driven contrary to flagman's instructions); *Marcroft v Carvel Corp.*, 120 AD2d 651, 502 NYS2d 245 (2d Dept 1986) (storeowner not liable to pedestrian for failure to erect barriers around store where car driven by inexperienced driver jumped curb and struck pedestrian); *Iannelli v Powers*, 114 AD2d 157, 498 NYS2d 377 (2d Dept 1986) (no causal link between building's failure to adopt better security and murder of decedent who encountered robbers in flight); *Rogers v Huggins*, 106 AD2d 621, 483 NYS2d 110 (2d Dept 1984) (defendant's tractor trailer was traveling at slow speed on highway; plaintiff veered into other lane and collided with a third vehicle; defendant not liable). Where the conduct of the plaintiff evinces a reckless disregard for the plaintiff's own safety, it constitutes an unforeseeable superseding event absolving the defendant of liability for negligence, *Grover v Montour*, 252 AD2d 859, 675 NYS2d 686 (3d Dept 1998) (defendant's alleged negligence in failing to remove hazardous railroad overpass superseded by deceased's negligent disregard of own safety on bicycle).

Where the risk of harm created by the defendant's conduct corresponds to the harm that actually results, it cannot be said that the defendant's negligence merely furnished the occasion for the harm, *Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502, 68 NE3d 1233 (2016).

Cases involving the application of the superseding cause doctrine to injuries caused by dives into shallow water are legion. Generally, where a plaintiff is injured as a result of a dive into shallow water and the plaintiff actually knew or based on the conditions of the body of water should have known that the water was shallow, the plaintiff's conduct will, as a matter of law, be deemed reckless and constitute the sole proximate cause of the injuries, see *Tkeshelashvili v State*, 18 NY3d 199, 936 NYS2d 645, 960 NE2d 414 (2011); *Olsen v Richfield*, 81 NY2d 1024, 599 NYS2d 912, 616 NE2d 498 (1993); *Boltax v Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660, 490 NE2d 527 (1986); *Lionarons v General Elec. Co.*, 215 AD2d 851, 626 NYS2d 321 (3d Dept 1995), *aff'd*, 86 NY2d 832, 634 NYS2d 436, 658 NE2d 214 (1995); *Butler v Marshall*, 243 AD2d 971, 663 NYS2d 381 (3d Dept 1997); *Rowell v Hempstead*, 186 AD2d 553, 588 NYS2d 405 (2d Dept 1992); see also *Finguerra v Conn*, 280 AD2d 420, 720 NYS2d 497 (1st Dept 2001); *Mortis v Dittl*, 275 AD2d 940, 715 NYS2d 182 (4th Dept 2000).

If, however, a plaintiff's conduct was foreseeable to the defendant, the defendant may not avoid liability on the ground that the plaintiff's conduct was reckless. Thus, *Kriz v Schum*, 75 NY2d 25, 550 NYS2d 584, 549 NE2d 1155 (1989), held that the plaintiff's use of a swimming pool slide to belly-slide head-first into a shallow pool could be found by a jury to be foreseeable and, therefore, was not as a matter of law such extraordinary and unforeseeable conduct as to absolve the landowner of

liability, see *Toyryla v St. Denis*, 119 AD3d 1263, 990 NYS2d 712 (3d Dept 2014). Likewise, in *Denkensohn v Davenport*, a companion case to *Kriz v Schum*, *supra*, the Court held that the plaintiff's dive into shallow water from the top of a pool slide platform was not unforeseeable as a matter of law and did not insulate the landowner from liability. Similarly, if a plaintiff did not know or have reason to know the depth of the water into which he or she dove, plaintiff's conduct was not reckless and defendant may not avoid liability on that ground. Thus, in *Ziecker v Orchard Park*, 75 NY2d 761, 551 NYS2d 898, 551 NE2d 99 (1989), a dive by the plaintiff, who was not aware of the depth of the water at the point he would reach on his dive, was not reckless and, therefore, did not constitute a superseding act absolving the defendant landowner from liability, see *Toyryla v St. Denis*, *supra*; *Taylor v Ilion*, 265 AD2d 841, 695 NYS2d 467 (4th Dept 1999). Moreover, in *Amatulli v Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 569 NYS2d 337, 571 NE2d 645 (1991), the in-ground installation of an above-ground pool by the landowners and their contractor, contrary to instructions from the manufacturer, may have contributed to the plaintiff's illusion that the pool was of a depth sufficient for diving and, thus, precluded a finding that the plaintiff's dive was an unforeseeable superseding event as a matter of law.

It has often been held that in the particular fact situation the commission of an intentional tort or criminal act, because not reasonably foreseeable, is a superseding cause, *Benenson v National Surety Co.*, 260 NY 299, 183 NE 505 (1932); *Saugerties Bank v Delaware & Hudson Co.*, 236 NY 425, 141 NE 904 (1923); *Bolsenbroek v Tully & Di Napoli, Inc.*, 12 AD2d 376, 212 NYS2d 323 (1st Dept 1961), *aff'd*, 10 NY2d 960, 224 NYS2d 280, 180 NE2d 61 (1961); *Stevens & Thompson Paper Company Inc. v Middle Falls Fire Department, Inc.*, 188 AD3d 1504, 137 NYS3d 529 (3d Dept 2020) (arson committed by trespassers was not reasonably foreseeable consequence of defendant property owner's lackluster efforts to secure its property); *Doe v Heckerth Plumbing & Heating of Woodstock, Inc.*, 192 AD3d 1236, 144 NYS3d 462 (3d Dept 2021) (employee's sexual abuse of plaintiff infant was superseding cause with respect to claim of employer's negligent supervision of employee's use of work vehicle); *Alexander v New York*, 176 AD3d 659, 107 NYS3d 688 (2d Dept 2019) (independent reckless conduct of motorist fleeing police, rather than officers' initiation of pursuit, was proximate cause of accident); *Stephenson v Coley v S.C. Johnson & Son, Inc.*, 239 AD2d 402, 658 NYS2d 636 (2d Dept 1997) (although defendant may have had a duty to prevent children from gaining access to spray cans, infant plaintiff's injuries did not arise from any foreseeable hazard to which that duty exists to prevent injury to plaintiff when child ignited aerosol can of insecticide and created "blow torch"); *Thomas v U.S. Soccer Federation, Inc.*, 236 AD2d 600, 653 NYS2d 958 (2d Dept 1997) (plaintiff's injuries sustained in fight during soccer game were not foreseeable consequence of defendants' alleged failure to provide adequate security or properly trained referee); *Iannelli v Powers*, 114 AD2d 157, 498 NYS2d 377 (2d Dept 1986); see *Bowman v Kennedy*, 126 AD3d 1203, 6 NYS3d 175 (3d Dept 2015) (reckless manner in which driver

operated his vehicle was unforeseeable and constituted superseding cause of pedestrian's injuries, severing any causal nexus between those injuries and alleged negligence of other driver, who stopped her vehicle and gestured to pedestrian to cross street); compare *Abbott v New York Public Library*, 263 App Div 314, 32 NYS2d 963 (1st Dept 1942) and *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick and Fayette, Seneca County*, 179 Misc 333, 39 NYS2d 103 (Sup 1941), *aff'd*, 264 App Div 943, 36 NYS2d 438 (4th Dept 1942), *aff'd*, 289 NY 800, 47 NE2d 50 (1943). Nevertheless, where a criminal act is reasonably foreseeable, the failure to provide adequate protective measures may preclude the act from being deemed a superseding cause, see *Desroches v Heritage Builders Group, LLC*, 187 AD3d 1369, 133 NYS3d 311 (3d Dept 2020); *Fowler v Yonkers Gospel Mission*, 67 AD3d 635, 889 NYS2d 603 (2d Dept 2009); *New York Cent. Mut. Fire Ins. Co. v Albany*, 247 AD2d 815, 669 NYS2d 450 (3d Dept 1998); *Whitfield v New York*, 239 AD2d 492, 657 NYS2d 757 (2d Dept 1997).

In cases involving a landlord's alleged failure to protect persons on their premises from criminal activity, see Comment, PJI 2:90, the First Department has held that a targeted (as opposed to a random) attack is a superseding cause cutting off the landlord's liability, *Roldan v New York City Housing Authority*, 171 AD3d 418, 97 NYS3d 122 (1st Dept 2019); *Estate of Faughey ex rel. Adam v New 56-79 IG Associates, L.P.*, 149 AD3d 418, 52 NYS3d 12 (1st Dept 2017); *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 907 NYS2d 189 (1st Dept 2010), whereas the Second Department has held that, regardless of whether the attack was targeted or random, issues of fact preclude summary judgment where inadequate security was a concurrent contributing cause, see *Scurry v New York City Housing Authority*, 193 AD3d 1, 140 NYS3d 255 (2d Dept 2021).

That policy considerations weigh heavily in the determination of what is a superseding cause was acknowledged in *Milks v McIver*, 264 NY 267, 190 NE 487 (1934), and is graphically demonstrated by cases recognizing as superseding causes limitations of space, of time, and of the degree of the intervening act, see *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 (1980); *Martinez v Lazaroff*, 66 AD2d 874, 411 NYS2d 955 (2d Dept 1978), *aff'd*, 48 NY2d 819, 424 NYS2d 126, 399 NE2d 1148 (1979); *Pagan v Goldberger*, 51 AD2d 508, 382 NYS2d 549 (2d Dept 1976). Distances in space may be so great or so short as to be remote or proximate as a matter of law; between the extremes any doubt should be resolved by the jury, *Bird v St. Paul Fire & Marine Ins. Co.*, 224 NY 47, 120 NE 86 (1918); compare *Hoffman v King*, 160 NY 618, 55 NE 401 (1899); see *Sewar v Gagliardi Brothers Service*, 51 NY2d 752, 432 NYS2d 367, 411 NE2d 786 (1980) (concurring opinion, citing PJI). As to remoteness in time see *Firman v Sacia*, 11 Misc2d 243, 173 NYS2d 440 (Sup 1958), *aff'd*, 7 AD2d 579, 184 NYS2d 945 (3d Dept 1959); see also *Rosebrock v General Electric Co.*, 236 NY 227, 140 NE 571 (1923); *Furstenheim v Congregation of First Church of Kew Gardens*, 28 AD2d 533, 282 NYS2d 198 (2d Dept 1967), *aff'd*, 21 NY2d 893, 289 NYS2d 410, 236 NE2d 638 (1968). In

McLaughlin v Mine Safety Appliances Co., 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962), it was held that the negligence of the vendee's employee was so gross as to supersede the negligence of defendant-manufacturer and insulate it from liability (employee had actual knowledge of the need for insulating heat blocks before applying them to a human body but failed to warn the nurse to whom he handed the blocks for application to plaintiff's person and removed the container thus depriving the nurse of any opportunity to read the instructions on the container).

It is the settled law of New York that the limit of liability for damages caused by fire is the damage to the lands to which the fire first spreads and that the owner of the premises on which the fire originated is not liable for damage to lands beyond that, *Homac Corporation v Sun Oil Co.*, 258 NY 462, 180 NE 172 (1932); *Davies v Delaware, L. & W.R. Co.*, 215 NY 181, 109 NE 95 (1915); *Hoffman v King*, 160 NY 618, 55 NE 401 (1899); *Ryan v New York Cent. R. Co.*, 35 NY 210 (1866); *European Motor Cars, Inc. v Gottlieb*, 24 AD2d 511, 261 NYS2d 369 (2d Dept 1965). The *Davies* case refers to the rule as "somewhat arbitrary."

G. SPECIFIC NEGLIGENCE ACTIONS

1. MOTOR VEHICLE ACCIDENTS

Introductory Statement

I. “Rules of the Road”

A. Vehicle and Traffic Law

The Vehicle and Traffic Law provides a uniform set of traffic regulations known as the “rules of the road,” *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 14 NYS3d 280, 35 NE3d 448 (2015); see *Kabir v Monroe*, 16 NY3d 217, 920 NYS2d 268, 945 NE2d 461 (2011); *Pellicano v Lee*, 89 AD2d 995, 454 NYS2d 324 (2d Dept 1982). The provisions of law in force at the time of the accident apply, VTL § 2313, and care must be taken to charge only the law then in effect.

B. Areas to Which “Rules of the Road” Apply

The Vehicle and Traffic Law applies “upon public highways, private roads open to public motor vehicle traffic and any other parking lot, except where a different place is specifically referred to in a given section,” VTL § 1100(a). Specified provisions may also apply to the parking areas and driveways of hospitals, shopping centers, private apartment and condominium complexes, and fire stations, when the local legislative body so orders, see VTL §§ 1100(b), 1640-a, 1660-a. The Rules of the Road must be read in conjunction with the definitions found in VTL §§ 100–159, and jury instructions must be prepared with those definitions in mind. For example, under VTL § 118, “highway” includes the shoulder and slope, but under VTL § 140, “roadway” excludes the shoulder and slope. An area of private property near to and used in conjunction with one or more stores or business establishments granting vehicular ingress or egress is a “parking lot,” VTL § 129-a. Driving a motor vehicle in such a “parking lot” while under the influence of alcohol or drugs, VTL § 1192(5), (7), may result in criminal conviction or other sanctions, VTL § 1193. Where the vehicle parking area is not used in conjunction with a business establishment, it is not a “parking lot” within the meaning of the statute and driving in such an area while impaired by alcohol or drugs would not appear to violate VTL Article 31 (§§ 1192 et seq.), see *People v Thew*, 44 NY2d 681, 405 NYS2d 433, 376 NE2d 906 (1978); see also *Wright v O’Leary*, 172 AD3d 1495, 99 NYS3d 477 (3d Dept 2019) (private property where utility vehicle was operated is not “public highway” under VTL § 134, and thus vehicle’s owner not subject to liability under VTL Article 11).

In *Cabrera v Port Authority of New York*, 185 AD3d 491, 128 NYS3d 1 (1st Dept 2020), where the plaintiff was allegedly injured by a salt spreader truck in an airport parking lot, the trial court committed reversible error by truncating proof as to whether parking lot was pub-

lic or private, since error directly impacted whether jury should have been charged with the recklessness standard set forth in VTL § 1103, or with the standard of care set forth in VTL § 1163.

C. Vehicles to Which “Rules of the Road” Apply

The “rules of the road” apply to all vehicles unless otherwise provided by law, VTL §§ 1101, 1103(a). Except for the provisions regarding driving under the influence of drugs or alcohol, the rules of the road explicitly do not apply to “persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway,” VTL § 1103(b). VTL § 1103(b) also provides that VTL § 1202(a), which regulates stopping, standing and parking, does not apply to “hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation.” Similarly, VTL § 1104 exempts “emergency vehicles,” such as ambulances, police vehicles and fire vehicles engaged in emergency operations from complying with certain rules of the road, subject to specified conditions, *Kabir v Monroe*, 16 NY3d 217, 920 NYS2d 268, 945 NE2d 461 (2011) (“emergency vehicles” exempt from rules of the road specified in VTL § 1104(b)); see *Riley v Broome*, 95 NY2d 455, 719 NYS2d 623, 742 NE2d 98 (2000). Therefore, all vehicles “actually engaged in work on a highway,” such as street sweepers, utility repair and maintenance vehicles, and snowplows are exempt from the rules of the road, *Riley v Broome*, supra; see *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 14 NYS3d 280, 35 NE3d 448 (2015); *Green v Covington*, 299 AD2d 636, 750 NYS2d 162 (3d Dept 2002) (citing VTL § 117-a); *Skolnick v Hempstead*, 278 AD2d 481, 718 NYS2d 81 (2d Dept 2000) (truck used in cleaning storm drains “actually engaged in work on a highway”), while all emergency vehicles engaged in emergency operations are exempt from certain statutorily-specified rules of the road, *Kabir v Monroe*, supra. The exemption turns on the nature of the work being performed, i.e., construction, repair, maintenance or similar work, and not on the nature of the vehicle performing the work, *id.* The exemption is not available to a vehicle such as a street sweeper or snowplow traveling from one work site to another, *Arrahim v Buffalo*, 151 AD3d 1773, 55 NYS3d 848 (4th Dept 2017) (snowplow); *Hofmann v Ashford*, 60 AD3d 1498, 876 NYS2d 588 (4th Dept 2009) (snowplow); *Davis v Babylon*, 13 AD3d 331, 786 NYS2d 550 (2d Dept 2004) (street sweeper).

VTL § 1103(b) imposes the same recklessness standard on vehicles engaged in work on a highway as that imposed on emergency vehicles, *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 14 NYS3d 280, 35 NE3d 448 (2015); *Riley v Broome*, 95 NY2d 455, 719 NYS2d 623, 742 NE2d 98 (2000); *Skolnick v Hempstead*, 278 AD2d 481, 718 NYS2d 81 (2d Dept 2000); *Kearns v Piatt*, 277 AD2d 677, 716 NYS2d 418 (3d Dept 2000). A triable issue of fact was raised as to whether defendant, who was engaged in work on a highway, acted recklessly in backing his truck, which had only side view mirrors and no rearview mirror, down a narrow decline on a bridge located on a heavily traveled

interstate highway in excess of the maximum safe speed, *Bliss v State*, 95 NY2d 911, 719 NYS2d 631, 742 NE2d 106 (2000). In *Bliss*, there was no indication that the driver of the truck attempted to slow down or sound his horn before colliding with claimant's automobile, the driver violated Thruway Authority safety directives, no spotter was provided for the operation, there was evidence that the work crew was hurrying to dismantle the lane closure, and the driver pleaded guilty to a traffic offense as a result of the incident, *id*; see *Deleon v New York City Sanitation Dept.*, *supra*; *Freitag v Potsdam*, 155 AD3d 1227, 64 NYS3d 396 (3d Dept 2017).

Bicyclists and motorcyclists must observe the same rules and be accorded the same rights as the operators of all other vehicles "except as to special regulations in [the VTL] and except as to those provisions of [the VTL] which by their nature can have no application," VTL § 1231 (bicycles); § 1250 (motorcycles); see *Brenner v Dixon*, 98 AD3d 1246, 951 NYS2d 635 (4th Dept 2012) (bicyclist); *Redcross v State*, 241 AD2d 787, 660 NYS2d 211 (3d Dept 1997) (bicyclist); *Secor v Kohl*, 67 AD2d 358, 415 NYS2d 434 (2d Dept 1979) (signalling by bicyclist). Mopeds are limited use motorcycles which may be operated on highways only in a specially designated lane or, in the absence of such a lane, in the right lane or upon a usable right shoulder, see VTL §§ 121-b, 2262(1). When operating a moped on the proper portion of the roadway, the driver must comply with all statutory rules of the road, except those which by their nature cannot apply, *Ward v Watson*, 146 AD2d 914, 536 NYS2d 899 (3d Dept 1989) (VTL § 1123, governing passing on the right, is applicable to mopeds).

D. Violation of "Rules of the Road"

Where plaintiff's claim is predicated upon an alleged violation of a law that specifically details and defines the duty resting on a reasonably prudent person, it is error to instruct the jury as to negligence generally without charging the jury as to the specific statute at issue, *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970); *Montanez v Manhattan and Bronx Surface Transit Operating Authority*, 139 AD2d 411, 526 NYS2d 466 (1st Dept 1988). However, where the only statute that allegedly was violated merely prohibited "follow[ing] another vehicle more closely than is reasonable and prudent," any error in refusing to charge the statute may be deemed "harmless" if the general "reasonable and prudent" standard has been charged and the jury has found defendant not negligent under that charge, *Stalikas v United Materials, L.L.C.*, 100 NY2d 626, 769 NYS2d 191, 801 NE2d 411 (2003) (citing PJI).

Evidence that a driver was not issued a traffic citation may not be admitted to demonstrate the absence of negligence, *LaPenta v Loca-Bik Ltee Transport*, 238 AD2d 913, 661 NYS2d 132 (4th Dept 1997); see *Franco v Zingarelli*, 72 AD2d 211, 424 NYS2d 185 (1st Dept 1980).

For charges as to the effect of violations of provisions of the Vehicle and Traffic Law, see PJI 2:26 and PJI 2:27.

E. Local Laws, Ordinances, Regulations and Rules

The statutory rules of the road are applicable and in force throughout the state, absent express authority to local government and designated authorities to enact conflicting ordinances, rules or regulations, VTL § 1600.

The City of New York may by local law, ordinance, order, rule, regulation or health code provision regulate traffic on or pedestrian use of any highway in the City, VTL § 1642; see *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 14 NYS3d 280, 35 NE3d 448 (2015). These provisions supersede the provisions of the Vehicle and Traffic Law with respect to the subjects enumerated in Section 1642, see *Deleon v New York City Sanitation Dept.*, *supra*. Since the New York City Traffic Regulations are the equivalent of an ordinance, a violation thereof is some evidence of negligence and not negligence per se, *Fox v Lyte*, 143 AD2d 390, 532 NYS2d 432 (2d Dept 1988); *Piarulli v Lason*, 35 AD2d 605, 313 NYS2d 613 (2d Dept 1970). It has been held to be reversible error to charge the Vehicle and Traffic Law when the N.Y.C. Traffic Regulations are applicable, *Fox v Lyte*, *supra*, even though neither party requests that the Traffic Regulations be charged, *Eichenholtz v Livery Service Corp.*, 40 AD2d 990, 338 NYS2d 667 (2d Dept 1972); see *Finkel v Benoit*, 211 AD2d 749, 622 NYS2d 295 (2d Dept 1995). Where the Vehicle and Traffic Law and the Traffic Regulations both apply, both should be charged, see *Gamar v Gamar*, 114 AD2d 487, 494 NYS2d 402 (2d Dept 1985).

Other cities, towns, villages, VTL §§ 1640, 1640-a, and designated State and local authorities, VTL §§ 1630–1632, may by local law, ordinance, order, rule or regulation regulate traffic on, or pedestrian use of, any highway in specified respects, Vehicle and Traffic Law, Title VIII, §§ 1600–1685; as to cities, see also NY Const, Art 9, § 2. These provisions may in some instances supersede or supplement the Vehicle and Traffic Law (see, e.g., §§ 1600, 1630, 1642). Care should be therefore taken to assure that all governing laws and regulations are charged. The court should, in the exercise of discretion, take judicial notice of and charge local ordinances even though not requested to do so, CPLR 4511(b).

For a charge on the effect of a violation of a traffic ordinance or regulation, see PJI 2:29. However, a regulation or ordinance should not be charged where the violation was not a proximate cause of the occurrence, *Fox v Lyte*, 143 AD2d 390, 532 NYS2d 432 (2d Dept 1988).

The Department of Motor Vehicles (DMV) may hold hearings to determine whether the license of a driver should be suspended or revoked pursuant to Vehicle & Traffic Law § 510, *Curtin v Curtin*, 244 AD2d 927, 665 NYS2d 241 (4th Dept 1997). The purpose of the administrative proceeding is simply to determine whether the circumstances of an accident warrant the suspension or revocation of the driver's license, not to determine the relative culpability of the driver, *id.*

Therefore, such determinations of the DMV are not entitled to collateral estoppel in a subsequent negligence action, *id.*

F. Choice of Law

As to choice of law in automobile accident litigation, see *Edwards v Erie Coach Lines Co.*, 17 NY3d 306, 929 NYS2d 41, 952 NE2d 1033 (2011); *Croft v National Car Rental*, 56 NY2d 989, 453 NYS2d 631, 439 NE2d 346 (1982); *Neumeier v Kuehner*, 31 NY2d 121, 335 NYS2d 64, 286 NE2d 454 (1972).

II. “No-Fault” Insurance Law

The Comprehensive Automobile Insurance Reparations Act (the “no-fault law”), Ins. L. Article 51 (§§ 5101–5108), affects personal injury claims arising out of accidents and has no application to vehicle property damage cases. Benefits under the no-fault law may be obtained from MVAIC, see Ins. L. § 5221.

Note that the Insurance Law was recodified in 1984 (L 1984, ch 367) and statutory references contained in earlier decisions will require reference to distribution tables in order to obtain the appropriate section numbers in the recodified statute.

A. Persons Affected by the “No-fault law”

The no-fault law limits the right to recover in common law negligence actions only if plaintiff and defendant are both “covered persons,” Ins. L. § 5102(j); see *Dean v Nationwide Mut. Ins. Co.*, 75 AD2d 984, 429 NYS2d 93 (4th Dept 1980).

1. Covered Plaintiff

A covered plaintiff is any one of the following persons:

a. A driver of a vehicle, as defined in VTL § 311(2) and § 125, carrying the mandatory coverages for first party benefits required by Ins. L. § 5103(a); see *Wilson v E. & J. Trucking Corp.*, 94 AD2d 666, 462 NYS2d 660 (1st Dept 1983);

b. A driver of a vehicle on which there is maintained other financial security in compliance with VTL Art. 6 or 8, or which is required to be subject to the no-fault law by VTL § 321(2), see Ins. L. §§ 5102(j) and 5103(a); *Joyce v Winkler*, 71 AD2d 28, 421 NYS2d 480 (4th Dept 1979) (injured driver of U.S. government vehicle is a “covered person” although the federal government is not required to furnish security under VTL § 321(1));

c. A passenger in a vehicle described in a or b above;

d. A pedestrian injured by the use or operation of a vehicle described

in a or b above, see Ins. L. § 5102(j); *Colon v Aetna Cas. & Sur. Co.*, 48 NY2d 570, 423 NYS2d 908, 399 NE2d 938 (1980);

e. Any other person injured through the use or operation of a vehicle described in a or b above who is “entitled to first-party benefits,” Ins. L. § 5102(j).

As to the coverage provided by first party benefits, see subdivision “B. Effects of the ‘no-fault’ law on claims of covered persons,” *infra*.

2. “Other Persons”

“Other persons” entitled to first-party benefits include bicyclists, *Oeschger v Fullforth*, 51 AD2d 864, 380 NYS2d 171 (4th Dept 1976), and operators of a snowmobile injured by the use or operation of a vehicle described in a or b above. Bicycles and snowmobiles are not “motor vehicles” as defined in the no-fault law, Ins. Law § 5102(f), VTL §§ 311(2), 125, 102, and thus the action of a pedestrian or motorist against the operator of a bicycle or snowmobile is not limited by the no-fault law.

While motorcyclists and owners of all terrain vehicles (ATV) are required to maintain liability insurance, first party benefits derived from no-fault insurance are not available to them because the statute specifically limits such benefits from their policies to persons “other than the occupants of such motorcycle or all terrain vehicle, another motorcycle or all terrain vehicle, or any motor vehicle, for loss arising out of the use or operation of the motorcycle or all terrain vehicle,” Ins. L. § 5103(f). This means that first party benefits for their policies are limited to pedestrians and bicyclists. Thus, a motorcyclist injured in a collision with another motor vehicle is not a “covered person” and is not entitled to first party benefits, but is not required to demonstrate “serious injury” in order to maintain a negligence action against the other persons involved in the occurrence, *Carbone v Visco*, 115 AD2d 948, 497 NYS2d 524 (4th Dept 1985); see Ins. L. §§ 5103(a)(1), (2), (3), 5104(a), (b).

Occupants of a bus or school bus, see VTL §§ 104, 142, other than operators, owners or their employees, are entitled to first party benefits under the policy covering the bus or school bus, but only if the occupant is not covered by a policy “providing first party benefits to the injured person and members of his household for loss arising out of the use or operation of any motor vehicle of such household,” Ins. L. § 5103(a)(1); see *Hill v Metropolitan Suburban Bus Authority*, 157 AD2d 93, 555 NYS2d 803 (2d Dept 1990). The statutory scheme is that bus passengers must first look to their own policies.

In *Collins v Blunt*, 15 AD3d 992, 789 NYS2d 348 (4th Dept 2005), the court determined that two persons injured when a vehicle struck the window of the room in which they were sitting were “covered persons” under Insurance Law § 5102(j).

A passenger in a vehicle may be entitled to first-party benefits. Insurance Law Section 5107 provides that no-fault coverage shall be deemed in force on an out-of-state vehicle (even if not provided for by the policy issued on the vehicle) if the insurer of the out-of-state vehicle is an insurer authorized to transact, actually transacts, or is under the control of an insurer authorized to transact or which transacts business, in New York.

A passenger in an uninsured vehicle is not a “covered person” entitled to first-party benefits and therefore may maintain a common law action for damages without having to establish the existence of a “serious injury,” *Millan v Yan Yee Lau*, 99 Misc2d 630, 420 NYS2d 529 (AppT 1979).

3. *Permissible Exclusions*

A policy of insurance may exclude from coverage for first-party benefits:

- a. persons intentionally causing their own injuries;
- b. persons whose injuries were caused as a result of their driving while intoxicated or drug-impaired, *Cernik v Sentry Ins.*, 131 AD2d 952, 516 NYS2d 810 (3d Dept 1987); see *Salisbury v Government Employees Ins. Co.*, 68 AD2d 965, 414 NYS2d 793 (3d Dept 1979), but an insurer shall not exclude such person from coverage with respect to necessary emergency health services rendered in a general hospital, as defined in Public Health Law § 2801(10), Ins. Law § 5103(b)(2);
- c. persons injured in the course of committing a felony, or seeking to avoid lawful apprehension;
- d. operators engaged in a race or speed test;
- e. operators or occupants who know the vehicle to be stolen;
- f. owners operating or occupying their own vehicle for which no-fault coverage is not in effect;
- g. pedestrians who are struck by their own vehicles for which no-fault coverage is not in effect; or
- h. persons who are injured while repairing servicing or otherwise maintaining a motor vehicle, if the activity is within the course of a business of repairing, etc., and the injury occurs on the business premises, Ins. L. § 5103(b).

Although not entitled to first party benefits, the persons described above may be “covered persons” whose rights to make a claim are subject to the no-fault limitations (e.g., the serious injury threshold), Insurance Law § 5104(a).

With respect to the exclusion for alcohol or drug impaired drivers, VTL § 1194 and § 1195 regulate the admissibility of blood alcohol and other tests in criminal prosecutions for driving while under the influence of alcohol or drugs, VTL § 1192; see *People v Blair*, 98 NY2d 722, 749 NYS2d 809, 779 NE2d 748 (2002). Although evidence of intoxication by alcohol or drug use may be inadmissible in a criminal case for failure to follow the statutory procedures set forth in VTL § 1195, such evidence may be admissible in a civil action, *Fafinski v Reliance Ins. Co.*, 106 AD2d 88, 484 NYS2d 729 (4th Dept 1985), *aff'd*, 65 NY2d 990, 494 NYS2d 92, 484 NE2d 121 (1985).

There is a conflict in authority as to the applicability in civil cases of the evidentiary presumptions set forth in VTL § 1195 with respect to the legal effect to be given test results. The Second Department has held that such evidentiary presumptions are intended for use in criminal cases and need not be charged in civil cases, and, in any event, are inapplicable to tests which do not involve testing of breath, blood, urine or saliva, *McCarthy v Fernandez*, 156 AD2d 544, 549 NYS2d 51 (2d Dept 1989). On the other hand, the Fourth Department has held it error to refuse to charge that a blood alcohol test of .01 of one percent was *prima facie* evidence that the subject's ability to drive was not impaired and the subject was not intoxicated, *Van Valkenburgh v Koehler*, 164 AD2d 971, 559 NYS2d 766 (4th Dept 1990).

A conviction for driving while intoxicated or impaired does not, by itself, disqualify a motorist from first-party benefits. While the motorist cannot relitigate the issue of intoxication, the insurer must still establish a causal connection between the intoxication or impairment and the injuries sustained, *Cernik v Sentry Ins.*, 131 AD2d 952, 516 NYS2d 810 (3d Dept 1987).

4. *Use of Vehicle Without Owner's Permission*

Use of a motor vehicle without permission of the owner presents a question not specifically covered by the statute. A passenger in, or an operator of, or a pedestrian struck by a covered vehicle used without the permission of the owner, is within the technical definition of "covered person," Ins. L. § 5102(j). But if the insurer of the covered vehicle validly disclaims coverage because of a permitted exclusion, an injured person, though remaining technically a "covered person," may not receive first-party benefits. Therefore, if the exclusion of Ins. L. § 5104(a) were applied literally, the injured person would be barred from recovering special damages within the basic economic loss limits. This result would inflict a harsh penalty upon the injured person, who because he or she is a "covered person," must establish the threshold qualifications necessary to an action for pain and suffering. Insurance Department regulations seek to avoid this result by the following rules:

a. The insurer of a vehicle used without permission of the owner (not including a stolen vehicle) is liable to a passenger in a covered vehicle for first-party benefits, 11 NYCRR § 65.15(1)(2)(iv);

b. Even if the vehicle is stolen, benefits are payable if the claimant is “an involuntary operator or occupant of” the vehicle, 11 NYCRR § 65.6(1)(2)(ii). *Michigan Millers Mut. Ins. Co. v Cullington*, 59 AD2d 784, 398 NYS2d 740 (2d Dept 1977), holds that the insurer of the owner of a stolen vehicle, although not liable for damages for negligence, remains responsible for payment of no-fault benefits to a pedestrian struck by the vehicle.

5. “Use or operation”

Whether the injury is incurred through “use or operation” of a “covered vehicle” may determine whether plaintiff is a covered person, see Ins. L. §§ 5102(a), 5103(a)(1). Where an injury is sustained out of the “use or operation” of a covered vehicle, the injured party may be entitled to first-party no-fault benefits. Moreover, if a plaintiff sustained an injury arising out of the use or operation of a covered vehicle, the plaintiff will be permitted to recover damages for personal injuries resulting from the accident only if he or she can demonstrate that he or she sustained a “serious injury” within the meaning of Insurance Law § 5102(d). The phrase “use or operation,” which relates to the scope of the No-Fault Law’s coverage, should be interpreted to reflect the Legislature’s intent to draw a line between motor vehicle accidents and all other types of torts, and to remove only the former from the domain of common law tort litigation, see *Civitanes v New York*, 20 NY3d 925, 957 NYS2d 685, 981 NE2d 281 (2012); *Walton v Lumbersmens Mut. Cas. Co.*, 88 NY2d 211, 644 NYS2d 133, 666 NE2d 1046 (1996). Thus, a plaintiff’s injury arises out of the use or operation of a vehicle when the vehicle is “the” proximate cause of the injury, *Civitanes v New York*, 95 AD3d 1, 940 NYS2d 619 (1st Dept 2012), *aff’d*, 20 NY3d 925, 957 NYS2d 685, 981 NE2d 281 (2012). The vehicle is “the” proximate cause of plaintiff’s injury if the vehicle itself is the instrumentality that produces the injury, *id.*

The following cases provide examples of when an accident will or will not be deemed to arise out of the use and operation of a vehicle: *Walton v Lumbersmens Mut. Cas. Co.*, 88 NY2d 211, 644 NYS2d 133, 666 NE2d 1046 (1996) (where person’s injuries sustained while unloading truck were produced by instrumentality other than vehicle itself, first party benefits under no-fault insurance law were not available); *Reisinger v Allstate Ins. Co.*, 58 AD2d 1028, 397 NYS2d 52 (4th Dept 1977), *aff’d*, 44 NY2d 881, 407 NYS2d 695, 379 NE2d 221 (1978) (injuries caused by explosion of heater in mobile home are not injuries arising out of “use or operation” as that phrase is used in the no-fault law); *Civitanes v New York*, 95 AD3d 1, 940 NYS2d 619 (1st Dept 2012), *aff’d*, 20 NY3d 925, 957 NYS2d 685, 981 NE2d 281 (2012) (where plaintiff stepped into hole in street while alighting bus and claimed that bus driver was negligent in failing to provide her with a safe place to exit the bus, accident did not arise out of use or operation of bus); *Mazzarella v Paolangelì*, 63 AD3d 1420, 881 NYS2d 540 (3d Dept 2009) (where plaintiff’s vehicle slid on diesel fuel that had been deposited on road after defendant continued to drive despite his own accident, plaintiff’s ac-

cident arose out of truck driver's use or operation of vehicle); *Locascio v Atlantic Mut. Ins. Co.*, 127 AD2d 746, 511 NYS2d 934 (2d Dept 1987) (shooting of one driver by another driver after the accident did not arise from "use or operation" of automobile); *Pierce v Utica Mut. Ins. Co.*, 110 AD2d 1023, 488 NYS2d 311 (3d Dept 1985) (where parasailor was using parakite attached to vehicle, use of vehicle was proximate cause of injury); *Horney v Tisyl Taxi Corp.*, 93 AD2d 291, 461 NYS2d 799 (1st Dept 1983) (battery committed by driver does not arise out of "use or operation"); *20th Century Ins. Co. v Lumbermen's Mut. Cas. Co.*, 80 AD2d 288, 439 NYS2d 527 (4th Dept 1981) (loading and unloading are deemed "use or operation"); *Thomas v Travelers Ins. Co.*, 54 AD2d 608, 387 NYS2d 498 (4th Dept 1976) (plaintiff who was about to enter his own car when he was hit by another vehicle, was not a user of his own car but a pedestrian entitled to first-party benefits from the insurer of the other vehicle); *McConnell v Fireman's Fund Am. Ins. Co.*, 49 AD2d 676, 370 NYS2d 730 (4th Dept 1975) (operator of snowmobile not injured through use or operation of parked car with which his snowmobile collided); see also *Celona v Royal Globe Ins. Co.*, 85 AD2d 635, 444 NYS2d 934 (2d Dept 1981) (oil truck parked while delivering oil is "in use"); *Kemp v Lakelands Precast, Inc.*, 84 AD2d 630, 444 NYS2d 274 (3d Dept 1981), *mod on other grounds*, 55 NY2d 1032, 449 NYS2d 710, 434 NE2d 1077 (1982) (accident occurring while cargo was being unloaded at excavation did not arise out of "use or operation" of truck that had been immobilized and was not in any way being used as a motor vehicle).

6. *Losses During Auto Repair*

The regulations of the Superintendent of Insurance, which deny benefits for losses arising out of "repairing, servicing, or otherwise maintaining motor vehicles" within the course of an auto repair, etc., business, 11 NYCRR § 65.12(a) ("Exclusions") (h) (iv), only exclude no-fault coverage for conduct applied directly to repairing, servicing or otherwise maintaining motor vehicles. Therefore, a masonry worker who was struck by a vehicle under repair when it was being moved from one part of the premises to another was entitled to first party benefits from the car owner's carrier, *Matter of Empire Mut. Ins. Co.*, 57 NY2d 833, 455 NYS2d 756, 442 NE2d 53 (1982).

7. *Derivative Actions*

The derivative action is not covered by Ins. L. § 5104(a), and there is no automatic exclusion of first party benefits from the derivative recovery. However, it has been held that the amount of such first party payments should be deducted from the sum recoverable by the derivative plaintiff, *Robinson v Sparta Taxi Inc.*, 80 Misc2d 525, 363 NYS2d 235 (Sup 1975). In such a case evidence of the amount of benefits received should be taken out of the presence of the jury in accordance with CPLR 4533-b, and then deduction of the verdict should be made by the court. This avoids the possible prejudice which might result from introducing evidence before the jury of the receipt of first party benefits from an insurance company and the possible introduction of comments concerning receipt of first party benefits in summation.

8. Covered Defendant

A covered defendant is any one of the following persons:

- a. The operator of a vehicle, including motorcycles and all terrain vehicles, Ins. Law § 5103(b), having in force a no-fault policy (or substitute financial responsibility), Insurance Law § 5102(j).
- b. The owner of such a vehicle, Insurance Law § 5102(j).
- c. An occupant of such a vehicle, Insurance Law §§ 5102(j), 5103(f).

B. Effects of the No-Fault Law on Claims of Covered Persons

A common law negligence action is barred when the no-fault law provides complete compensation to the injured party or when the injured party has not sustained a “serious injury.” If a negligence action may be brought, the statute does not change the substantive law relating to the liability of a tortfeasor but it does affect the rules concerning the computation and recovery of damages.

1. Terminology

In order to analyze the effect and operation of the no-fault law, three fundamental terms must be understood: basic economic loss, first party benefits and non-economic loss.

a. Basic economic loss consists of medical expenses, lost earnings and other defined expenses incurred as the result of the occurrence. Basic economic loss payable to each eligible person cannot exceed \$50,000 and does not include any loss sustained on account of death, Ins. L. § 5102(a).

b. The term first party benefits is closely related to basic economic loss. Under the no-fault system, first party benefits are payments to an eligible person in reimbursement of basic economic loss, see Ins. Law § 5102(b). First party benefits are paid by the no-fault insurer and may be recovered from no one else, see Ins. Law §§ 5102, 5103, 5104(c). The \$50,000 figure does not represent a threshold requirement that must be met before further economic loss may be recovered in a common law negligence suit. It represents the maximum amount that the no-fault insurer is obligated to pay.

c. Non-economic loss includes pain and suffering and similar non-monetary detriment, Ins. Law, § 5102(c). A negligence action by any covered person against another covered person to recover non-economic loss is barred unless a serious injury, as defined by Ins. Law. § 5102(d), has been sustained.

2. Elements of Basic Economic Loss

Basic economic loss affects two issues. First, it is considered in con-

nection with the liability of the covered person's insurance carrier to provide first party benefits. Second, where economic loss (special damages) exceeds basic economic loss, an action may be maintained against a covered tortfeasor only for recovery of such excess, Ins. Law § 5104(a).

Three discrete elements comprise basic economic loss:

a. medical, remedial, and health care services described in Ins. Law § 5102(a)(1);

b. lost earnings during each month for up to three years following the date of the accident, not exceeding \$2,000 per month, Ins. Law, § 5102(a)(2); and

c. all other reasonable and necessary expenses incurred, up to \$25 per day, for not more than one year following the date of the accident, Ins. Law § 5102(a)(3).

Given the manner in which basic economic loss is computed, recovery may be had in a common law negligence action for the difference between basic economic loss and actual economic loss, whether or not the actual economic loss is more or less than \$50,000. The following examples illustrate the point:

Case #1. The injured party has sustained the following economic losses: (i) necessary medical expenses of \$25,000; and (ii) lost earnings of \$3,000 per month for nine months. While the entire \$25,000 in necessary medical expenses is included in computing basic economic loss, only \$18,000 of the \$27,000 in lost earnings is included. This is because all necessary medical expenses are included in the computation but lost earnings are calculated only up to \$2,000 per month. Thus, even though the actual economic losses (special damages) total \$52,000, the basic economic loss is \$43,000. The injured party may seek recovery from the tortfeasor for \$9,000 in lost earnings and, if the injured party has sustained a "serious injury," the injured party may also seek recovery of all other damages not compensated by first-party benefits, such as pain and suffering, permanency of injury and future lost earnings.

Case #2. The injured party has sustained the following economic losses: (i) necessary medical expenses of \$15,000; (ii) lost earnings of \$3,000 per month for 40 months; and (iii) other daily expenses of \$20 per day for 180 days. The total actual economic loss is \$138,600. Again, the entire amount of necessary medical expenses is included in basic economic loss. However, the maximum amount includable for lost earnings is \$72,000, computed at \$2,000 per month for 36 months, not the total amount of \$120,000. The entire amount for the daily ex-

penses, \$3,600, is includable as the amount per day is less than the \$25 allowed by the statute and the period involved was less than one year from the accident. Thus, the calculated amount of the items includable in basic economic loss is \$90,600, which exceeds the \$50,000 limitation on basic economic loss. Accordingly, the injured party may seek recovery from the tortfeasor for: (a) the \$40,600 by which the items included in the computation of basic economic loss exceed \$50,000; and (b) for the \$48,000 of lost earnings that were not included in the basic economic loss computation. In addition, if the injured party has sustained a "serious injury," the injured party may also seek recovery of all other damages not compensated by first-party benefits, such as pain and suffering, permanency of injury and future lost earnings.

Because basic economic loss encompasses certain losses up to \$50,000 "per person," an injured party cannot obtain more than \$50,000 by making claims against different policies. Thus, where plaintiff collected the maximum first party benefits from her own insurer by claiming that she was a pedestrian struck by a hit and run vehicle, she was precluded from obtaining more by claiming that she was a passenger in a vehicle insured by defendant, *Powers v General Acc. Ins. Co. of America*, 109 AD2d 830, 486 NYS2d 764 (2d Dept 1985).

3. *First Party Benefits*

First party benefits are payments to reimburse a person for basic economic loss. However, first party benefits, which are payable by the insurer, may be less than the amount of basic economic loss. This is because the statute permits certain deductions from the amount of basic economic loss in calculating first party benefits.

In calculating first party benefits, the statute requires the deduction of 20% of the lost earnings which were included in basic economic loss, Ins. Law § 5102(b)(1). Thus, while an employee who suffers lost earnings of \$2,000 per month for 36 months from the time of the accident will have the entire amount of lost earnings computed in ascertaining basic economic loss, the insurer, in paying first party benefits, pays only 80% of the amount. If the lost earnings exceed \$2,000 per month, the no fault insurer is obligated to pay 80% of the loss, up to a maximum first party benefit payment for lost earnings of \$2,000 per month, but not for more than three years after the accident, Ins. Law § 5102(b)(1). Where the lost earnings amount to \$2,000 per month or less, no recovery in a negligence suit against a covered defendant may be had for the 20% for which there has been no reimbursement, *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 426 NYS2d 454, 403 NE2d 159 (1980) (prescribing statutory formula whereby insurer pays \$2,000 maximum monthly first party payment if lost earnings exceed \$2,500); see *Gurnee v Aetna Life and Cas. Co.*, 55 NY2d 184, 448 NYS2d 145,

433 NE2d 128 (1982). Regardless of the reductions credited against the insurer's obligation to pay first party benefits, the maximum monthly amount of basic economic loss, with respect to lost earnings, is the sum of \$2,000, *Normile v Allstate Ins. Co.*, 87 AD2d 721, 448 NYS2d 907 (3d Dept 1982), *aff'd*, 60 NY2d 1003, 471 NYS2d 550, 459 NE2d 843 (1983) (*aff'd*, for reasons in App. Div. memorandum); *Fiveson v Kondenar*, 110 AD2d 749, 488 NYS2d 46 (2d Dept 1985) (citing PJI); see *Heitner v Government Employees Ins. Co.*, 64 NY2d 834, 486 NYS2d 933, 476 NE2d 332 (1985) (reinstating trial court order "for reasons stated in the opinion . . . at Special Term"). If a person is self-employed, lost earnings may be determined by reference to the person's loss of profits, *Young v Utica Mut. Ins. Co.*, 86 AD2d 764, 448 NYS2d 83 (4th Dept 1982).

In general, an insurer paying first party benefits is not entitled to reimbursement from its insured, nor is it entitled to rights as a subrogee against a covered tortfeasor, *Hunter v OOIDA Risk Retention Group, Inc.*, 79 AD3d 1, 909 NYS2d 88 (2d Dept 2010); *Country Wide Ins. Co. v Osathanugrah*, 94 AD2d 513, 465 NYS2d 26 (1st Dept 1983), *aff'd*, 62 NY2d 815, 477 NYS2d 623, 466 NE2d 163 (1984); *Government Employees Ins. Co. v Burns Ford, Inc.*, 261 AD2d 508, 690 NYS2d 613 (2d Dept 1999). However, an insurer that has paid additional personal injury benefits for "extended economic loss" can pursue a subrogation claim for such payments against a covered tortfeasor, *Allstate Ins. Co. v Stein*, 1 NY3d 416, 775 NYS2d 219, 807 NE2d 268 (2004); *State Farm Mut. Auto. Ins. Co. v Baltz Concrete Const., Inc.*, 29 AD3d 777, 815 NYS2d 203 (2d Dept 2006). However, where a covered person is found to have violated VTL § 1192, which prohibits the operation of a motor vehicle while intoxicated or impaired, an insurer has a cause of action against that covered person for the amount of first-party benefits paid or payable on behalf of the person, L. 2010, ch. 303 § 1.

An insurer may only sue a tortfeasor if the tortfeasor is a non-covered person whom the injured party could have sued but failed to do so within two years of the cause of action's accrual, Ins. Law § 5104(b); see *Country-Wide Ins. Co. v 3-M Production Sales*, 96 AD2d 569, 465 NYS2d 255 (2d Dept 1983); see also *State-Wide Ins. Co. v Buffalo Ins. Co.*, 105 AD2d 315, 483 NYS2d 393 (2d Dept 1984). In such situations, the insurer's cause of action is in addition to that of the covered person; however, in any action that may subsequently be commenced by the covered person, the amount of the insured's basic economic loss is not recoverable, Ins. Law § 5104(b).

Where the insured has sued a noncovered tortfeasor, the insurer has a lien on the insured's recovery for medical expenses and lost earnings, and a plenary action is not necessary to enforce the lien, Ins. Law § 5104(b); *Aetna Life and Cas. Co. v Nelson*, 67 NY2d 169, 501 NYS2d 313, 492 NE2d 386 (1986); *Dymond v Dunn*, 148 AD2d 56, 543 NYS2d 230 (3d Dept 1989). The insurer's lien may not be circumvented by manipulation of a settlement; however, the lien attaches only to that portion of a settlement which reasonably represents basic economic loss

for which the insured received first party benefits, *Dymond v Dunn*, supra. The three-year statute of limitations provided in CPLR 214(2) applies to an action based on such a lien and the cause of action accrues upon payment to the insured pursuant to settlement or judgment, *Aetna Life and Cas. Co. v Nelson*, supra. For a discussion of the date of accrual where the insurer seeks recovery against the tortfeasor, see *Safeco Ins. Co. of America v Jamaica Water Supply Co.*, 83 AD2d 427, 444 NYS2d 925 (2d Dept 1981), aff'd, 57 NY2d 994, 457 NYS2d 245, 443 NE2d 493 (1982).

In cases involving uninsured motorist benefits paid to an insured, the insurer's claim against the third-party tortfeasor is based on its subrogation right rather than on an indemnification theory. Accordingly, the insurer's claim accrues on the date of the underlying accident, not the date of its payment to the insured, *Liberty Mut. Ins. Co. v Clark*, 296 AD2d 442, 745 NYS2d 64 (2d Dept 2002); see *Hanover Ins. Co. v Finnerty*, 225 AD2d 1054, 639 NYS2d 433 (4th Dept 1996).

The insurer's liability for first party benefits may be reduced by the amount of disability payments made to the injured party, Ins. Law § 5102(b)(2); *Heitner v Government Employees Ins. Co.*, 64 NY2d 834, 486 NYS2d 933, 476 NE2d 332 (1985). Payments which may be considered include state and federal social security disability benefits, workers' compensation benefits, and medicare benefits. However, medicare benefits from lifetime reserve days are excluded and medicare benefits may not be used to achieve a reduction if the benefits utilized result in a reduction in the person's medicare benefits for a subsequent illness or injury, Ins. Law § 5102(b).

Where an employee is injured in a work-related automobile accident, first party benefits are offset by recovered or recoverable workers' compensation payments, *Fox v Atlantic Mut. Ins. Co.*, 132 AD2d 17, 521 NYS2d 442 (2d Dept 1987). But workers' compensation payments by the compensation carrier may not be offset against payments due the insured under the mandatory uninsured motorist endorsement, *id.* *Fox* held that a qualified person injured by an uninsured motorist is entitled under the Insurance Law to have the mandatory \$10,000 coverage available to compensate for noneconomic loss, i.e., pain and suffering. However, additionally purchased uninsured motorist coverage above the statutory minimum may be offset by workers' compensation payments if the uninsured motorist endorsement so provides.

A workers' compensation carrier has a lien on the proceeds of a tort recovery against a noncovered wrongdoer, see *Workers' Compensation Law* § 29(1). However, the lien of the compensation carrier does not extend to workers' compensation or medical benefits paid by the carrier which were "in lieu of first party benefits" that the no-fault insurer would otherwise have been required to pay, *Workers' Compensation Law* § 29(1-a); see *Shutter v Philips Display Components Co.*, 90 NY2d 703, 665 NYS2d 379, 688 NE2d 235 (1997); *Johnson v Buffalo & Erie County Private Industry Council*, 84 NY2d 13, 613 NYS2d 861, 636

NE2d 1394 (1994); *Johnston v Colvin*, 145 AD2d 846, 535 NYS2d 833 (3d Dept 1988). The exclusive remedy of the insurer providing first party benefits or the compensation carrier against the tortfeasor's liability insurer is mandatory arbitration, Workers' Compensation Law § 29(1)(a); Ins. Law § 5105(b); see *Hunter v OOIDA Risk Retention Group, Inc.*, 79 AD3d 1, 909 NYS2d 88 (2d Dept 2010).

Payments for permanent partial disability or facial disfigurement may be deemed to be payments in lieu of first-party benefits, *Dietrick v Kemper Ins. Co.*, 76 NY2d 248, 557 NYS2d 301, 556 NE2d 1108 (1990). Insurance Law § 5102(a)(2) limits the definition of "basic economic loss" to "loss of earnings from work which the person would have performed had he not been injured . . . up to two thousand dollars per month for not more than three years from the date of the accident causing the injury." Where payments to claimant continue beyond three years from the date of the accident, that portion of claimant's payments may not be properly characterized as "basic economic loss," and the Workers' Compensation Law § 29(1-a) lien restrictions do not apply to the carrier, *Johnson v Buffalo & Erie County Private Industry Council*, 84 NY2d 13, 613 NYS2d 861, 636 NE2d 1394 (1994). The lien of the compensation carrier attaches to any recovery from a noncovered person, i.e., a person not entitled to receive first-party benefits, even if the noncovered person was a third-party defendant, *Stedman v New York*, 107 AD2d 600, 483 NYS2d 1013 (1st Dept 1985).

Workers' compensation payments for economic loss may not be offset against payments due for non-economic loss under the mandatory uninsured motorist endorsement, *Fox v Atlantic Mut. Ins. Co.*, 132 AD2d 17, 521 NYS2d 442 (2d Dept 1987). Further, the compensation carrier's lien does not extend to uninsured motorist's benefits paid under an insurance policy purchased by the claimant who was disabled in a work related automobile accident, *Shutter v Philips Display Components Co.*, 90 NY2d 703, 665 NYS2d 379, 688 NE2d 235 (1997).

First party benefits are payable "as the loss is incurred" and are overdue if not paid within 30 days after claimant supplies proof of loss, see Ins. Law § 5106(a). Claimant is entitled to interest on overdue payments at the rate of 2% per month and may also recover attorneys' fees incurred in collecting the claim, see Ins. Law § 5106(a); 11 NYCRR § 65.15(g), (h). However, evidence that first party benefits were paid to claimant may not be considered an admission in a subsequent personal injury action, *Dermatossian v New York City Transit Authority*, 67 NY2d 219, 501 NYS2d 784, 492 NE2d 1200 (1986).

If the insurer fails or refuses to pay first party benefits and the claimant elects arbitration or litigation, the claimant may bring subsequent claims arising from the same occurrence only in the forum originally selected and may not "flit between forums," *Roggio v Nationwide Mut. Ins. Co.*, 66 NY2d 260, 496 NYS2d 404, 487 NE2d 261 (1985). Nevertheless, if the arbitration award exceeds \$5,000, the claim is subject to de novo judicial adjudication after the benefits phase of the

bifurcated procedure set forth in 11 NYCRR § 65.16; see *Ins. Law* § 5106(c); *Matter of Greenberg*, 70 NY2d 573, 523 NYS2d 67, 517 NE2d 879 (1987). Absent a contractual agreement to the contrary, a claim for first party benefits is subject to a six year statute of limitations, CPLR 213(2), which begins to run 30 days after claimant supplies proof of loss to the insurer, *Benson v Boston Old Colony Ins. Co.*, 134 AD2d 214, 521 NYS2d 14 (1st Dept 1987). An insured's claim against an insurer for refusal to pay first-party benefits accrues when payment becomes overdue, not when the accident occurred, *Micha v Merchants Mut. Ins. Co.*, 94 AD2d 835, 463 NYS2d 110 (3d Dept 1983).

There is no authority under the Insurance Law or the applicable regulations for an insurance company to discontinue plaintiff's insurance benefits on the ground that plaintiff has reached "maximum medical improvement," *Hobby v CNA Ins. Co.*, 267 AD2d 1084, 700 NYS2d 346 (4th Dept 1999). If plaintiff establishes that her treatment continues to be necessary, the insurance company must continue to pay outstanding medical bills pursuant to the no-fault provisions in the motor vehicle insurance policy even though "maximum medical improvement" has been reached, *id.*

4. *Tort Recovery for Economic Loss*

Where an injured party has suffered economic loss greater than basic economic loss, suit may be brought to recover the excess economic loss even in the situation where the injured party has not sustained a serious injury and, therefore, cannot recover for non-economic loss (pain and suffering), *Montgomery v Daniels*, 38 NY2d 41, 378 NYS2d 1, 340 NE2d 444 (1975); *Jones v Marshall*, 147 AD3d 1279, 47 NYS3d 791 (3d Dept 2017); *Tortorello v Landi*, 136 AD2d 545, 523 NYS2d 165 (2d Dept 1988) (lost earnings sustained more than 36 months after accident are recoverable, even in the absence of a "serious injury"). Even where plaintiff has sustained a "serious injury," plaintiff, in order to recover economic loss exceeding basic economic loss, must plead and prove such loss, *Acerra v Gutmann*, 294 AD2d 384, 742 NYS2d 107 (2d Dept 2002); *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 (3d Dept 1986). At trial, plaintiff may offer evidence of all economic losses but the jury's finding as to the amount of economic loss must be reduced by the basic economic loss component of the award, *Big Apple Leasing Corp. v Narda Microwave Corp.*, 182 AD2d 660, 582 NYS2d 254 (2d Dept 1992); *Stern v Calzado*, 163 AD2d 299, 557 NYS2d 156 (2d Dept 1990). It has been held that, where, after subtracting plaintiff's share of comparative fault, a jury's verdict for basic economic loss is less than \$50,000.00, it must be reduced to zero because the first \$50,000.00 in basic economic loss are not recoverable, *Ellis v Johnson Motor Lines, Inc.*, 198 AD2d 258, 603 NYS2d 523 (2d Dept 1993); see *Miller v Santoro*, 227 AD2d 534, 643 NYS2d 168 (2d Dept 1996); *Kelly v Tarnowski*, 213 AD2d 1054, 624 NYS2d 504 (4th Dept 1995). In an action against a noncovered person, recovery may be had for basic economic loss, in which event the no-fault insurer may have a lien against that portion of the recovery, *Ins. Law* § 5104(b).

Even where plaintiff has sustained a serious injury, there can be no recovery in a negligence action by a covered plaintiff against a covered defendant for basic economic loss, *Hughes v Ryder Truck Rental, Inc.*, 125 AD2d 177, 508 NYS2d 442 (1st Dept 1986). Recovery for basic economic loss is barred even if the covered plaintiff was not paid first party benefits, *id*; see *Fiveson v Kondenar*, 110 AD2d 749, 488 NYS2d 46 (2d Dept 1985). An award for future medical expenses to treat a condition that was not diagnosed within one year after the accident need not be reduced because such expenses are not included in the term “basic economic loss,” *Hadden v Effner*, 263 AD2d 807, 693 NYS2d 734 (3d Dept 1999); see Insurance Law § 5102(a)(1)(iv).

Where plaintiff is precluded from recovering economic loss, the jury may be instructed that economic loss is not recoverable in the action; it was error, however, to charge that there was “no proof of economic loss” since the charge of “no proof” might lead to inferences about plaintiff’s credibility, see *Decker v Rassaert*, 131 AD2d 626, 516 NYS2d 710 (2d Dept 1987).

5. Serious Injury

The No-Fault Law precludes recovery for pain and suffering and other non-monetary detriment (“non-economic” loss), between covered persons, unless the plaintiff pleads and proves a “serious injury,” Ins. Law § 5104(a); CPLR 3016(g); CPLR 3043(a)(6); *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 (2001); *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982). A person claiming benefits for non-economic loss under a policy’s uninsured motorist coverage, see Ins. Law § 3420(f)(1), must also establish serious injury as defined in Insurance Law § 5102(d). However, the requirement to prove serious injury applies only if the accident arose out of the use or operation of a motor vehicle in New York, *Ofori v Green*, 74 AD3d 474, 901 NYS2d 835 (1st Dept 2010) (serious injury requirement not applicable to accident occurring in New Jersey between two New York residents whose vehicles were registered in New York). In *Raffellini v State Farm Mut. Auto. Ins. Co.*, 9 NY3d 196, 848 NYS2d 1, 878 NE2d 583 (2007), the Court of Appeals upheld 11 NYCRR 60-2.3, which imposes the same requirement for claims for non-economic loss under supplementary uninsured/underinsured motorist (SUM) endorsements, see Ins. Law § 3420(f)(2).

Serious injury is defined in Insurance Law § 5102(d) as an injury resulting in:

- (i) death;
- (ii) dismemberment;
- (iii) significant disfigurement;
- (iv) a fracture;

- (v) loss of a fetus;
- (vi) permanent loss of use of a body organ, member, function or system;
- (vii) permanent consequential limitation of use of a body organ or member;
- (viii) significant limitation of use of a body function or system; and
- (ix) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

With the exception of “dismemberment” and “loss of fetus,” all of these categories of serious injury have a specific charge and comments, see 2:88A (injury resulting in death); 2:88B (significant disfigurement); 2:88C (fracture); 2:88D (permanent and total loss of body organ, member, function or system); 2:88E (permanent consequential limitation of use of body organ or member); 2:88F (significant limitation of use of body function or system); and 2:88G (non-permanent medically determined injury that prevents performance of usual and customary daily activities for 90 of 180 days immediately subsequent to injury). As to damages issues, see 2:285A (expenses incurred); 2:290 (lost earnings); 2:280, 2:280.1, 2:280.2 (pain and suffering); 2:316, 2:318 (derivative claims). For case law defining and discussing the statutory categories of “serious injury,” see the specific charges and comments pertaining to each category. For a discussion of the evidentiary and other procedural considerations pertaining to the serious injury requirement, see e. No-Fault Law, Introductory Statement.

a. Accrual of Claim

A personal injury claim accrues for purposes of the statute of limitations on the date of the accident, not when plaintiff discovers his or her serious injury or when “basic economic loss” is exceeded, see *Jackson v L.P. Transp., Inc.*, 72 NY2d 975, 534 NYS2d 362, 530 NE2d 1282 (1988); *Mehlenbacher v Swartout*, 289 AD2d 651, 734 NYS2d 290 (3d Dept 2001); *Yawn v Regional Transit Service*, 61 AD2d 1126, 402 NYS2d 894 (4th Dept 1978).

b. Other Considerations

The defense of failure to use an available seatbelt is not relevant in determining whether the serious injury threshold has been met, *Carson v De Lorenzo*, 238 AD2d 790, 657 NYS2d 469 (3d Dept 1997); *Davis v Bradford*, 226 AD2d 670, 642 NYS2d 48 (2d Dept 1996).

That plaintiff is precluded from suit against a covered defendant because of lack of a serious injury does not preclude a non-covered defendant from asserting a contribution claim against the covered defendant, *Hill v Metropolitan Suburban Bus Authority*, 157 AD2d 93, 555 NYS2d 803 (2d Dept 1990).

a. MOTORIST—PEDESTRIAN

PJI 2:75. Motor Vehicle Accidents—Pedestrian Crossing Highway

The plaintiff, AB [*a pedestrian*], and the defendant, CD [*motorist*], were each under a duty to use that degree of care that a reasonably prudent person would have used under the same circumstances. CD was required to keep a reasonably careful look out for pedestrians, to see what was there to be seen, to sound the horn when a reasonably prudent person would have done so to warn a pedestrian of danger and to operate the car with reasonable care to avoid hitting any pedestrian on the roadway.

Before crossing the road, and while crossing the road, AB was required to look with care for oncoming traffic to avoid placing (himself, herself) in a position of danger and to see what was there to be seen.

AB and CD were also required to obey the statutes governing traffic at the time and place of the accident and each was entitled to assume that the other would do so.

If you decide that AB was within a crosswalk at the time of the accident, you must consider section 1151 of the Vehicle and Traffic Law, which provides:

“(a) When traffic-control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling, [*Add the following if it is applicable: except that any pedestrian crossing a roadway at a point where a pedestrian tunnel or overpass has been provided shall yield the right of way to both vehicles*].

(b) No pedestrian shall suddenly leave a curb

or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.”

If you decide that CD failed to yield the right of way as required by the statute, you must find that CD was negligent. If you decide that CD did not violate the statute, you must consider whether upon all of the circumstances CD acted as a reasonably prudent person. If you decide that AB violated the statute by suddenly walking or running into the path of the vehicle, making it impractical for CD to yield the right of way, you will decide that plaintiff was negligent. If you decide that AB did not violate the statute, you will consider whether upon all of the circumstances AB acted as a reasonably prudent person.

If you decide that AB was not within a crosswalk at the time of the accident, CD was still required to use reasonable care under the circumstances to avoid hitting AB, and you must decide whether CD did use reasonable care. In considering the question of AB’s negligence, you must consider section 1152 of the Vehicle and Traffic Law, which provides:

“(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.”

The statute does not prohibit a pedestrian from crossing the roadway outside a crosswalk, but requires a pedestrian crossing outside a crosswalk to yield the right of way to a motor vehicle that is likely to strike (him, her). If you find that AB failed to yield the right of way as required by the statute, you must find that AB was negligent. If you find that AB did not violate the statute, you must consider whether AB acted as a reasonably prudent person.

Comment

[See also Introductory Statement preceding this charge.]

Caveat: Local law, ordinance, rule or regulation may supersede the Vehicle & Traffic Law, see Introductory Statement preceding this charge. In such a case the applicable provision, which constitutes only some evidence of negligence, *Fox v Lyte*, 143 AD2d 390, 532 NYS2d 432 (2d Dept 1988); see PJI 2:29, should be substituted for the Vehicle & Traffic Law and the charge should be modified accordingly.

The charge is based on *Knapp v Barrett*, 216 NY 226, 110 NE 428 (1915); *Murphy v Orr*, 96 NY 14 (1884); *Pecora v Marique*, 273 App Div 705, 79 NYS2d 350 (1st Dept 1948); *Keosayan v Geiger*, 188 App Div 829, 176 NYS 585 (1st Dept 1919). The relative rights of motorists and pedestrians are discussed in *Grisoff v Nicoletta*, 107 AD2d 1047, 486 NYS2d 579 (4th Dept 1985) (citing PJI); 8A NYJur2d, Automobiles, §§ 972–986.

A charge that the plaintiff had a duty to keep a reasonably vigilant lookout for vehicles and to avoid placing himself in danger should not be given where the plaintiff was a construction worker working with his back to oncoming traffic in a lane that was closed and marked with mesh fencing, *Lamuraglia v New York City Transit Authority*, 299 AD2d 321, 749 NYS2d 82 (2d Dept 2002).

If the pedestrian was within a crosswalk, marked or unmarked, the court should charge § 1151, *Cavalli v Cohen*, 209 AD2d 240, 618 NYS2d 339 (1st Dept 1994). If the pedestrian was not within a crosswalk, the court should charge § 1152. Where the issue is in dispute, it is a question of fact for the jury to decide, *Holt v New York City Transit Authority*, 151 AD2d 460, 542 NYS2d 250 (2d Dept 1989) (construing NYC traffic regulations). The jury should be given the definition of crosswalk contained in VTL § 110. At a T intersection the prolongation of lateral sidewalk lines is an unmarked crosswalk within the meaning of VTL § 110, *Fan v Buzzitta*, 42 AD2d 40, 344 NYS2d 788 (2d Dept 1973); see *Kochloffel v Giordano*, 99 AD2d 798, 472 NYS2d 132 (2d Dept 1984). Where an accident occurs within an unmarked crosswalk as defined by VTL § 110, the court should charge VTL § 1151, *Rudolf v Kahn*, 4 AD3d 408, 771 NYS2d 370 (2d Dept 2004); *Cavalli v Cohen*, 209 AD2d 240, 618 NYS2d 339 (1st Dept 1994).

When the pedestrian is within a crosswalk at an intersection controlled by a traffic signal, the court must charge VTL § 1111 instead of VTL § 1151. Under VTL § 1111, the pedestrian has the right of way when crossing with the pedestrian light in a crosswalk. In contrast, under VTL § 1151, although the pedestrian has the right of way, a duty is imposed on the pedestrian not to leave a curb or other place of safety and enter the path of a vehicle when the vehicle is so close that is impractical for the driver to yield, *Rudolf v Kahn*, 4 AD3d 408, 771 NYS2d 370 (2d Dept 2004). VTL § 1111 is the applicable statute when the ac-

cident occurs in an intersection controlled by a traffic light. It is reversible “fundamental” error to charge VTL § 1111 where VTL § 1151 is the controlling statute, since the two provisions impose different rights and duties on drivers and pedestrians. *Rudolf v Kahn*, *supra*.

Crossing outside a crosswalk is not prohibited by statute, *Chandler v Keene*, 5 AD2d 42, 168 NYS2d 788 (3d Dept 1957), and is not negligence as a matter of law, *Deitz v Huibregtse*, 25 AD3d 645, 808 NYS2d 737 (2d Dept 2006) (citing PJI). Whether plaintiff exercised reasonable care under the circumstances is a question of fact for the jury, *Franco v Zingarelli*, 72 AD2d 211, 424 NYS2d 185 (1st Dept 1980) (citing PJI); *Calico v Phillips*, 63 AD2d 955, 405 NYS2d 490 (2d Dept 1978); *Dann v Martin*, 52 AD2d 687, 382 NYS2d 379 (3d Dept 1976); *Lo Giudice v Riedel*, 32 AD2d 950, 303 NYS2d 756 (2d Dept 1969); *Hogeboom v Protts*, 30 AD2d 618, 290 NYS2d 437 (3d Dept 1968). The pedestrian who is not in a crosswalk, however, must yield the right of way when the respective positions of the parties and the speed at which they are traveling is such that, if they both persist in their course, the pedestrian would be struck by the vehicle, *Chandler v Keene*, *supra*; see *Perrin v Winne*, 123 AD2d 610, 507 NYS2d 19 (2d Dept 1986); *Campbell v National Acoustics, Inc.*, 79 AD2d 912, 434 NYS2d 430 (1st Dept 1981).

Whether or not a pedestrian is in a crosswalk, a pedestrian is negligent for failing to look with care for oncoming traffic, but if the pedestrian looks as he/she starts to cross and the way seems clear, the pedestrian is not bound to look again as a matter of law, *Knapp v Barrett*, 216 NY 226, 110 NE 428 (1915); see *Sullivan v Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept 1991). A pedestrian who crosses in the crosswalk with the right-of-way may still be held comparatively negligent if he or she failed to notice an oncoming vehicle that could be seen by the use of ordinary attention, *Quintavalle v Perez*, 139 AD3d 182, 30 NYS3d 81 (1st Dept 2016) (plaintiff not comparatively negligent based on failure to notice and avoid vehicle that came up from behind him); see *Hines v New York City Transit Authority*, 112 AD3d 528, 977 NYS2d 238 (1st Dept 2013). Defendant establishes entitlement to summary judgment *prima facie* by submitting evidence that plaintiff suddenly darted into defendant’s vehicle’s path so that defendant was unable to avoid contact, *St. Andrew v O’Brien*, 45 AD3d 1024, 845 NYS2d 184 (3d Dept 2007). However, that principle was inapplicable where defendant had knowledge that she was approaching an area congested with people, including children, and that the road was narrowed by parked cars, *id*. In that situation, a question of fact may exist as to the reasonableness of defendant’s speed under the circumstances, *id*, citing *Vehicle and Traffic Law § 1180(a)*.

A motorist is charged with seeing what is within his/her vision and VTL § 1151(a) is applicable where the motorist did not observe the pedestrian in the crosswalk, *Grisoff v Nicoletta*, 107 AD2d 1047, 486 NYS2d 579 (4th Dept 1985) (citing PJI); see *Avila v Mellen*, 131 AD2d 408, 515 NYS2d 856 (2d Dept 1987). Pedestrians are prohibited by law

from walking on interstate highways, VTL § 1229-a. Where practicable, pedestrians should walk on the left side of the road or its shoulder facing traffic when there are no sidewalks, VTL § 1156(b). A violation of the statutes will not be considered as negligence, however, where the pedestrian was directed by a police officer, *Merrill v State*, 110 Misc2d 260, 442 NYS2d 352 (Ct Cl 1981), *aff'd*, 89 AD2d 802, 453 NYS2d 384 (4th Dept 1982) and *aff'd*, 89 AD2d 802, 453 NYS2d 383 (4th Dept 1982).

It is error to submit the issue of the negligence of the motorist to the jury, where it is not disputed that the motorist failed to yield the right of way, *Loeb v United Traction Co.*, 24 AD2d 917, 264 NYS2d 571 (3d Dept 1965). The failure to yield the right of way, however, does not, *ipso facto*, settle the question of whether the pedestrian also was negligent, *Thoma v Ronai*, 189 AD2d 635, 592 NYS2d 333 (1st Dept 1993), *aff'd*, 82 NY2d 736, 602 NYS2d 323, 621 NE2d 690 (1993); see *Schmidt v S. M. Flickinger Co., Inc.*, 88 AD2d 1068, 452 NYS2d 767 (3d Dept 1982).

The charge should be modified if the plaintiff is a child. Even if an adult plaintiff would be chargeable with a violation of the statute, a child may not properly be charged with a violation unless the child has the mental capacity to understand the nature of the statute and to make the calculations that were required to render the statutory duty applicable, *Chandler v Keene*, 5 AD2d 42, 168 NYS2d 788 (3d Dept 1957); see *Dugan v Dieber*, 32 AD2d 815, 302 NYS2d 423 (2d Dept 1969). Thus, the court should charge a subjective standard of care, that is, what the infant plaintiff is mentally capable of, based on age, experience, intelligence, and development, *Dimino v Burriesci*, 125 AD2d 361, 509 NYS2d 86 (2d Dept 1986) (citing PJI 2:49).

VTL § 1146 imposes a superseding duty on a motorist to exercise due care to avoid hitting a pedestrian or bicyclist, *Deitz v Huijbregtse*, 25 AD3d 645, 808 NYS2d 737 (2d Dept 2006) (citing PJI), or bicyclist, *Fernandez v Ortiz*, 183 AD3d 443, 121 NYS3d 867 (1st Dept 2020) (bicyclist entitled to summary judgment on issue of liability based upon violation of VTL § 1146). Additionally, VTL § 1146 imposes a duty on motorists to warn pedestrians or bicyclists by sounding the horn when necessary, see *Long v Niagara Frontier Transp. Authority*, 81 AD3d 1391, 917 NYS2d 463 (4th Dept 2011); *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979); *Waterfall v Taylor*, 35 AD2d 619, 312 NYS2d 753 (3d Dept 1970). The failure to sound the horn is not negligence where the motorist, instead of sounding the horn, attempts to steer away from the pedestrian, where the pedestrian's appearance in the road is sudden and unexpected, *Chiappone v Greenebaum*, 189 App Div 579, 178 NYS 854 (1st Dept 1919). Where the motorist is aware of the pedestrian in the crosswalk and, further, is aware that the pedestrian's view of the vehicle is obscured, the motorist is required to yield the right of way or sound the horn, *Klucserits v Llope*, 49 AD2d 409, 375 NYS2d 639 (3d Dept 1975).

The pattern charge applies when no traffic control system governs

the movements of the motorist and pedestrian. When there is a traffic control system in operation, a charge based on VTL §§ 1111 and 1112 must be given, *Burns v Dixon*, 46 AD2d 943, 362 NYS2d 245 (3d Dept 1974); *Applebaum v Hersh*, 26 AD2d 58, 270 NYS2d 805 (1st Dept 1966).

On a sidewalk a pedestrian has the right of way over a vehicle emerging from or entering an alleyway, building entrance, private road or driveway, and the driver of an emerging vehicle is required to stop immediately prior to driving onto the sidewalk, or, if there is no sidewalk, at the point nearest the road where the driver has a view of approaching traffic, VTL §§ 1151-a, 1173; see *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976); *Green v Downs*, 27 NY2d 205, 316 NYS2d 221, 265 NE2d 68 (1970). A person who voluntarily places himself or herself on a sidewalk to observe or assist a driver in backing a van into a garage, however, is not a “pedestrian” within VTL § 1151-a, *Nealon v Barton*, 160 AD2d 786, 553 NYS2d 828 (2d Dept 1990).

In addition to a motorist’s duty to operate his or her vehicle with care and to see what there is to be seen, there is a separate duty that arises when a motorist gestures to a pedestrian or another vehicle in a way that is understood and relied on as an assurance that it is safe to proceed, *Dolce v Cucolo*, 106 AD3d 1431, 966 NYS2d 581 (3d Dept 2013); *Kievman v Philip*, 84 AD3d 1031, 924 NYS2d 112 (2d Dept 2011); *Ohlhausen v New York*, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010). Thus, a motorist may be liable for the failure to use reasonable care when gesturing or signaling to others, provided that the gesture or signal is a proximate cause of the accident, *Bowman v Kennedy*, 126 AD3d 1203, 6 NYS3d 175 (3d Dept 2015). The duty described above extends to both pedestrians and other motorists as well as to third parties who might be injured as a result of the actions of the intended recipient of the gesture who proceeded in reliance upon the assurance of safety, *Ohlhausen v New York*, supra; see *Williams v Weatherstone*, 23 NY3d 384, 991 NYS2d 779, 15 NE3d 792 (2014); *Yau v New York City Transit Authority*, 10 AD3d 654, 781 NYS2d 778 (2d Dept 2004). The absence of reliance by the injured party is not a bar to recovery by an injured pedestrian under such circumstances, *Ohlhausen v New York*, supra.

PJI 2:76. Motor Vehicle Accidents—Pedestrian Walking Along Roadway

As you have heard, the plaintiff AB claims that *[state plaintiff’s contentions]* *[add where appropriate: that the defendant CD violated section 1146 of the Vehicle and Traffic Law by (state plaintiff’s contentions)]*, **and that CD thereby caused injury to AB. CD claims that** *[state defendant’s contentions]* *[add where appropriate: and that AB violated section*

1156(b) of the Vehicle and Traffic Law by (*state defendant's contentions*)].

AB and CD were each under a duty to use the same degree of care that a reasonably prudent person would have used under the same circumstances. As a driver, CD was required to keep a reasonably careful lookout for pedestrians, to sound the vehicle's horn when a reasonably prudent person would do so in order to warn a pedestrian of danger, and to drive the vehicle with reasonable care to avoid hitting anyone on the road. As a pedestrian, AB was required to use reasonable care for (his, her) own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing (himself, herself) in a dangerous position.

AB and CD were also required to obey the laws governing traffic and each was entitled to assume that the other would do so. Section 1146 of the Vehicle and Traffic Law provides:

“ . . . every driver of a vehicle shall exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway and shall give warning by sounding the horn when necessary.”

Section 1156(b) of the Vehicle and Traffic Law provides [*Caution: VTL § 1156 does not apply in the City of New York*]:

“Where sidewalks are not provided any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction. Upon the approach of any vehicle from the opposite direction, such pedestrian shall move as far to the left as practicable.”

If you find, by a preponderance of the evidence, that CD failed to give warning by sounding (his, her) horn when a reasonably prudent person would have done so, or failed to maintain a rea-

sonably vigilant lookout, or failed to use reasonable care to avoid the accident, you will find that CD was negligent. If you find, by preponderance of the evidence, that AB failed to use reasonable care for (his, her) own safety, or failed to keep a reasonably vigilant lookout for cars, or failed to avoid placing (himself, herself) in a dangerous position, then you will find that AB was negligent. Additionally, if you find, by a preponderance of the evidence, that AB failed to walk on the left side of the road or on its shoulder facing oncoming traffic although it was practicable for (him, her) to do so, or that while AB was walking on the left side it was practicable for AB to move further to the left out of the way of the vehicle and AB failed to do so, then you will find that AB was negligent.

Comment

[See also Introductory Statement to this division.]

Caveat: Local law, ordinance, rule or regulation, as in New York City, may supersede the Vehicle & Traffic Law, see Introductory Statement to this division. In such a case the applicable provision, which constitutes only some evidence of negligence, see PJI 2:29, should be substituted for the Vehicle & Traffic Law.

Based on *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979); *Heffernan v Logue*, 40 AD2d 1071, 339 NYS2d 225 (4th Dept 1972); *Waterfall v Taylor*, 35 AD2d 619, 312 NYS2d 753 (3d Dept 1970); *Miller v Hine*, 281 App Div 387, 120 NYS2d 231 (3d Dept 1953); see also *Schmidt v S. M. Flickinger Co., Inc.*, 88 AD2d 1068, 452 NYS2d 767 (3d Dept 1982); *McPartland v Bitzen*, 42 AD2d 897, 347 NYS2d 702 (1st Dept 1973); *Lo Giudice v Riedel*, 32 AD2d 950, 303 NYS2d 756 (2d Dept 1969); 8A NYJur2d, Automobiles § 781, 8B NYJur2d Automobiles, § 972.

Unless causation is undisputed, proximate cause must be charged, see PJI 2:70. The jury must also be instructed with respect to comparative negligence, see PJI 2:36.

A charge that the plaintiff had a duty to keep a reasonably vigilant lookout for vehicles and to avoid placing himself in danger should not be given where the plaintiff was a construction worker working with his back to oncoming traffic in a lane that was closed and marked with mesh fencing, *Lamuraglia v New York City Transit Authority*, 299 AD2d 321, 749 NYS2d 82 (2d Dept 2002).

The pattern charge assumes that no sidewalk was provided at the

place where the collision occurred. If there was a sidewalk, VTL § 1156(a) must be charged instead of VTL § 1156(b). These sections do not apply in the City of New York, see section 402(e) of the New York City Traffic Rules. VTL § 1156(a) provides that “where sidewalks are provided and they may be used with safety,” it is unlawful for a pedestrian to use the roadway. Even where there is no justification for the pedestrian’s failure to use the sidewalk and the injury would not have occurred if the pedestrian had been on the sidewalk, it is for the jury to decide whether the violation of the statute was a cause of the accident, see *Tedla v Ellman*, 280 NY 124, 19 NE2d 987 (1939); *Miocic v Winters*, 66 AD2d 770, 410 NYS2d 863 (2d Dept 1978); *Quinn v Sullivan*, 48 AD2d 965, 369 NYS2d 551 (3d Dept 1975); *Miller v Hine*, 281 App Div 387, 120 NYS2d 231 (3d Dept 1953).

Where there is evidence of a statutory violation, see PJI 2:25 and 2:26. With respect to justifiable non-compliance with statute, see PJI 2:27, and as to justifiable noncompliance with VTL § 1156, see *Tedla v Ellman*, 280 NY 124, 19 NE2d 987 (1939); *Cassidy v Hudson Transit Corporation*, 280 NY 667, 20 NE2d 1021 (1939), Annot: 45 ALR3d 658.

PJI 2:76A. Motor Vehicle Accidents—Bicyclist Along Roadway

As you have heard, the plaintiff AB claims that [state plaintiff’s contentions] [add where appropriate: that the defendant CD violated section 1146 of the Vehicle and Traffic Law by (state plaintiff’s contentions)], and that CD thereby caused injury to AB. CD claims that [state defendant’s contentions] [add where appropriate: and that AB violated section 1234 of the Vehicle and Traffic Law by (state defendant’s contentions)].

AB and CD were each under a duty to use the same degree of care that a reasonably prudent person would have used under the same circumstances. As a motorist, CD was required to keep a reasonably vigilant lookout for bicyclists, to sound the vehicle’s horn when a reasonably prudent person would do so in order to warn a bicyclist of danger, and to operate the vehicle with reasonable care to avoid colliding with anyone on the road. As a bicyclist, AB was required to use reasonable care for (his, her) own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing (himself, herself) in a dangerous position.

AB and CD were also required to obey the

statutes governing traffic and each was entitled to assume that the other would do so. Section 1146 of the Vehicle and Traffic Law provides:

“ . . . every driver of a vehicle shall exercise due care to avoid colliding with any . . . bicyclist . . . upon any roadway and shall give warning by sounding the horn when necessary.”

Section 1234(a) of the Vehicle and Traffic Law provides [*Caution: VTL § 1234 does not apply in the City of New York.*]:

“Upon all roadways, any bicycle or in-line skate shall be driven either on a usable bicycle or in-line skate lane or, if a usable bicycle or in-line skate lane has not been provided, near the right-hand curb or edge of the roadway or upon a usable right-hand shoulder in such a manner as to prevent undue interference with the flow of traffic except when preparing for a left turn or when reasonably necessary to avoid conditions that would make it unsafe to continue along near the right-hand curb or edge. Conditions to be taken into consideration include, but are not limited to, fixed or moving objects, vehicles, bicycles, in-line skates, pedestrians, animals, surface hazards or traffic lanes too narrow for a bicycle or person on in-line skates and a vehicle to travel safely side-by-side within the lane.”

If you find, by a preponderance of the evidence, that CD failed to give warning when a reasonably prudent person would have done so, or failed to maintain a reasonably vigilant lookout, or failed to use reasonable care to avoid the collision, you will find that CD was negligent. If you find, by a preponderance of the evidence, that AB failed to use reasonable care for (his, her) own safety, or failed to keep a reasonably vigilant lookout for vehicles or failed to avoid placing (himself, herself) in a dangerous position, then you will find that AB was negligent. Additionally, if you find, by a preponderance of the evidence, that AB failed to ride near the right-hand curb or usable right-hand

shoulder when it was safe for (him, her) to do so, or that AB failed to use reasonable care in riding the bicycle, then you will find that AB was negligent.

Comment

[See also Introductory Statement to this division.]

Caveat: Local law, ordinance, rule or regulation, as in New York City, may supersede the Vehicle & Traffic Law, see Introductory Statement to this division. In such a case the applicable provision, which constitutes only some evidence of negligence, see PJI 2:29, should be substituted for the Vehicle & Traffic Law.

Based on VTL §§ 1146, 1234; *Gonzalez v Medina*, 69 AD2d 14, 417 NYS2d 953 (1st Dept 1979); see also Comment to PJI 2:76.

A plaintiff bicyclist may be entitled to summary judgment on the issue of liability based upon proof that a motorist violated VTL § 1146(a), which requires that every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist upon any roadway and shall give a warning by sounding the horn when necessary, see *Fernandez v Ortiz*, 183 AD3d 443, 121 NYS3d 867 (1st Dept 2020).

Unless causation is undisputed, proximate cause must be charged, see PJI 2:70. The jury must also be instructed with respect to comparative negligence, see PJI 2:36.

Even where there is no justification for the bicyclist's failure to use the bicycle path and the injury would not have occurred if the bicyclist had been on the bicycle path, it is for the jury to decide whether the violation of the statute was a cause of the accident. In an analogous situation, involving the unjustified failure of a pedestrian to use a sidewalk, the issue of causation is one for the jury to decide, see *Tedla v Ellman*, 280 NY 124, 19 NE2d 987 (1939); *Miocic v Winters*, 66 AD2d 770, 410 NYS2d 863 (2d Dept 1978); *Quinn v Sullivan*, 48 AD2d 965, 369 NYS2d 551 (3d Dept 1975); *Miller v Hine*, 281 App Div 387, 120 NYS2d 231 (3d Dept 1953). With respect to justifiable non-compliance with statute, see PJI 2:27.

Bicyclists are "granted all of the rights" and are "subject to all of the duties applicable to" drivers of motor vehicles under the Vehicle & Traffic Law, *Redcross v State*, 241 AD2d 787, 660 NYS2d 211 (3d Dept 1997); see *Coffed v McCarthy*, 130 AD3d 1436, 12 NYS3d 751 (4th Dept 2015), rev'd on other grounds 29 NY3d 978, 52 NYS3d 287, 74 NE3d 671 (2017); *Brenner v Dixon*, 98 AD3d 1246, 951 NYS2d 635 (4th Dept 2012), except as to the special regulations set forth in Article 34 of the Vehicle & Traffic Law and except as to such other provisions of the Ve-

hicle & Traffic Law as “by their nature can have no application,” VTL § 1231. Article 34 of the Vehicle & Traffic Law contains special provisions with respect to the operation of bicycles which apply whenever a bicycle is operated upon a highway, a private road open to public motor vehicles, and upon any path set aside for the exclusive use of bicycles, VTL § 1230(b). Where an intersection is controlled by both a vehicular traffic control device and a pedestrian control signal or device, a bicyclist must follow the vehicular traffic control device, not the signal for pedestrians, *Joannis v Cahill*, 71 AD3d 1437, 897 NYS2d 575 (4th Dept 2010).

Parents or guardians may not authorize, or knowingly permit, a child to violate any of the provisions of Vehicle & Traffic Law, Article 34, VTL § 1230(a); see *Pedersen v Balzan*, 117 AD2d 933, 499 NYS2d 239 (3d Dept 1986). As to the vicarious liability of a parent for a tortious act of a child, see PJI 2:261. The failure of a child to obey the provisions of the Vehicle & Traffic Law may constitute negligence, see *Finn v New York State Dept. of Mental Hygiene*, 49 AD2d 995, 374 NYS2d 394 (3d Dept 1975) (failure of child to keep to right as required by VTL § 1234 was at least *prima facie* comparative fault); *Steinberg v Cauchois*, 249 App Div 518, 293 NYS 147 (2d Dept 1937) (infant held liable for riding bicycle on sidewalk in violation of ordinance). However, particularly young children may not be charged with knowledge and understanding of traffic regulations, see *Branch v Stehr*, 93 AD2d 849, 461 NYS2d 346 (2d Dept 1983) (six-year-old child); *Avram v Haddad*, 88 AD2d 942, 451 NYS2d 178 (2d Dept 1982) (five-year-old child). A child under four years of age is incapable as a matter of law of understanding danger, cannot be found negligent, and is not responsible for his or her acts, *Verni v Johnson*, 295 NY 436, 68 NE2d 431 (1946). For a charge and comment on the standard of care required of an infant, see PJI 2:23.

b. MOTORIST—MOTORIST

(1) DUTY TOWARD OTHER MOTORISTS, IN GENERAL

PJI 2:77. Motor Vehicle Accidents—Duty Toward Other Motorists, In General

As you have heard, AB contends that CD failed to operate (his, her) vehicle with reasonable care in that [state AB's contentions]. CD denies AB's contention and contends that [state CD's contentions].

A driver has the duty to operate (his, her) vehicle with reasonable care, taking into account the actual and potential dangers existing from weather, road, traffic, and other conditions. This duty requires the driver to maintain a reasonably safe rate of speed; to have (his, her) vehicle under proper control; to keep a proper lookout under the existing circumstances; to see and be aware of what is in (his, her) view; and to use reasonable care to avoid an accident.

[Add where appropriate: A driver is charged with the duty to see that which under existing circumstances (he, she) should have seen by the proper use of (his, her) senses. If you find that (AB, CD) did not observe that which was there to be seen you may find that (he, she) was negligent in failing to look or in not looking carefully.]

AB has the burden to prove CD failed to operate (his, her) vehicle with reasonable care. If you decide that CD operated (his, her) vehicle with reasonable care, then you will find CD was not negligent. If you decide that CD failed to operate (his, her) vehicle with reasonable care, you will find CD was negligent and you then must consider whether CD's negligence was a substantial factor in bringing about (the accident, AB's injuries).

Comment

Caveat 1: By virtue of Vehicle & Traffic Law § 1231, persons riding

bicycles or using in-line skates must follow the rules of the road. In such a case, this charge may be modified accordingly.

Caveat 2: Where a statutory violation is in issue, see PJI 2:25 and 2:26. The applicable section of the Vehicle & Traffic Law must also be charged, see PJI 2:78, 2:79, 2:79A, 2:80, 2:82A and 2:83. Local law, ordinance, rule, or regulation may supersede the Vehicle & Traffic Law, see Introductory Statement preceding PJI 2:75. In such a case, the applicable provision, which constitutes only some evidence of negligence, see PJI 2:29, should be substituted for the Vehicle & Traffic Law.

Based on *Baker v Close*, 204 NY 92, 97 NE 501 (1912); *Regdos v Buffalo*, 132 AD3d 1343, 17 NYS3d 528 (4th Dept 2015) (citing PJI); *Le Claire v Pratt*, 270 AD2d 612, 704 NYS2d 354 (3d Dept 2000); *Duffy v Chautauqua*, 225 AD2d 261, 649 NYS2d 297 (4th Dept 1996) (citing PJI) (abrogated on other grounds by *Artibee v Home Place Corp.*, 28 NY3d 739, 49 NYS3d 638, 71 NE3d 1205 (2017)); *Tracy v Liberty Lines Transit, Inc.*, 129 AD2d 576, 514 NYS2d 75 (2d Dept 1987) (citing PJI); *Oberman v Alexander's Rent-A-Car*, 56 AD2d 814, 392 NYS2d 662 (1st Dept 1977); *Tenczar v Milligan*, 47 AD2d 773, 365 NYS2d 272 (3d Dept 1975); *Hartstein v U.S. Trucking Corp.*, 260 App Div 643, 23 NYS2d 251 (1st Dept 1940).

A. Speeding

Where the court has properly charged the jury on the statutory obligation of VTL § 1180(a), requiring the driver to proceed at a speed reasonable and prudent under the existing conditions, the court does not have to give a separate charge under VTL § 1180(e), requiring a driver to drive at an appropriate reduced speed when approaching and crossing an intersection, *Dingle v Virga*, 195 AD2d 538, 600 NYS2d 474 (2d Dept 1993); see *Bagnato v Romano*, 179 AD2d 713, 578 NYS2d 613 (2d Dept 1992). It is error to charge VTL § 1180(a) absent evidence that a party's speed was imprudent, *Putnam v Lamoreaux*, 59 AD2d 974, 399 NYS2d 333 (3d Dept 1977).

B. Stopping on a highway

As to the prohibition on stopping on a highway, see VTL §§ 147, 1200, 1201; *Rees v Grandelli*, 21 NY2d 946, 289 NYS2d 977, 237 NE2d 230 (1968) (negligence as a matter of law to stop on parkway to exchange license data after collision); *Campbell v Waltz*, 212 AD2d 995, 622 NYS2d 173 (4th Dept 1995) (VTL § 1200(c) permits vehicle to be temporarily stopped for purpose of delivering merchandise, irrespective of whether vehicle is parked in violation of § 1201); *Quiquin v Fitzgerald*, 146 AD2d 894, 536 NYS2d 874 (3d Dept 1989) (jury question as to whether bus driver, in stopping temporarily to discharge passengers, violated VTL § 1201(a) by stopping bus on traveled portion of highway, rather than in available area off highway); *Kallasy v New York Telephone Co.*, 70 AD2d 749, 416 NYS2d 887 (3d Dept 1979) ("hazard vehicle," e.g., telephone repair truck not exempt from VTL § 1201(a)); *Goldberg v Statewide Excavators Inc.*, 30 AD2d 572, 291 NYS2d 76 (2d

Dept 1968) (negligence and proximate cause questions for jury when disabled vehicle left on expressway); *Johnson v Budine*, 20 AD2d 843, 247 NYS2d 900 (3d Dept 1964) (affirming jury verdict finding repair of flat tire on highway to be negligence); see also *Somersall v New York Telephone Co.*, 52 NY2d 157, 436 NYS2d 858, 418 NE2d 373 (1981) (double parking by utility company truck in New York City is governed by applicable City Traffic Regulations, which make no exceptions for “hazard vehicles”). As to backing into lanes of traffic, see VTL § 1211(a); *Garcia v Verizon New York, Inc.*, 10 AD3d 339, 781 NYS2d 93 (1st Dept 2004); *Pena v Santana*, 5 AD3d 649, 774 NYS2d 744 (2d Dept 2004).

It is error to charge VTL § 1201(a) unless there is evidence that the accident happened on a highway, *Oliver v Al's Taxi, Inc.*, 35 AD2d 766, 314 NYS2d 963 (3d Dept 1970). When VTL § 1201(a) is to be charged, the better practice is to read all of subdivision (a) to the jury, and also to read the definition of stop or stopping in VTL §§ 146, 147, see *Mravlja v Hoke*, 22 AD2d 848, 254 NYS2d 162 (3d Dept 1964), *aff'd*, 17 NY2d 822, 271 NYS2d 271, 218 NE2d 314 (1966); *Starks v Poulein*, 57 AD2d 645, 393 NYS2d 214 (3d Dept 1977). For definitions pertinent to VTL § 1201(a), see VTL §§ 105 (business district), 118 (highway), 129 (park or parking), 138 (residence district), 145 (stand or standing), 146 (stop), and 147 (stop or stopping).

Generally, when one causes a public road to become obstructed, there is a duty to exercise the care that a reasonably prudent person should have exercised under all the circumstances, *Jones v G & I Homes, Inc.*, 86 AD3d 786, 927 NYS2d 206 (3d Dept 2011). The exercise of reasonable care under the circumstances may include warning other motorists of the hazards posed by the obstruction (e.g., cones, signs, etc), *id.* Typically, the adequacy of the warnings is a question of fact, *id.*

C. Yielding to authorized emergency vehicles

Drivers are required to stop and yield the right of way to an authorized emergency vehicle with at least one red light and siren activated, VTL § 1144. A bus driver who obeys this rule and stops to enable an emergency vehicle to pass is not negligent solely because the size of the bus makes it difficult or impossible for other drivers to see around it, *Ohlhausen v New York*, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010). Additionally, in such situations, the bus driver has no duty to activate his or her own hazard lights or to warn other drivers of the oncoming emergency vehicle, *id.*

D. Keeping a lookout

Although a motorist is charged with the duty to keep a proper lookout, a motorist is not required to anticipate that a vehicle going in the opposite direction will cross the median strip of a highway and enter the flow of traffic in the opposite direction, and the jury should be so instructed, *Tenenbaum v Martin*, 131 AD2d 660, 516 NYS2d 741 (2d Dept 1987); see *Palmer v Rouse*, 232 AD2d 909, 649 NYS2d 76 (3d Dept

1996) (citing PJI) (driver not required to anticipate oncoming tractor's bucket to cross center of road into oncoming lane of travel); *Mangano v New York City Housing Authority*, 218 AD2d 787, 631 NYS2d 54 (2d Dept 1995). A driver has no duty to watch for and avoid a driver who might fail either to stop or to proceed with due caution at a stop sign, *Doxtader v Janczuk*, 294 AD2d 859, 741 NYS2d 368 (4th Dept 2002). However, a driver who has the right of way has a duty to take evasive action to avoid a collision where the driver has sufficient time to act, *Pena v Santana*, 5 AD3d 649, 774 NYS2d 744 (2d Dept 2004); see *Miles v Walsh*, 195 AD3d 924, 146 NYS3d 501 (2d Dept 2021); *Lupowitz v Fogarty*, 295 AD2d 576, 744 NYS2d 480 (2d Dept 2002); *King v Washburn*, 273 AD2d 725, 710 NYS2d 185 (3d Dept 2000); *Le Claire v Pratt*, 270 AD2d 612, 704 NYS2d 354 (3d Dept 2000); *Wilke v Price*, 221 AD2d 846, 633 NYS2d 686 (3d Dept 1995).

A driver has no duty to anticipate that the driver's car will be struck from behind because of the negligence of another with no fault on the driver's part and the driver has no obligation under such circumstances to reasonably and prudently prepare for such an eventuality, i.e., following the "safe driving tip" of keeping wheels straight until one commences a left turn, *Stretch v Tedesco*, 263 AD2d 538, 693 NYS2d 203 (2d Dept 1999); *Piotrowski v Nye*, 262 AD2d 991, 692 NYS2d 270 (4th Dept 1999); *Murphy v Spickler*, 224 AD2d 814, 638 NYS2d 188 (3d Dept 1996).

Although the operator of a motor vehicle has a duty to see that which under the facts and circumstances he or she should have seen by the proper use of her senses, a passenger has no such obligation, *Duffy v Chautauqua*, 225 AD2d 261, 649 NYS2d 297 (4th Dept 1996) (citing PJI).

E. Failure to control vehicle

Evidence that the defendant's vehicle crossed to the wrong side of the road and struck the plaintiff's vehicle makes out a prima facie case, shifting the burden to the defendant to come forward with an explanation, *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966); see *Coury v Safe Auto Sales, Inc.*, 32 NY2d 162, 344 NYS2d 347, 297 NE2d 88 (1973); *Lyons v De Vore*, 48 AD2d 943, 368 NYS2d 887 (3d Dept 1975), *aff'd*, 39 NY2d 971, 387 NYS2d 108, 354 NE2d 848 (1976); *Rusho v State*, 76 AD3d 783, 906 NYS2d 836 (4th Dept 2010); *Fagle v Bell*, 65 AD2d 887, 410 NYS2d 422 (3d Dept 1978); *Novis v Sheinkin*, 60 AD2d 623, 400 NYS2d 161 (2d Dept 1977); *Simmons v Stiles*, 43 AD2d 417, 353 NYS2d 257 (3d Dept 1974); *Lewis v Rivers*, 41 AD2d 657, 340 NYS2d 671 (2d Dept 1973); *Stafford v Mussers Potato Chips, Inc.*, 39 AD2d 831, 333 NYS2d 139 (4th Dept 1972). While an unexcused violation of a Vehicle & Traffic Law provision constitutes negligence per se, *Gadon v Oliva*, 294 AD2d 397, 742 NYS2d 122 (2d Dept 2002), a driver who crossed into plaintiff's lane of travel after being struck by a third vehicle rendering him unconscious was not negligent as a matter of law, *Baker v Joyal*, 4 AD3d 596, 771 NYS2d 269 (3d Dept 2004).

Similarly, an injured passenger makes out a prima facie case where a car goes out of control, see *Czekala v Meehan*, 27 AD2d 565, 276 NYS2d 279 (2d Dept 1966), *aff'd*, 20 NY2d 686, 282 NYS2d 553, 229 NE2d 230 (1967); *Bergeron v Hyer*, 55 AD2d 1001, 391 NYS2d 767 (4th Dept 1977). The rule concerning loss of control also has been applied to a head-on collision, *Manzi v Grand Ave. Cab Co.*, 42 AD2d 607, 345 NYS2d 120 (2d Dept 1973); to skidding, *Canfield v Giles*, 182 AD2d 1075, 585 NYS2d 242 (4th Dept 1992); *Knise v Shearer*, 30 AD2d 741, 291 NYS2d 473 (3d Dept 1968); to brake failure, *Warrick v Oliver*, 38 AD2d 664, 327 NYS2d 219 (3d Dept 1971); to a truck running off a road onto the shoulder, *Schmoll v Luther*, 36 AD2d 996, 320 NYS2d 975 (3d Dept 1971); and to a bus overturning in a center mall, *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 414 NYS2d 540 (1st Dept 1979). Evidence that a bus approached a curve at a speed within the posted speed limit on a slick and slushy road and that the bus driver pleaded guilty to “careless driving” constitutes a prima facie showing of negligence so convincing as to warrant summary judgment if not rebutted by other evidence, *Yu Guo Hu v Dahlia Travel & Tours*, 13 AD3d 99, 785 NYS2d 457 (1st Dept 2004).

F. Unlicensed drivers

Licensing statutes do not establish standards of care under which drivers must perform in relation to others, *Dance v Southampton*, 95 AD2d 442, 467 NYS2d 203 (2d Dept 1983). Thus, a violation of the motor vehicle licensing statute is not material to the issue of negligence. Negligence relates to the manner in which the car is operated, not whether the driver was licensed, see *Huff v Rodriguez*, 88 AD3d 1274, 930 NYS2d 717 (4th Dept 2011); *Dance v Southampton*, *supra*; *Phass v MacClenathen*, 274 App Div 535, 85 NYS2d 643 (3d Dept 1948). The absence or possession of a driver’s license relates only to the authority for operating the vehicle and not to the manner thereof, *Huff v Rodriguez*, *supra*; *Almonte v Marsha Operating Corp.*, 265 AD2d 357, 696 NYS2d 484 (2d Dept 1999); *Dalal v New York*, 262 AD2d 596, 692 NYS2d 468 (2d Dept 1999); *Phass v MacClenathen*, *supra*. A license restriction requiring a driver to wear glasses, however, relates directly to the actual operation of the vehicle, *Dalal v New York*, *supra*. Therefore, an unexcused violation of VTL § 509(3), which provides that no person shall operate any vehicle in violation of any restriction contained in the driver’s license, constitutes negligence per se, *id.*

G. Other considerations

A motorist may be liable to other motorists and pedestrians when he or she gestures in a way that is understood and relied on as an assurance that it is safe to proceed, *Ohlhausen v New York*, 73 AD3d 89, 898 NYS2d 120 (1st Dept 2010); see *Yau v New York City Transit Authority*, 10 AD3d 654, 781 NYS2d 778 (2d Dept 2004). The gesturing motorist may be liable to a person injured as a result of the actions of another motorist who saw and acted upon the gesture, even in the absence of reliance by the injured party, *Ohlhausen v New York*, *supra*.

(2) AT INTERSECTION**PJI 2:78. Motor Vehicle Accidents—Collision at Uncontrolled Intersection**

As you have heard, AB contends that CD failed to operate (his, her) vehicle with reasonable care when entering the intersection by [state AB's contentions]. CD denies AB's contentions and contends that [state CD's contentions].

A driver may not enter an intersection without giving attention to any other vehicle approaching it. Before entering an uncontrolled intersection, a driver has the duty to look with due care in both directions from a point or points where (he, she) could see a vehicle approaching on the intersecting road; to use reasonable care under all the circumstances to determine if a vehicle is approaching; to make a reasonable effort to avoid a collision; and to obey the Vehicle & Traffic Law.

Section 1140 of the Vehicle & Traffic Law provides:

“(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

(b) When two vehicles enter an intersection from different highways at approximately the same time the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.”

This rule concerning the right of way is not inflexible and absolute. If two vehicles are so near the intersecting point that there is a chance of collision, then the vehicle approaching from the left must slow down or stop to permit the vehicle approaching from the right to proceed.

AB has the burden to prove CD failed to operate (his, her) vehicle with reasonable care when entering the intersection. If you decide that CD

entered the intersection with reasonable care, then you will find CD was not negligent. If you decide that CD failed to enter the intersection with reasonable care, then you will find CD negligent and then must consider whether CD's negligence was a substantial factor in bringing about the (accident, occurrence, injuries).

Comment

Caveat 1: By virtue of Vehicle & Traffic Law § 1231, persons riding bicycles or using in-line skates must follow the rules of the road. In such a case, this charge may be modified accordingly.

Caveat 2: Local law, ordinance, rule or regulation may supersede the Vehicle & Traffic Law, see Introductory Statement preceding PJI 2:75. In such a case, a violation of the applicable local ordinance, rule, or regulation constitutes only some evidence of negligence, see PJI 2:29, and the local law should be substituted for the Vehicle & Traffic Law.

Based on *Shuman v Hall*, 246 NY 51, 158 NE 16 (1927); *Ward v Clark*, 232 NY 195, 133 NE 443 (1921); *Villa v Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4th Dept 1975) (citing PJI); *Maryinuk v Pendell*, 27 AD2d 694, 276 NYS2d 907 (4th Dept 1967); *Scott v New York*, 259 App Div 851, 19 NYS2d 443 (2d Dept 1940).

For the rules governing an intersection with a private road or driveway, see VTL §§ 1143 and 1173; *Darnley v Randazzo*, 159 AD3d 1578, 73 NYS3d 341 (4th Dept 2018) (VTL § 1143 requires driver entering roadway from private property to yield to vehicle in roadway's center turning lane); *Robinson v Day*, 265 AD2d 916, 695 NYS2d 825 (4th Dept 1999) (VTL § 1143 does not apply to driver leaving roadway and entering into private driveway).

For rules governing authorized emergency vehicles, see PJI 2:79A. For a definition of "right of way," see VTL § 139.

PJI 2:79. Motor Vehicle Accidents—Collision at Intersection Controlled by Traffic Control Signal

As you have heard, AB contends that CD failed to obey the instructions of a traffic control signal. CD denies that (he, she) did so.

Section 1110 of the Vehicle Traffic Law provides that the driver of any vehicle shall obey the instructions of any official traffic-control device.

Section 1111, which deals with traffic control signal, provides:

[Read applicable provisions of Vehicle Traffic Law, Section 1111.]

AB has the burden to prove that CD violated this section.

If you find that CD entered the intersection against a red light in violation of this section, you will find that CD was negligent, and proceed to consider whether CD's negligence was a substantial factor in bringing about (the accident, AB's injuries).

If you find that CD did not enter the intersection against a red light, then you must still consider whether CD's conduct in entering the intersection was negligent. A green light is an invitation to proceed. A driver who has a green light has the right to assume that the light is red for cross traffic and that other drivers will stop for the red light. However, a driver who has a green light must still use reasonable care under the circumstances. If a driver saw or should have seen another vehicle in the intersection, or so near the intersection that a collision was likely to occur, the driver was required to use reasonable care to avoid the collision.

If you find that CD did not enter the intersection against a red light, and that CD exercised reasonable care in entering the intersection, then you will find CD was not negligent. If you find that CD did not enter the intersection against a red light, but nevertheless failed to enter the intersection with reasonable care, then you will find CD negligent and and you then must consider whether CD's negligence was a substantial factor in bringing about (the accident, AB's injuries).

Comment

Caveat 1: By virtue of Vehicle & Traffic Law § 1231, persons riding bicycles or using in-line skates must follow the rules of the road. In such a case, this charge may be modified accordingly.

Caveat 2: Local law, ordinance, rule or regulation may supersede the Vehicle & Traffic Law, see Introductory Statement preceding PJI 2:75. In such a case the applicable provision, which constitutes only some evidence of negligence, see PJI 2:29, should be substituted for the Vehicle & Traffic Law and the charge should be modified accordingly.

Caveat 3: A motorist is required to comply with the directions of a traffic or police officer, VTL § 1102. If a traffic or police officer's direction differs from that of a traffic control device, the officer's direction prevails, VTL §§ 1102, 1110(a). The charge may be adapted to cover that situation and the situation of an intersection controlled by a traffic or police officer alone.

Based on *Shea v Judson*, 283 NY 393, 28 NE2d 885 (1940); *Siegel v Sweeney*, 266 AD2d 200, 697 NYS2d 317 (2d Dept 1999) (citing PJI); *Crespo v New York City Housing Authority*, 222 AD2d 300, 635 NYS2d 593 (1st Dept 1995) (citing PJI); *Walker v Dartmouth Plan Leasing Corp.*, 180 AD2d 952, 580 NYS2d 535 (3d Dept 1992) (citing PJI); *Sontag v Mulkerin*, 63 AD2d 699, 404 NYS2d 697 (2d Dept 1978).

When a traffic control signal is out-of-service, a motor vehicle must stop in a manner required for a stop sign, VTL § 1117; *Jeudy v Passmore*, 145 AD3d 764, 43 NYS3d 455 (2d Dept 2016). The fact that the traffic light controlling the intersection was malfunctioning did not relieve a driver of liability for an accident occurring in the intersection where the driver was familiar with the intersection and knew it was ordinarily controlled by a traffic light, *Reed v Syracuse*, 309 AD2d 1195, 765 NYS2d 125 (4th Dept 2003).

When traffic is controlled by a flashing signal, VTL § 1113 governs. VTL § 1113(a) provides that a driver facing a flashing red light is obligated to stop before proceeding into the intersection, *Valiando v Catalfamo*, 138 AD3d 1271, 29 NYS3d 685 (3d Dept 2016); *Rabenstein v Suffolk County Dept. of Public Works*, 131 AD3d 1145, 16 NYS3d 334 (2d Dept 2015); *Melendez v Nassau*, 56 AD3d 736, 868 NYS2d 252 (2d Dept 2008); see *Colaruotolo v Crowley*, 290 AD2d 863, 736 NYS2d 525 (3d Dept 2002); *Doctor v Juliana*, 277 AD2d 1013, 716 NYS2d 196 (4th Dept 2000). A driver approaching an intersection controlled by a flashing yellow light is obligated to proceed through the intersection with caution, VTL § 1113(b); *Jeudy v Passmore*, *supra*; *Valiando v Catalfamo*, *supra*; *Rabenstein v Suffolk County Dept. of Public Works*, *supra*; see *Colaruotolo v Crowley*, *supra*; *Doctor v Juliana*, *supra*. However, even if a driver at a traffic signal has the right of way, the driver is obligated to use reasonable care to avoid an accident, *Valiando v Catalfamo*, *supra*; *Rabenstein v Suffolk County Dept. of Public Works*, *supra*; *Doctor v Juliana*, *supra*.

Similarly, even with a green light, a driver must exercise reasonable care to avoid a collision with another vehicle or bicycle in an intersection, *Siegel v Sweeney*, 266 AD2d 200, 697 NYS2d 317 (2d Dept 1999) (citing PJI); see *Redcross v State*, 241 AD2d 787, 660 NYS2d 211

(3d Dept 1997); see *Miles v Walsh*, 195 AD3d 924, 146 NYS3d 501 (2d Dept 2021) (issue of fact as to plaintiff's comparative fault). A vehicle approaching an intersection must yield the right of way to a vehicle or bicycle already crossing the intersection, *Redcross v State*, supra (citing PJI). Where a group of cyclists had a green light in their favor when they started to cross a four lane avenue, all traffic on the avenue was required to yield to them even though they had not yet cleared the fourth lane of the avenue before the lights changed to green for traffic on the avenue, *Redcross v State*, supra; see VTL § 1111(a)(1).

A vehicle stopped at a red traffic signal outside of New York City may turn right after stopping and yielding the right of way to pedestrians and other traffic, unless prohibited by sign, VTL § 1111(d)(2)(a). Turning right at a red light where a "No Turn On Red" sign is present is a violation of VTL § 1111(d) and constitutes negligence as a matter of law, *Packer v Mirasola*, 256 AD2d 394, 681 NYS2d 559 (2d Dept 1998). Likewise, it is negligence as a matter of law to make a right turn at a red traffic signal without yielding the right of way to another vehicle, *Hellenbrecht v Radeker*, 309 AD2d 834, 766 NYS2d 81 (2d Dept 2003). Vehicles within the City of New York may not turn right at a red traffic signal unless permitted by sign, VTL § 1111(d)(2).

**PJI 2:79A. Motor Vehicle Accidents—Authorized
Emergency Vehicles—Vehicle and Traffic
Law § 1104**

As you have heard, AB claims to have been injured when CD, the driver of the (police car, fire engine, ambulance) was (speeding, went through a red light at high speed) and collided with AB's car. AB claims that CD violated [*specify applicable traffic law(s)*] and was driving with reckless disregard for the safety of others. Drivers of emergency vehicles are allowed to disobey certain traffic laws under some circumstances, but they are liable for injuries caused if they act with reckless disregard for the safety of others.

CD claims that (he, she) was driving an emergency vehicle in an emergency operation and going to the scene of (an injury, a crime, a fire) when the collision occurred. CD denies that (he, she) was (speeding, went through a red light at high speed) and that (he, she) was driving with reckless disregard for the safety of others.

Reckless disregard is not the same thing as

negligence. Negligence is failing to exercise reasonable care under the circumstances. On the other hand, a person acts with reckless disregard for the safety of others when (he, she) intentionally does an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. The act must have been done with conscious indifference to the outcome.

AB has the burden to prove that CD acted with reckless disregard for the safety of others as I have defined that term for you. In deciding whether CD acted in reckless disregard for the safety of others, you may consider such factors as: (the nature of the emergency, road, traffic and weather conditions, the time of day, the speed of CD's vehicle, whether CD followed departmental guidelines, whether the emergency signals of CD's vehicle were activated).

If you decide that CD did not (speed, go through a red light at high speed), you will find for CD. If you decide that CD did (speed, go through a red light at high speed), you will then determine whether CD acted with reckless disregard for the safety of others. If you decide that CD did not act with reckless disregard for the safety of others, you will find for CD. If you decide that CD acted in reckless disregard for the safety of others, you will consider whether CD's actions were a substantial factor in causing AB's injuries.

Comment

Caveat 1: The pattern charge is intended for use in a case in which there are factual issues concerning the manner in which the emergency vehicle was operated (e.g., the vehicle was speeding, went through a red light at a high speed), and whether the driver of the emergency vehicle was driving with reckless disregard for the safety of others. In the event that only one issue is to be resolved by the jury (e.g., whether the driver of the emergency vehicle was driving with reckless disregard for the safety of others), the charge must be modified accordingly.

Caveat 2: The reckless disregard standard of care in Vehicle and

Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b), *Kabir v Monroe*, 16 NY3d 217, 920 NYS2d 268, 945 NE2d 461 (2011). As a result of the exemptions afforded by § 1104(b), a driver of an authorized emergency vehicle involved in an emergency operation may (a) stop and stand in locations where stopping and standing is otherwise prohibited, (b) proceed past a steady red signal, a flashing red signal or a stop sign after slowing down “as may be necessary for safe operation,” (c) exceed the speed limit, provided that life and property are not endangered, and (d) disregard regulations regarding turning or moving in specified directions, *id.* Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence, *id.*

Caveat 3: The reckless disregard standard reflected in the charge is not applicable where an authorized operator of an emergency vehicle is seeking to recover for his or her own injuries and defendant is asserting the operator’s comparative fault as a defense. In that situation, the standard for measuring the operator’s fault is ordinary negligence rather than recklessness, *Ayers v O’Brien*, 13 NY3d 456, 896 NYS2d 295, 923 NE2d 578 (2009).

In addition to the foregoing instruction, proximate cause must be charged unless the facts are undisputed. For a charge on proximate cause, see PJI 2:70.

Based on *Frezzell v New York*, 24 NY3d 213, 997 NYS2d 367, 21 NE3d 1028 (2014); *Kabir v Monroe*, 16 NY3d 217, 920 NYS2d 268, 945 NE2d 461 (2011); *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252, 686 NE2d 1346 (1997); *Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297, 644 NE2d 988 (1994); *Salzano v Korba*, 296 AD2d 393, 745 NYS2d 56 (2d Dept 2002); *Notorangelo v State*, 240 AD2d 716, 659 NYS2d 312 (2d Dept 1997); see Comment to PJI 2:10; see also *McAndrews v New York*, 100 NY2d 603, 769, 769 NYS2d 151, 801 NE2d 371 (2003); *Criscione v New York*, 97 NY2d 152, 736 NYS2d 656, 762 NE2d 342 (2001).

Vehicle & Traffic Law § 1104 provides that the driver of an “authorized emergency vehicle” (defined in VTL § 101) engaged in an “emergency operation” may (a) stop and stand in locations where stopping and standing is otherwise prohibited, (b) proceed past a steady red signal, a flashing red signal or a stop sign after slowing down “as may be necessary for safe operation,” (c) exceed the speed limit, provided that life and property are not endangered and (d) disregard regulations regarding turning or moving in specified directions, see also VTL § 1110(a). If the conditions set forth in VTL § 1104 are satisfied, the operator of the vehicle cannot be held liable for accidents as long as he or she acted “with due regard for the safety of others” and did not act in “reckless disregard for the safety of others,” VTL § 1104(e); see *Frezzell v New York*, 24 NY3d 213, 997 NYS2d 367, 21 NE3d 1028 (2014); *Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297, 644 NE2d 988 (1994); *Campbell v Elmira*, 84 NY2d 505, 620 NYS2d 302, 644 NE2d 993 (1994). Where

the operator of an emergency vehicle is engaged in an “emergency operation” as defined in VTL § 114-b, the court must instruct the jury that the defendant may only be held liable if the conduct of the operator demonstrated a reckless disregard for the safety of others, *Molinari v New York*, 267 AD2d 436, 700 NYS2d 489 (2d Dept 1999); see *Criscione v New York*, 97 NY2d 152, 736 NYS2d 656, 762 NE2d 342 (2001); *Mulholland v Nabisco, Inc.*, 264 AD2d 411, 693 NYS2d 242 (2d Dept 1999). With the exception of vehicles operated as police emergency vehicles and bicycles, the operator of the emergency vehicle may rely on the statutory exemptions from traffic regulations only if the vehicle’s audible signals and visible red lights are activated while the vehicle is in motion, VTL § 1104(c); see *Frezzell v New York*, supra; *Jones v Albany County Sheriff’s Dept.*, 123 AD3d 1331, 999 NYS2d 260 (3d Dept 2014).

The privilege provided in VTL § 1104 applies only if the driver of the authorized emergency vehicle was engaged in both an “emergency operation” and conduct falling within one of the four categories of privileged activities enumerated in the statute, *Kabir v Monroe*, 16 NY3d 217, 920 NYS2d 268, 945 NE2d 461 (2011); see *Levere v Syracuse*, 173 AD3d 1702, 103 NYS3d 212 (4th Dept 2019) (officer proceeding against a steady red light while conducting emergency operation exempted from rules of the road under VTL § 1104 [b] [2]). Thus, in *Kabir*, the privilege did not apply to a police officer who was driving in slow-moving traffic and who rear-ended a vehicle after looking down at his mobile data terminal to ascertain the location of a burglary to which he had been dispatched. Since such conduct did not fall within the categories of activities enumerated in VTL § 1104(b), the officer’s municipal employer could be held liable for his ordinary negligence even though he was arguably engaged in an “emergency operation” at the time of the accident, *Kabir v Monroe*, supra; see *Benn v New York Presbyterian Hosp.*, 120 AD3d 453, 990 NYS2d 584 (2d Dept 2014) (failure to abide by VTL §§ 1111 and 1112 relating to right of way of pedestrians not conduct specified in VTL § 1104(b)); *Starkman v Long Beach*, 106 AD3d 1076, 965 NYS2d 609 (2d Dept 2013) (failure to see that which was there to be seen not conduct specified in VTL § 1104(b)); *LoGrasso v Tonawanda*, 87 AD3d 1390, 930 NYS2d 129 (4th Dept 2011) (officer did not proceed past a stop sign, conduct exempt under VTL § 1104 (b), but stopped and looked both ways, and thus injury-causing conduct governed by ordinary negligence). Where there is conflicting testimony as to whether the officer proceeded through a steady red signal or whether the traffic light was green, the factfinder’s resolution of that issue will determine the standard of care by which the officer’s conduct must be evaluated, *Odde v Buffalo*, 159 AD3d 1519, 72 NYS3d 706 (4th Dept 2018) (citing PJI). In such a case, if the jury finds that the officer, who otherwise meets the requirements of VTL § 1104, was proceeding through a steady red signal, the reckless disregard standard would apply, *id.* However, if the jury finds that the officer was proceeding through a green signal, then the officer’s conduct is governed by principles of ordinary negligence, *id.* VTL § 1104 has no applicability to a vehicle such as a snowplow put to its intended use; the pertinent statute applicable to such vehicles is VTL § 1103(b), see this Comment, *infra*; *Howell v State*, 169 AD3d 1208, 93 NYS3d 736 (3d Dept 2019).

A police officer operating a patrol vehicle while responding to a police dispatch to investigate a 911 call regarding a family dispute is involved in an “emergency operation” under VTL § 114-b, *Criscione v New York*, 97 NY2d 152, 736 NYS2d 656, 762 NE2d 342 (2001); see *Jones v Albany County Sheriff’s Dept.*, 123 AD3d 1331, 999 NYS2d 260 (3d Dept 2014) (police officer assisting another officer who appeared to be having trouble with a detained suspect was engaged in an emergency operation). However, an officer who drives onto a highway to look for a truck whose occupants were reportedly throwing litter onto the road is not involved in an emergency operation, *DeLuca v Blanco*, 31 AD3d 600, 819 NYS2d 86 (2d Dept 2006), nor is an officer who had double-parked his or her police vehicle for 15 to 20 minutes in order to observe two suspects, *Quintero v New York*, 113 AD3d 414, 978 NYS2d 155 (1st Dept 2014). A parole officer operating a State-owned vehicle while investigating whether a person he observed operating a vehicle in the opposite lane of traffic was a parole absconder was not engaged in an “emergency operation,” *Rusho v State*, 76 AD3d 783, 906 NYS2d 836 (4th Dept 2010). The nature of the underlying police call or the officer’s perception of its urgency is not relevant in determining whether the officer was engaged in an emergency operation pursuant to VTL § 1104, although it may be relevant to the question whether the officer was acting in reckless disregard for the safety of others, *O’Banner v Sullivan*, 16 AD3d 950, 792 NYS2d 230 (3d Dept 2005).

The Court of Appeals has construed the “due regard” and “reckless disregard” provisions as imposing liability upon the driver for reckless disregard, not lack of due care under the circumstances, *Saarin v Kerr*, 84 NY2d 494, 620 NYS2d 297, 644 NE2d 988 (1994); *Campbell v Elmira*, 84 NY2d 505, 620 NYS2d 302, 644 NE2d 993 (1994); see *Frezzell v New York*, 24 NY3d 213, 997 NYS2d 367, 21 NE3d 1028 (2014); *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252, 686 NE2d 1346 (1997); *Sweeney v Peterson*, 1 AD3d 650, 766 NYS2d 255 (3d Dept 2003); *Brkani v New York*, 211 AD2d 740, 621 NYS2d 696 (2d Dept 1995); *McCullen v Rensselaer*, 210 AD2d 779, 620 NYS2d 527 (3d Dept 1994); *Palella v Palella v State*, 141 AD2d 999, 530 NYS2d 650 (3d Dept 1988); *Kerwin v Broome*, 134 AD2d 812, 521 NYS2d 871 (3d Dept 1987); *Klayman v New York*, 130 AD2d 551, 515 NYS2d 285 (2d Dept 1987) (citing PJI). This construction does not convert the action from one governed by the three-year statute of limitations to one governed by the one-year statute of limitations, *Smelts v Deputy Monroe County Sheriff O’Hara*, 302 AD2d 948, 753 NYS2d 921 (4th Dept 2003). The court must ensure when charging the jury with respect to VTL § 1104(e) that it defines the “reckless disregard” standard, *McAndrews v New York*, 100 NY2d 603, 769 NYS2d 151, 801 NE2d 371 (2003). “Reckless disregard,” which has been characterized as an exacting standard, is defined as “the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow and done with a conscious indifference to the outcome”, *Saarin v Kerr*, *supra* (internal citations omitted); see *Frezzell v New York*, *supra*; *Gonzalez v Iocovello*, 93 NY2d 539, 693 NYS2d 486, 715 NE2d 489 (1999); *Szczerbiak v Pilat*, *supra*; *Primeau v*

Amherst, 17 AD3d 1003, 794 NYS2d 169 (4th Dept 2005), *aff'd*, 5 NY3d 844, 806 NYS2d 145, 840 NE2d 114 (2005); *Rodriguez-Garcia v Southampton Police Department*, 185 AD3d 744, 124 NYS3d 870 (2d Dept 2020); *Jobson v SM Livery, Inc.*, 175 AD3d 1510, 109 NYS3d 376 (2d Dept 2019); *Wonderly v Poughkeepsie*, 185 AD3d 632, 125 NYS3d 734 (2d Dept 2020); *Gonyea v Saratoga*, 23 AD3d 790, 803 NYS2d 764 (3d Dept 2005); *Salzano v Korba*, 296 AD2d 393, 745 NYS2d 56 (2d Dept 2002); *Notorangelo v State*, 240 AD2d 716, 659 NYS2d 312 (2d Dept 1997); see also *McAndrews v New York*, *supra*. This standard requires more than a momentary lapse on the part of the vehicle operator, *Saarinén v Kerr*, *supra*; *Green v State*, 71 AD3d 1310, 897 NYS2d 536 (3d Dept 2010). Whether the operator of the emergency vehicle recklessly disregarded the safety of others is a fact-specific inquiry focused on the precautionary measures taken by the operator to avoid causing harm to the general public weighed against his or her duty to respond to an urgent emergency situation, *Frezzell v New York*, *supra*.

VTL § 1103(b) exempts from the rules of the road all vehicles actually engaged in work on a highway, including “hazard vehicles” such as street sweepers and snowplows, *Riley v Broome*, 95 NY2d 455, 719 NYS2d 623, 742 NE2d 98 (2000); *Howell v State*, 169 AD3d 1208, 93 NYS3d 736 (3d Dept 2019); *Hofmann v Ashford*, 60 AD3d 1498, 876 NYS2d 588 (4th Dept 2009); *Skolnick v Hempstead*, 278 AD2d 481, 718 NYS2d 81 (2d Dept 2000); Introductory Statement to PJI 2:75; see *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 14 NYS3d 280, 35 NE3d 448 (2015). The exemption turns on the nature of the work being performed, i.e., construction, repair, maintenance or similar work, and not on the nature of the vehicle performing the work, *Riley v Broome*, *supra*. Ordinary refuse collection by a municipal garbage truck is not a class of work to which the statute applies, *Guzman v Bowen*, 38 AD3d 837, 833 NYS2d 548 (2d Dept 2007). VTL § 1103(b) is applicable only if the vehicle was actually performing work on a highway at the time of the accident and is inapplicable if the vehicle was traveling between work sites, *Hofmann v Ashford*, *supra*. The vehicle need not be performing assigned work at the time of the accident; so long as the vehicle is engaged in work that is within the scope of its duties, VTL § 1103(b) may apply, *Gawron v Cheektowaga*, 117 AD3d 1410, 984 NYS2d 715 (4th Dept 2014); see *Matsch v Chemung County Dept. of Public Works*, 128 AD3d 1259, 9 NYS3d 724 (3d Dept 2015) (street sweeper diving along highway to make additional, necessary pass over area that required sweeping was “actually engaged” in protected work; that sweeper broom not engaged at time of accident not determinative to applicability of VTL § 1103[b]). As to the definition of a “highway,” see *id* (service road can constitute a highway). VTL § 1103(b) imposes the same recklessness standard on vehicles engaged in work on a highway, such as street sweepers and snowplows, *Riley v Broome*, *supra*; *Primeau v Amherst*, 17 AD3d 1003, 794 NYS2d 169 (4th Dept 2005), *aff'd*, 5 NY3d 844, 806 NYS2d 145, 840 NE2d 114 (2005); *Farese v Carmel*, 296 AD2d 436, 745 NYS2d 197 (2d Dept 2002) (tractor mowing grass at guardrail); *Skolnick v Hempstead*, *supra*; *Kearns v Piatt*, 277 AD2d 677, 716 NYS2d 418 (3d Dept 2000) (sand truck); see *Deleon v New York City Sanitation Dept.*, *supra*.

It takes more than a “momentary judgment lapse” to satisfy the reckless disregard test, *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252, 686 NE2d 1346 (1997); *Saarinén v Kerr*, 84 NY2d 494, 620 NYS2d 297, 644 NE2d 988 (1994); see *Lorber v Hamburg*, 225 AD2d 1062, 639 NYS2d 607 (4th Dept 1996). The fact that the officer was turning unintentionally in the wrong direction onto a one-way street, *Gervasi v Peay*, 254 AD2d 172, 679 NYS2d 45 (1st Dept 1998), or was exceeding the speed limit does not, standing alone, constitute a predicate for the imposition of liability, *Schieren v State*, 281 AD2d 828, 722 NYS2d 128 (3d Dept 2001); *Powell v Mount Vernon*, 228 AD2d 572, 644 NYS2d 766 (2d Dept 1996); see *Rice v Buffalo*, 145 AD3d 1503, 44 NYS3d 281 (4th Dept 2016). Similarly, the fact that the officer, in response to the conduct of a motorist, established a stationary vehicular roadblock, in substantial compliance with police guidelines, and provided an escape route should the motorist have decided not to stop, does not constitute a predicate for imposing liability, *Csizmadia v Town Of Webb*, 289 AD2d 854, 735 NYS2d 222 (3d Dept 2001); see *Gonyea v Saratoga*, 23 AD3d 790, 803 NYS2d 764 (3d Dept 2005) (parking police car primarily on shoulder and partially in road, consistent with police policies, with emergency lights activated, not predicate for liability). In *Szczerbiak v Pilat*, *supra*, the Court of Appeals distinguished *Campbell v Elmira*, 84 NY2d 505, 620 NYS2d 302, 644 NE2d 993 (1994), asserting that in *Campbell* the driver of the fire truck may have been reckless when he drove through a red traffic light without using a siren, horn or flashing light, see also *Rodriguez-Garcia v Southampton Police Department*, 185 AD3d 744, 124 NYS3d 870 (2d Dept 2020) (issue of fact as to whether officer was reckless in straddling double-yellow line to pass row of vehicles without using warning siren or lights); *Wonderly v Poughkeepsie*, 185 AD3d 632, 125 NYS3d 734 (2d Dept 2020) (merely activating sirens and lights to pull over vehicle not reckless); *Regdos v Buffalo*, 132 AD3d 1343, 17 NYS3d 528 (4th Dept 2015) (police officer’s excessive speed, failure to activate emergency lights and siren and slow down or brake as she approached plaintiff’s vehicle from behind, plaintiff’s timely and appropriate engagement of left turn signal, and officer’s attempt to pass plaintiff’s vehicle on left on wrong side of street constituted reckless disregard for safety of others); *Rockhead v Troche*, 17 AD3d 118, 791 NYS2d 823 (1st Dept 2005) (issue of fact as to whether deputy sheriffs who pursued stolen van at high rate of speed through residential, heavily trafficked area and who passed through red light acted recklessly); *Gordon v Nassau*, 261 AD2d 359, 689 NYS2d 192 (2d Dept 1999) (where police officer traveled at high rate of speed down center turning lane of main thoroughfare heavily congested with traffic and did not engage emergency siren before colliding with plaintiff’s car and did not attempt to decelerate while approaching red light, issue whether officer’s conduct rose to level of “reckless disregard” for safety of others was question for jury); *Hudson v Boutin*, 239 AD2d 624, 656 NYS2d 781 (3d Dept 1997) (where police officer failed to set up flares and intentionally parked his vehicle in driving lane of interstate highway on night with freezing rain mixed with snow, issue of whether officer’s conduct rose to level of recklessness was matter for jury). In *Szczerbiak v Pilat*, *supra*, however, the Court held that a police officer could not be held liable for driving

800 feet at an increased speed before attempting to engage his emergency lights and siren when there was no pedestrian traffic in sight and he was several blocks from the next intersection, see *Frezzell v New York*, 24 NY3d 213, 997 NYS2d 367, 21 NE3d 1028 (2014) (police officer's conduct in driving police car against the flow of traffic did not rise to level of reckless disregard for safety of others; officer slowed car as he turned on subject street and was driving below speed limit on clear, dry evening, and officer took measures to avoid collision with plaintiff's vehicle). The operator of fire truck did not act with reckless disregard for the safety of others, as a matter of law, where the truck's lights and siren were activated and the operator either stopped or slowed sufficiently before entering intersection where the accident occurred, *Jobson v SM Livery, Inc.*, 175 AD3d 1510, 109 NYS3d 376 (2d Dept 2019). A Thruway Authority employee who parked a truck outside of the lane of travel and activated the truck's hazard lights did not act with reckless disregard toward passengers of vehicle that struck the truck, despite his violation of safety regulation requiring him to park "as far from traffic as feasible," *Alexandra R. v Krone*, 186 AD3d 981, 129 NYS3d 579 (4th Dept 2020).

The plaintiff bears the burden of establishing that the driver of the authorized emergency vehicle intentionally drove in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and did so with conscious indifference to the outcome, *Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297, 644 NE2d 988 (1994); *Molinari v New York*, 267 AD2d 436, 700 NYS2d 489 (2d Dept 1999); *King v Cobleskill*, 237 AD2d 689, 654 NYS2d 439 (3d Dept 1997); *Lorber v Hamburg*, 225 AD2d 1062, 639 NYS2d 607 (4th Dept 1996); see *Alexandra R. v Krone*, 186 AD3d 981, 129 NYS3d 579 (4th Dept 2020). The nature of the call to which the emergency vehicle was responding is relevant in determining whether the responding officer acted recklessly, *O'Banner v Sullivan*, 16 AD3d 950, 792 NYS2d 230 (3d Dept 2005). Where the evidence indicates that the conduct of the fleeing motorist posed a threat to the public safety, a police officer is authorized to use whatever means are necessary, short of reckless disregard for the safety of others, to overtake and stop the offending driver, *Powell v Mount Vernon*, 228 AD2d 572, 644 NYS2d 766 (2d Dept 1996); see *Alexander v New York*, 176 AD3d 659, 107 NYS3d 688 (2d Dept 2019); *Schieren v State*, 281 AD2d 828, 722 NYS2d 128 (3d Dept 2001). Officers did not act with reckless disregard in attempting to pull over a vehicle that abruptly accelerated through a red light and struck plaintiffs' decedents' vehicle, *Wonderly v Poughkeepsie*, 185 AD3d 632, 125 NYS3d 734 (2d Dept 2020).

Operators of authorized emergency vehicles must comply with the restrictions of VTL § 1104 as well as departmental procedures, *Marigliano v New York*, 196 AD2d 533, 601 NYS2d 161 (2d Dept 1993) (abrogated on other grounds by, *Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769, 716 NYS2d 24 (2d Dept 2000)) (failure to abide by departmental rules may be offered as some evidence of negligence). To establish liability, plaintiff must prove that the violation of internal

departmental rules and regulations constituted reckless conduct, *Cavigliano v Livingston*, 254 AD2d 817, 678 NYS2d 186 (4th Dept 1998); *Dibble v Rotterdam*, 234 AD2d 733, 650 NYS2d 897 (3d Dept 1996). The jury may consider the training received by the operator and guidelines issued by his/her employer, *Palella by Palella v State*, 141 AD2d 999, 530 NYS2d 650 (3d Dept 1988). The statute requires the operator to use an audible signal to warn motorists of his/her approach, VTL § 1104(4)(c); see *Abood v Hospital Ambulance Service, Inc.*, 30 NY2d 295, 332 NYS2d 877, 283 NE2d 754 (1972); *Thain v New York*, 35 AD2d 545, 313 NYS2d 484 (2d Dept 1970), *aff'd*, 30 NY2d 524, 330 NYS2d 67, 280 NE2d 892 (1972); *Ryan v Riverhead*, 117 AD3d 707, 985 NYS2d 584 (2d Dept 2014); see also *Rice v Buffalo*, 145 AD3d 1503, 44 NYS3d 281 (4th Dept 2016). Police vehicles, however, are exempt from the requirement that audible signals be emitted when an emergency vehicle is in motion, *Frezzell v New York*, 24 NY3d 213, 997 NYS2d 367, 21 NE3d 1028 (2014); see *Jones v Albany County Sheriff's Dept.*, 123 AD3d 1331, 999 NYS2d 260 (3d Dept 2014). The privilege afforded to operators of authorized emergency vehicles engaged in an emergency operation pursuant to VTL § 1104 was held inapplicable to an unmarked car that had no flashing lights or sirens operating while responding to the scene of a buy-and-bust operation, *Mattera v Avis Rent A Car System, Inc.*, 245 AD2d 274, 665 NYS2d 94 (2d Dept 1997). A police vehicle is an authorized emergency vehicle regardless of whether it is marked; that the vehicle is unmarked may be relevant on whether the officer acted recklessly, *Jones v Albany County Sheriff's Dept.*, *supra*.

Pursuant to Vehicle & Traffic Law § 1144, a driver is required to yield the right of way and, among other precautions, stay clear of an intersection where an emergency vehicle's red rotating lights, siren and air horn have been activated, *Tobacco v North Babylon Fire Dept.*, 251 AD2d 398, 674 NYS2d 125 (2d Dept 1998). For a general discussion of liability resulting from collisions with emergency vehicles, see Annot: 4 ALR4th 865; 82 ALR2d 312; 83 ALR2d 383; 84 ALR2d 121.

Various statutes govern the operation of emergency vehicles: VTL §§ 100-b (definition of ambulance), 101 (definition of authorized emergency vehicle), 114-b (emergency operation), 115-a (definition of fire vehicle), 115-c (definition of emergency ambulance service vehicle), 132-a (definition of police vehicle), 1103, 1104, 1110, 1144; see *Sierk v Frazon*, 32 AD3d 1153, 821 NYS2d 689 (4th Dept 2006) (vehicle owned by public housing authority operated by law enforcement officer); *Klayman v New York*, 130 AD2d 551, 515 NYS2d 285 (2d Dept 1987) (New York City Corrections Department vehicle, responding to inmate disturbance, is emergency vehicle). For a discussion of the interplay of several of these statutes, see *Criscione v New York*, 97 NY2d 152, 736 NYS2d 656, 762 NE2d 342 (2001). Under certain circumstances, ambulances may be prohibited from operating on a specifically designated highway, VTL § 1104(f). When VTL § 1104 is charged, VTL § 1144 also should be charged if the facts warrant, *Ciurca v Rochester*, 29 AD2d 914, 289 NYS2d 780 (4th Dept 1968). VTL § 1104(e) should be charged together with VTL § 1104(2)(b), *Siivonen v Oneida*, 33 AD2d 934, 306 NYS2d 278 (3d Dept 1970).

PJI 2:80. Motor Vehicle Accidents—Collision at Intersection Controlled by Stop or Yield Sign

Section 1172 of the Vehicle and Traffic Law provides [*read applicable portion only*]:

“Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.”

In applying this provision of the statute, you must first decide whether the (plaintiff, defendant) actually stopped as required. If you decide that (he, she) failed to stop as required, (plaintiff, defendant) was negligent.

If you decide that (plaintiff, defendant) did stop, (he, she) was required to comply with the provisions of Section 1142(a), which provides:

“Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop . . . and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.”

This section requires that a driver, after having stopped, yield the right of way to an approaching vehicle if a collision might occur if (he, she) proceeds. If you decide that (plaintiff, defendant)

failed to yield the right of way as required, (plaintiff, defendant) was negligent.

Comment

[See also Introductory Statement preceding 2:75.]

Caveat: Local law, ordinance, rule or regulation may supersede the Vehicle & Traffic Law, see Introductory Statement preceding 2:75. In such case the applicable provision, which constitutes only some evidence of negligence, see PJI 2:29, should be substituted for the Vehicle & Traffic Law.

The charge is based on *Albrecht v Karbner*, 30 AD2d 545, 290 NYS2d 654 (2d Dept 1968) (error to refuse to charge applicable portion of VTL § 1172(a)). If one of the parties is an infant, the charge should include PJI 2:49, *Poczkal v Cartwright*, 65 AD2d 945, 410 NYS2d 488 (4th Dept 1978) (twelve-year-old bicyclist struck by car).

A through highway is defined as one on which vehicular traffic is given preferential right of way, VTL § 149. Thus, for example, where an intersection is controlled by a stop sign or flashing red light on one highway and a yield sign or flashing yellow light on the other highway, the motorist confronted with the yield sign or flashing yellow light has the right of way, *Milka v Hernandez*, 187 AD2d 1031, 590 NYS2d 342 (4th Dept 1992); *Bartholomew v New York Tel. Co.*, 35 AD2d 767, 315 NYS2d 71 (3d Dept 1970). The driver of a vehicle approaching a yield sign may be required to stop before entering the intersection, subject to the general right of way rules provided in VTL § 1142.

Where one street of an intersection is controlled by a stop sign (the subordinate highway) and the cross street is not (the through highway), a motorist stopped on the subordinate highway is required to yield to traffic on the through highway, VTL § 1140; see VTL § 149 (defining through highway). Prior to the adoption of VTL § 1140, courts had construed then VTL §§ 82(4) and 90 as giving the right of way to the vehicle on the right, even if it was entering the intersection from a subordinate highway, see *Petoff v Wilkins*, 277 App Div 748, 103 NYS2d 351 (3d Dept 1951).

In some circumstances, it may be improper for the court to charge both VTL § 1140(a) or (b) and VTL § 1142(a), *Le Claire v Pratt*, 270 AD2d 612, 704 NYS2d 354 (3d Dept 2000); *Hohenstein v Mosher*, 36 AD2d 662, 318 NYS2d 247 (3d Dept 1971) (citing PJI); *O'Connor v Eggleston*, 31 AD2d 735, 297 NYS2d 29 (4th Dept 1968) (citing PJI). For instance, the provisions of VTL § 1140 are inapplicable where the intersection is controlled by a stop sign, *Le Claire v Pratt*, *supra*; see VTL § 1140(c). VTL §§ 1142 and 1172 deal specifically with the rights and obligations of vehicles at intersections controlled by stop signs and must supersede the more general right of way rules of VTL § 1140, *Le Claire v Pratt*, *supra*; *Hohenstein v Mosher*, *supra*.

The failure of a motorist to yield the right of way in violation of the statute is negligence as a matter of law and cannot be disregarded by the jury, *Weiser v Dalbo*, 184 AD2d 935, 585 NYS2d 124 (3d Dept 1992); see *Heltz v Barratt*, 115 AD3d 1298, 983 NYS2d 160 (4th Dept 2014), *aff'd* 24 NY3d 1185, 3 NYS3d 757, 27 NE3d 471 (2014) (summary judgment dismissing complaint proper where plaintiff had stop sign, defendant did not have traffic control and defendant could not have avoided accident); *Driscoll v Casey*, 299 AD2d 885, 750 NYS2d 223 (4th Dept 2002) (summary judgment properly granted to plaintiff where defendant entered plaintiff's lane only an instant before collision); *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 (2d Dept 1997) (plaintiff established entitlement to partial summary judgment on issue of liability based on defendant's violation of VTL § 1142(a)); *Anastasio v Scheer*, 239 AD2d 823, 658 NYS2d 467 (3d Dept 1997). A driver is entitled to anticipate that a motorist facing a stop sign will yield the right of way, *Friedberg v Citiwide Auto Leasing, Inc.*, 22 AD3d 522, 801 NYS2d 770 (2d Dept 2005); *Morgan v Hachmann*, 9 AD3d 400, 780 NYS2d 33 (2d Dept 2004); *Driscoll v Casey*, *supra*. The fact that the view of a motorist properly stopped is obscured does not exculpate the motorist; the motorist is under a common-law duty to see what is there to be seen, *Weiser v Dalbo*, *supra*; *Olsen v Baker*, 112 AD2d 510, 490 NYS2d 916 (3d Dept 1985). Further, the fact that the motorist may have initially stopped at the stop sign does not negate his or her liability if he or she subsequently failed to yield the right of way, *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650, 854 NYS2d 763 (2d Dept 2008); *Friedberg v Citiwide Auto Leasing, Inc.*, 22 AD3d 522, 801 NYS2d 770 (2d Dept 2005); *Morgan v Hachmann*, *supra*. The motorist may assert an unexpected brake failure in an attempt to excuse the violation, *Gamar v Gamar*, 114 AD2d 487, 494 NYS2d 402 (2d Dept 1985), but only if the motorist makes a two-pronged showing that the brake problem was unanticipated and that he or she exercised reasonable care to keep the brakes in good working order, *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 (1st Dept 2010).

The pattern charge concerns the duty of the driver on the subordinate highway. For a charge covering the duty of the driver on the through highway, see PJI 2:80A.

PJI 2:80A. Motor Vehicle Accidents—Duty of Driver on Through Highway

As the driver traveling on the through highway, (plaintiff, defendant) had the right to assume that vehicles traveling on intersecting streets would obey the provisions of Vehicle and Traffic Law, Section 1142(a). However, a driver traveling on a through highway is still required to use reasonable care and may not proceed recklessly into the intersection in disregard of a vehicle traveling on an intersecting street. A driver proceeds reck-

lessly after (he, she) knows or has reason to know that the other vehicle has entered or is about to enter the intersection without stopping.

Comment

The court should give this charge in conjunction with PJI 2:80. The charge explains the duty of the driver on the through highway and is based on *Lee v City Brewing Corporation*, 279 NY 380, 18 NE2d 628 (1939); *Scott v New York*, 259 App Div 851, 19 NYS2d 443 (2d Dept 1940); see *Shea v Judson*, 283 NY 393, 28 NE2d 885 (1940); *Gilkerson v Buck*, 167 AD3d 1470, 90 NYS3d 750 (4th Dept 2018) (driver on through highway has duty to exercise reasonable care in proceeding through intersection; driver cannot “blindly and wantonly” enter intersection); *Aunchman v Palen*, 186 AD2d 104, 587 NYS2d 710 (2d Dept 1992); *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977). A motorist, aware of the presence of a stop sign on the subordinate highway, is entitled to assume that the driver on the subordinate highway will stop, *Le Claire v Pratt*, 270 AD2d 612, 704 NYS2d 354 (3d Dept 2000); *Terrell v Kissel*, 116 AD2d 637, 497 NYS2d 716 (2d Dept 1986); see *Pena v Santana*, 5 AD3d 649, 774 NYS2d 744 (2d Dept 2004) (motorist on through highway entitled to anticipate that driver backing out of driveway would yield). Additionally, a driver has no duty to watch for and avoid a driver who might fail to stop or to proceed with due caution at a stop sign, *Doxtader v Janczuk*, 294 AD2d 859, 741 NYS2d 368 (4th Dept 2002); *Perez v Brux Cab Corp.*, 251 AD2d 157, 674 NYS2d 343 (1st Dept 1998). The fact that a party facing a stop sign was unable to drive through an intersection without being struck by another vehicle on a through street is compelling evidence that the party had reason to know of the existence of the immediate hazard of proceeding into the intersection, *Le Claire v Pratt*, *supra*.

Notwithstanding the presence of a stop sign at an intersection, the driver traveling on the uncontrolled through highway may not have the right of way with respect to a vehicle that has already entered the intersection, *Nevarez v S.R.M. Management Corp.*, 58 AD3d 295, 867 NYS2d 431 (1st Dept 2008); see *Rivera v Berrios Trans Service Inc.*, 64 AD3d 416, 882 NYS2d 114 (1st Dept 2009). Thus, where plaintiff testified that she stopped at a stop sign, looked to the left and right, observed no vehicles approaching the intersection and was struck on the passenger side of her vehicle only after she crossed the double yellow line on the far side of the through street and heard her passenger say that a car was approaching “mad fast,” a question of fact existed as to whether the vehicle that struck her had the right of way, *id.* Further, even if the approaching vehicle did have the right of way, a question of fact existed in such circumstances as to the comparative negligence of that vehicle’s operator, *Nevarez v S.R.M. Management Corp.*, *supra*.

For a charge covering the respective rights and obligations when the stop sign is missing or obscured, see PJI 2:80B. For the definitions of “intersection” and “stop,” see VTL §§ 120, 146.

**PJI 2:80B. Motor Vehicle Accidents—Duties of Motorists
Where Stop Sign is Missing or Obscured**

In this case, (plaintiff, defendant) contends that the stop sign was (missing, obscured). The first question for you to decide is whether the stop sign was (in place, sufficiently visible to be seen by an ordinarily observant person). If you find that it was, (plaintiff's, defendant's) failure to stop was negligence. If you find that it was not, you must decide whether (plaintiff, defendant) knew or in the use of reasonable care should have known that the intersecting highway was a through highway. If you find that (plaintiff, defendant) knew or should have known that fact, (plaintiff's, defendant's) failure to stop was negligence. If you find that (plaintiff, defendant) did not know and had no reason to know that the intersecting road was a through highway, you must then decide whether (plaintiff, defendant) was negligent under the usual right-of-way rule that I just gave you.

Comment

A situation may arise where the driver on the subordinate highway is not aware of its subordinate nature or that the intersecting highway is a through highway because a stop sign is not in place or is not visible because it is twisted or obscured. The charge is based on the charge given in *New v Cortright*, 32 AD2d 576, 299 NYS2d 43 (3d Dept 1969) (Record on Appeal, p 275 ff) and *Del Villano v Lasky*, 8 AD2d 924, 187 NYS2d 205 (3d Dept 1959) (Record on Appeal, folio 803 ff); see also VTL §§ 1110(b), 1142(a), 1172 (a); Annot: 74 ALR2d 242; 8A NYJur2d, Automobiles, § 936. The principles of the stop sign cases apply to yield intersections, and the charge can be used in yield cases with appropriate modification to incorporate the rules enunciated in VTL §§ 1142(b) and 1172(b). For a discussion of municipal liability for failure to maintain a stop or yield sign properly, see PJI 2:226A. For the rights and duties of a motorist at an intersection controlled by a stop sign that is in place and visible, see PJI 2:80; at an intersection controlled by a traffic light or policeman, see PJI 2:79; at an uncontrolled intersection, see PJI 2:78.

The obligation of the driver on a subordinate highway to stop, imposed by VTL §§ 1142(a) and 1172(a), does not apply if the "sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person," VTL § 1110(b). If it is not, the driver's rights and obligations depend on whether the driver is aware that the intersecting

highway is a through highway. If so, the fact that the stop sign is missing or obscured is irrelevant, *Mays v Weiman*, 73 AD2d 639, 422 NYS2d 751 (2d Dept 1979) (quoting PJI); *Villa v Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4th Dept 1975) (quoting PJI); *Del Villano v Lasky*, 8 AD2d 924, 187 NYS2d 205 (3d Dept 1959). If the driver is not, the situation is governed by VTL § 1140 concerning uncontrolled intersections, see PJI 2:78.

If the sign is obscured, the driver on the subordinate highway has a duty to stop if he or she knows or should know that the stop sign was there, *New v Cortright*, 32 AD2d 576, 299 NYS2d 43 (3d Dept 1969). Whether the motorist's view of the stop sign was obstructed is a jury question. A person who removes a stop or yield sign or obscures it by parking in violation of VTL § 1202(a)(2)(c) may be liable to a person injured in a resulting collision, *New v Cortright*, 32 AD2d 576, 299 NYS2d 43 (3d Dept 1969); see also Annot: 64 ALR2d 1364.

(3) TURNING ACROSS TRAFFIC

PJI 2:81. Motor Vehicle Accidents—Turning Across Traffic

A motorist turning across traffic must use care in doing so because of the risk of an accident that such a turn creates. (He, she) must look out for approaching cars but need only wait until conditions are such that (he, she) may proceed safely. Other motorists must also show consideration and use due care not to collide with the turning car. The relative rights of the motorists depend upon distances and speeds.

Comment

[See also Introductory Statement to this division.]

Caveat: Local law, ordinance, rule or regulation may supersede or supplement the Vehicle & Traffic Law, see Introductory Statement to this division. In such a case the applicable provision, which constitutes only some evidence of negligence, see PJI 2:29, should be substituted for the Vehicle & Traffic Law or added to the charge.

Based on *Alphin v Dudish*, 8 AD2d 567, 183 NYS2d 464 (3d Dept 1959); see *Anderson v Burkardt*, 275 NY 281, 9 NE2d 929 (1937); *Rounds v Fitzgerald*, 207 App Div 534, 202 NYS 595 (3d Dept 1924), *aff'd*, 239 NY 568, 147 NE 199 (1924); *Doyle v Olin's Leasing Corp.*, 73 AD2d 634, 422 NYS2d 760 (2d Dept 1979); *Thompson v Korn*, 48 AD2d 1007, 368 NYS2d 923 (4th Dept 1975); *Hamby v Bonventre*, 36 AD2d 648, 318 NYS2d 178 (3d Dept 1971); *Annot*: 53 ALR4th 849; 38 ALR2d 143; 39 ALR2d 15; 39 ALR2d 65; 39 ALR2d 103. VTL § 1163(a) should also be charged upon request. It proscribes turns “unless and until such movement can be made with reasonable safety,” and requires that an appropriate signal be given, see *Brenner v Dixon*, 98 AD3d 1246, 951 NYS2d 635 (4th Dept 2012) (VTL § 1163(a) applies to bicyclists). Failure to give such a signal is negligence, *Hamby v Bonventre*, *supra*, but as long as there is a conflict in the testimony on the issue of signaling, the question remains for the jury, *Camp v Lyons*, 42 AD2d 804, 346 NYS2d 547 (3d Dept 1973); see *Pickard v Koenigstreuter*, 70 AD2d 693, 416 NYS2d 399 (3d Dept 1979). VTL § 1163(b) requires a turn signal to be “given continuously during not less than the last one hundred feet . . . before turning,” see *Secor v Kohl*, 67 AD2d 358, 415 NYS2d 434 (2d Dept 1979) (bicyclist not required to give such signal). As to the signals a bicyclist is required to give, see VTL §§ 1163(a) and 1237; *Brenner v Dixon*, 98 AD3d 1246, 951 NYS2d 635 (4th Dept 2012). With respect to changing from one lane to another, see VTL § 1128(d). With respect to “U” turns, see VTL § 1161.

The driver of a vehicle intending to turn left at a green traffic signal must yield the right of way to any oncoming traffic within the intersection or so close as to constitute an immediate hazard, see VTL § 1141; *Godwin v Mancuso*, 170 AD3d 1672, 95 NYS3d 710 (4th Dept 2019); *Hyo Jin Yoon v Guang Chen*, 127 AD3d 1023, 7 NYS3d 471 (2d Dept 2015); *Cadeau v Gregorio*, 104 AD3d 464, 961 NYS2d 106 (1st Dept 2013); *Vogel v Gilbo*, 276 AD2d 977, 715 NYS2d 455 (3d Dept 2000); *Mattera v Avis Rent A Car System, Inc.*, 245 AD2d 274, 665 NYS2d 94 (2d Dept 1997) (unmarked police car); *Stinehour v Kortright*, 157 AD2d 899, 550 NYS2d 169 (3d Dept 1990). A violation of VTL § 1141 constitutes negligence per se, *Katikireddy v Espinal*, 137 AD3d 866, 26 NYS3d 775 (2d Dept 2016); *Covington v Kumar*, 67 AD3d 463, 891 NYS2d 10 (1st Dept 2009); *Ciatto v Lieberman*, 266 AD2d 494, 698 NYS2d 54 (2d Dept 1999). However, a finding that a driver failed to yield the right-of-way in violation of Vehicle and Traffic Law § 1141 does not preclude the existence of an issue of fact as to comparative fault where there is conflicting evidence regarding how the accident occurred, *London v North*, 152 AD3d 884, 58 NYS3d 714 (3d Dept 2017); *Katikireddy v Espinal*, *supra*. A double yellow line does not prohibit a left turn to enter or leave the highway, VTL § 1126(b), nor is a level mall bounded by double yellow lines a “dividing section so constructed as to impede vehicular traffic” within the meaning of VTL § 1130 so as to proscribe a left turn across it, *Carroll v Conrad*, 30 AD2d 744, 291 NYS2d 731 (3d Dept 1968). VTL § 1126(c) permits driving within a two-way left turn lane or flush median preparatory to making a left turn. However, VTL § 1126(c) only permits driving within a two-way left turn lane “for such distance as is required for safety in preparing to turn left,” see *Darnley v Randazzo*, 159 AD3d 1578, 73 NYS3d 341 (4th Dept 2018) (issue of fact as to whether defendant was negligent for allegedly using center turning lane to bypass stopped traffic). For a turn at an uncontrolled intersection §§ 1141 and 1163 of the Vehicle and Traffic Law must be charged, see *Ciatto v Lieberman*, 266 AD2d 494, 698 NYS2d 54 (2d Dept 1999); the jury must be advised that the right of way depends upon the position and speed of the respective vehicles at the time the defendant entered the intersection, *Bogorad v Fitzpatrick*, 38 AD2d 923, 329 NYS2d 874 (1st Dept 1972), *aff’d*, 31 NY2d 984, 341 NYS2d 314, 293 NE2d 561 (1973), and inclusion of the definition of right of way (see VTL §§ 139, 1140) may be required. Violation of VTL § 1141 constitutes negligence per se, *Ciatto v Lieberman*, *supra*. For a turn at an intersection controlled by a traffic control sign, a charge based on VTL § 1111 must be given and on the facts of a particular case VTL § 1141 may also have application, see PJI 2:79. In *Gutman v Simon*, 224 AD2d 584, 638 NYS2d 682 (2d Dept 1996), the court held that § 1141 applies to an intersection collision on city streets but that it was error and confusing to also charge § 1140 that governs the right of way of vehicles approaching from a different highway. It is a jury question whether reasonable care requires the driver of one vehicle overtaking another about to make a left turn to give some audible signal of his or her approach before attempting to pass, *Penrose v Nichele*, 55 AD2d 1052, 391 NYS2d 928 (4th Dept 1977); see VTL § 1122.

(4) REAR END COLLISIONS

PJI 2:82. Motor Vehicle Accidents—Rear End Collisions—Negligence

The plaintiff AB claims that (his, her) vehicle was struck in the rear by a vehicle driven by the defendant CD. Since AB's vehicle was struck in the rear, you must find that CD was negligent, unless CD has provided an adequate explanation that does not involve any negligence on (his, her) part.

AB claims [*state plaintiff's claim, e.g., (he, she) was stopped at a traffic light, was stopped waiting to make a left turn, was parked*]. CD claims that (he, she) was unable to stop in time to avoid striking the rear of AB's vehicle because [*state CD's claim, e.g., there was an unexpected patch of ice in the road, (his, her) brakes unexpectedly failed*]. You must first decide whether or not the collision occurred as explained by CD. If you do not accept CD's explanation, then you must find for AB. If you accept CD's explanation, you must then decide whether CD was negligent. Negligence is the failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. If you find that CD failed to use reasonable care, then you must find that (he, she) was negligent and therefore caused the collision. If you accept CD's version of the event, and you further find that CD did use reasonable care under the circumstances, then you will find that CD was not negligent.

[Where appropriate, a comparative negligence charge should be given, see PJI 2:36, 2:45.]

Comment

[See also *Introductory Statement to this division*.]

Based on *Pampris v Egnasher*, 20 AD3d 746, 799 NYS2d 309 (3d Dept 2005); *Macauley v Elrac, Inc.*, 6 AD3d 584, 775 NYS2d 78 (2d Dept 2004); *Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 (2d Dept 2003); *Shamah v Richmond County Ambulance Service, Inc.*, 279 AD2d 564, 719 NYS2d 287 (2d Dept 2001); *Leonard v New York*, 273 AD2d 205, 708 NYS2d 467 (2d Dept 2000); *Levine v Taylor*, 268 AD2d 566,

702 NYS2d 107 (2d Dept 2000); *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 (2d Dept 1996); see also *Carter v Castle Elec. Contracting Co.*, 26 AD2d 83, 271 NYS2d 51 (2d Dept 1966).

Rear-end collisions often involve close following or “tailgating” in violation of Vehicle and Traffic Law (VTL) § 1129(a) and, consequently, there is often a degree of overlap in the courts’ discussions of the applicable standards, see *Pampris v Egnasher*, 20 AD3d 746, 799 NYS2d 309 (3d Dept 2005); *Malone v Morillo*, 6 AD3d 324, 775 NYS2d 312 (1st Dept 2004). However, not all rear-end collision cases involve close following or “tailgating,” see *Simpson v Eastman*, 300 AD2d 647, 753 NYS2d 104 (2d Dept 2002); *Holtermann v Cochetti*, 295 AD2d 680, 743 NYS2d 590 (3d Dept 2002); *Di Cesare v Glasgow*, 295 AD2d 1007, 743 NYS2d 646 (4th Dept 2002); *Torres v WABC Towing Corp.*, 282 AD2d 406, 724 NYS2d 49 (1st Dept 2001); *Doolittle v T.E. Conklin Brass & Copper Co., Inc.*, 103 AD2d 722, 478 NYS2d 625 (1st Dept 1984); see also *Aldrich v Sampier*, 2 AD3d 1101, 769 NYS2d 338 (3d Dept 2003), and not all close following or “tailgating” cases involve rear end collisions, see *Darmento v Pacific Molasses Co., Inc.*, 81 NY2d 985, 599 NYS2d 528, 615 NE2d 1012 (1993); *Williams v New York*, 240 AD2d 734, 659 NYS2d 302 (2d Dept 1997). Moreover, while causes of action or claims based specifically on close following or “tailgating” are governed by the standards for violating a statute (i.e., VTL § 1129(a)), other causes of action or claims arising from rear-end collisions are governed by common-law principles. This charge reflects the common-law principles and is to be given in rear-end collision cases. When close following or “tailgating” in violation of VTL § 1129(a) is in issue, PJI 2:82A should also be given.

When approaching another vehicle from behind, a driver is required to maintain a reasonably safe rate of speed, maintain control of his or her vehicle and use reasonable care to avoid colliding with the other vehicle, which necessarily includes a duty to maintain a safe distance between the two vehicles, *Appollonia v Bonse*, 92 AD3d 1170, 938 NYS2d 668 (3d Dept 2012). Thus, under the case law applicable to rear-end collisions, a *prima facie* case of negligence is established by proof that a stopped car was hit in the rear, *Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 22 NYS3d 75 (2d Dept 2015); *Briceno v Milbry*, 16 AD3d 448, 791 NYS2d 622 (2d Dept 2005); *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 (2d Dept 2004); *Gubala v Gee*, 302 AD2d 911, 754 NYS2d 504 (4th Dept 2003); *Leonard v New York*, 273 AD2d 205, 708 NYS2d 467 (2d Dept 2000); *Shamah v Richmond County Ambulance Service, Inc.*, 279 AD2d 564, 719 NYS2d 287 (2d Dept 2001); *Hurley v Cavitolo*, 239 AD2d 559, 658 NYS2d 90 (2d Dept 1997); *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 (2d Dept 1996); *Mead v Marino*, 205 AD2d 669, 613 NYS2d 650 (2d Dept 1994); *Conyers v Vinti*, 107 AD2d 787, 484 NYS2d 620 (2d Dept 1985). Further, the rear-most driver in a chain-reaction collision is presumed responsible, *De La Cruz v Ock Wee Leong*, 16 AD3d 199, 791 NYS2d 102 (1st Dept 2005); *Macauley v Elrac, Inc.*, 6 AD3d 584, 775 NYS2d 78 (2d Dept 2004); *Mustafaj v Driscoll*, 5 AD3d 138, 773 NYS2d 26 (1st Dept 2004). In chain collision accidents, the operator of the

middle vehicle may establish prima facie entitlement to summary judgment by demonstrating that his or her vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle, *Skura v Wojtowski*, 165 AD3d 1196, 87 NYS3d 100 (2d Dept 2018). However, the negligence of the rear-most driver is not necessarily a proximate cause of the injuries sustained by individuals in the lead vehicle where there is a question of fact as to the sequence of the collisions in a multi-vehicle accident, *Vavoulis v Adler*, 43 AD3d 1154, 842 NYS2d 526 (2d Dept 2007).

Absent a sufficient non-negligent excuse, colliding with the rear of a stopped vehicle is negligence as a matter of law, see *Skura v Wojtowski*, 165 AD3d 1196, 87 NYS3d 100 (2d Dept 2018); *Danza v Longioliere*, 256 AD2d 434, 681 NYS2d 603 (2d Dept 1998); *Corbly v Butler*, 226 AD2d 418, 641 NYS2d 71 (2d Dept 1996); *Barile v Lazzarini*, 222 AD2d 635, 635 NYS2d 694 (2d Dept 1995); *Mead v Marino*, 205 AD2d 669, 613 NYS2d 650 (2d Dept 1994); *Countermin v Galka*, 189 AD2d 1043, 593 NYS2d 113 (3d Dept 1993). In cases involving rear-end collisions, the Fourth Department has referred to a “presumption of negligence,” *Bender v Rodriguez*, 302 AD2d 882, 754 NYS2d 475 (4th Dept 2003); *Di Cesare v Glasgow*, 295 AD2d 1007, 743 NYS2d 646 (4th Dept 2002). The presumption or prima facie showing of negligence can be rebutted if the defendant driver comes forward with a non-negligent explanation for the collision, *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 (2d Dept 2004); *Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 (2d Dept 2003); *Danner v Campbell*, 302 AD2d 859, 754 NYS2d 484 (4th Dept 2003).

A duty of explanation is imposed on the operator of a moving vehicle that has hit a stopped vehicle because that operator is in the best position to explain whether the accident was due to a reasonable non-negligent cause, *Higgins v Ridgewood Sav. Bank*, 262 AD2d 357, 691 NYS2d 175 (2d Dept 1999); *Reid v Courtesy Bus Co.*, 234 AD2d 531, 651 NYS2d 612 (2d Dept 1996). Evidence to excuse the collision, such as mechanical failure of defendant’s vehicle or an unavoidable skidding on a wet pavement, may be considered by the jury, *Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 22 NYS3d 75 (2d Dept 2015) (unavoidable skid on wet or slippery pavement may suffice as non-negligent explanation; presence on pavement of oil or fuel that caused defendant’s vehicle to skid rebutted presumption of negligence); *Reid v Courtesy Bus Co.*, supra (defendant cut off by another vehicle applied brakes and moved into center lane); *Jackson v Young*, 226 AD2d 230, 641 NYS2d 29 (1st Dept 1996) (unexplained brake failure); see also *Simpson v Eastman*, 300 AD2d 647, 753 NYS2d 104 (2d Dept 2002) (defendant’s explanation sufficient where he unsuccessfully braked and turned steering wheel to avoid hitting stopped taxicab on road covered with snow and ice). As a matter of law, a non-negligent explanation for the accident exists when a stopping vehicle has itself been rear-ended and then propelled into the vehicle in front, *Katz v Masada II Car & Limo Service, Inc.*, 43 AD3d 876, 841 NYS2d 370 (2d Dept 2007).

Under some circumstances, the sudden stop of the lead vehicle can

constitute a sufficient explanation for a rear-end collision, rebutting the presumption of negligence, *Klopchin v Masri*, 45 AD3d 737, 846 NYS2d 311 (2d Dept 2007) (lead vehicle stopped suddenly and failed to make proper signal); *Forget v Smith*, 39 AD3d 1127, 835 NYS2d 490 (3d Dept 2007) (lead vehicle stopped suddenly to avoid hitting deer; rear vehicle driver testified that she did not see deer and was not tailgating); *Brooks v High Street Professional Bldg., Inc.*, 34 AD3d 1265, 825 NYS2d 330 (4th Dept 2006) (lead vehicle began to accelerate to merge into traffic but suddenly returned to its lane of travel and abruptly stopped or began to stop); *Bender v Rodriguez*, 302 AD2d 882, 754 NYS2d 475 (4th Dept 2003) (sudden stop of lead vehicle without activation of brake lights); see *Baez-Pena v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 56 NYS3d 307 (1st Dept 2017) (driver could reasonably expect that traffic would continue unimpeded); *Berger v New York City Housing Authority*, 82 AD3d 531, 918 NYS2d 458 (1st Dept 2011); *Carter v Castle Elec. Contracting Co.*, 26 AD2d 83, 271 NYS2d 51 (2d Dept 1966); *Taveras v Amir*, 24 AD3d 655, 808 NYS2d 368 (2d Dept 2005); see also *Gitman v Martinez*, 169 AD3d 1283, 95 NYS3d 427 (3d Dept 2019) (testimony that second vehicle in chain reaction accident suddenly stopped raised question of fact as to sequence of impacts).

Several courts have held that a sudden stop of the lead vehicle, standing alone, is not a sufficient non-negligent explanation, to rebut the presumption of negligence, *Matos v Sanchez*, 147 AD3d 585, 47 NYS3d 307 (1st Dept 2017); *Morgan v Browner*, 138 AD3d 560, 28 NYS3d 594 (1st Dept 2016); *Diako v Yunga*, 126 AD3d 567, 3 NYS3d 577 (1st Dept 2015); *Francisco v Schoepfer*, 30 AD3d 275, 817 NYS2d 52 (1st Dept 2006); *Mullen v Rigor*, 8 AD3d 104, 778 NYS2d 168 (1st Dept 2004); see also *Rodriguez v Budget Rent-A-Car Systems, Inc.*, 44 AD3d 216, 841 NYS2d 486 (1st Dept 2007) (sudden stop of lead vehicle insufficient explanation where defendant claimed that lead vehicle moved forward after traffic light turned green and then stopped without signaling turn); *Woodley v Ramirez*, 25 AD3d 451, 810 NYS2d 125 (1st Dept 2006) (sudden stop of lead vehicle insufficient to rebut presumption of non-negligence by lead vehicle's driver, who stopped abruptly to avoid hitting limousine that pulled onto road); *Ayach v Ghazal*, 25 AD3d 742, 808 NYS2d 759 (2d Dept 2006) (sudden stop of lead vehicle when third vehicle cut off lead vehicle insufficient to rebut presumption of non-negligence by lead vehicle's driver; lead driver not comparatively negligent under these circumstances); *Agramonte v New York*, 288 AD2d 75, 732 NYS2d 414 (1st Dept 2001) (sudden stop of lead vehicle insufficient where defendant operating truck at 20 miles per hour in heavy traffic and momentarily blinded by sun); *Mascitti v Greene*, 250 AD2d 821, 673 NYS2d 206 (2d Dept 1998) (sudden stop of lead vehicle in slow-moving traffic insufficient). Vehicle stops that are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead, *De Castillo v Sormeley*, 140 AD3d 918, 32 NYS3d 654 (2d Dept 2016); *Theo v Vasquez*, 136 AD3d 795, 26 NYS3d 85 (2d Dept 2016); *Brothers v Bartling*, 130 AD3d 554, 13 NYS3d 202 (2d Dept 2015). Wet

road conditions, without more, are an insufficient explanation, since drivers are required to compensate for existing road conditions, *Pincus v Cohen*, 198 AD2d 405, 604 NYS2d 139 (2d Dept 1993); *Young v New York*, 113 AD2d 833, 493 NYS2d 585 (2d Dept 1985). A driver's claim that he was suddenly blinded by the glare of the rising sun was insufficient to raise a non-negligent explanation for a rear end collision, *Rodriguez v Beal*, 191 AD3d 617, 139 NYS3d 534 (1st Dept 2021). The failure to prevent an animal in the car from interfering with the operation of the vehicle is negligence as a matter of law, *Conyers v Vinti*, 107 AD2d 787, 484 NYS2d 620 (2d Dept 1985).

Although a driver who collided with the rear end of a stopped vehicle is liable, the person injured in the lead vehicle may also recover from a third party whose negligence was a substantial causative factor in the accident. Thus, fault may be apportioned between the driver who struck the stopped vehicle and another driver who abruptly decelerated while changing lanes and thereby caused the driver of the struck vehicle to stop short, *Tutrani v Suffolk*, 10 NY3d 906, 861 NYS2d 610, 891 NE2d 726 (2008). The driver whose rapid deceleration and lane change was a substantial cause of the accident may be held liable even though there was no contact between his or her vehicle and the vehicle that was struck in the rear. In this situation, the fact that the latter vehicle was able to stop in time to avoid hitting the rapidly decelerating vehicle does not absolve the driver of the former of responsibility for setting in motion the foreseeable chain of events that led to the rear-end collision, *id*; see *Prine v Santee*, 101 AD3d 1601, 956 NYS2d 716 (4th Dept 2012), *aff'd*, 21 NY3d 923, 967 NYS2d 684, 989 NE2d 966 (2013) (defendant entitled to summary judgment on basis that she brought her vehicle, the lead vehicle in a multi-vehicle-chain-reaction accident, to a safe and complete stop at traffic light immediately before accident); *Burg v Mosey*, 126 AD3d 1522, 6 NYS3d 358 (4th Dept 2015) (triable issue of fact present regarding whether defendant, who crossed his vehicle over several lanes in front of plaintiff's vehicle, causing her to apply brakes and move to shoulder of busy highway, set into motion foreseeable chain of events resulting in plaintiff's vehicle being rear-ended by third vehicle).

As to a sudden stop by the lead vehicle, see PJI 2:83. With respect to an emergency stop, see PJI 2:14.

(5) CLOSE FOLLOWING

PJI 2:82A. Motor Vehicle Accidents—Violations of Vehicle and Traffic Law § 1129(a)

As you have heard, the plaintiff AB claims [*state plaintiff's claim, e.g., (he, she) stopped because of traffic, was stopping to avoid a child running into the street*] when his vehicle was struck in the rear by a vehicle driven by defendant CD. AB further claims that the collision happened because CD was following (his, her) vehicle too closely. CD claims that (he, she) was not following AB's vehicle too closely and that (he, she) was unable to stop in time to avoid colliding with AB's vehicle because of [*state defendant's explanation, e.g., there was an unexpected patch of ice on the road, (his, her) brakes unexpectedly failed*].

A driver is required to comply with Section 1129(a) of the Vehicle and Traffic Law, which states:

"The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Under this law, a driver is required to drive (his, her) vehicle at a sufficient distance behind the vehicle ahead so as to be able to stop without hitting the vehicle ahead when the vehicle ahead stops.

The failure to obey Vehicle and Traffic Law § 1129(a) constitutes negligence. If you find that the defendant CD failed to comply with that law because (he, she) followed another vehicle more closely than was reasonable and prudent under the circumstances, including the speed of the vehicles, the traffic conditions, the condition of the highway [*state any other relevant conditions, e.g., the weather*], you must find that CD was negligent.

I will provide you with a verdict sheet that will ask you to answer the question whether AB has

proved that CD violated section 1129(a) of the Vehicle and Traffic Law by following AB's vehicle too closely than was reasonable and prudent under the circumstances and thus was negligent. If the answer is "no," you will not have to answer the next question. If you conclude that the answer is "yes," then you will answer the next question, whether CD's negligence was a substantial factor in causing the collision.

[Where appropriate, a comparative negligence charge should be given, see PJI 2:36, 2:45.]

Comment

[See also Introductory Statement to this division].

Caveat 1: Local law, ordinance, rule or regulation may supersede or supplement the Vehicle and Traffic Law, see Introductory Statement to this division. In such a case, PJI 2:29 should be charged instead of this charge.

Caveat 2: This charge should be given only where the facts support a claim that defendant was following a vehicle too closely or engaging in the practice commonly called "tailgating," *Simpson v Eastman*, 300 AD2d 647, 753 NYS2d 104 (2d Dept 2002); *Torres v WABC Towing Corp.*, 282 AD2d 406, 724 NYS2d 49 (1st Dept 2001); *Doolittle v T.E. Conklin Brass & Copper Co., Inc.*, 103 AD2d 722, 478 NYS2d 625 (1st Dept 1984); see *Aldrich v Sampier*, 2 AD3d 1101, 769 NYS2d 338 (3d Dept 2003); *Holtermann v Cochetti*, 295 AD2d 680, 743 NYS2d 590 (3d Dept 2002); *Di Cesare v Glasgow*, 295 AD2d 1007, 743 NYS2d 646 (4th Dept 2002). In other cases involving rear-end collisions where there is no claim of a statutory violation, only PJI 2:82 should be given.

Based on *Thrower v Smith*, 62 AD2d 907, 406 NYS2d 513 (2d Dept 1978), *aff'd*, 46 NY2d 835, 414 NYS2d 124, 386 NE2d 1091 (1978) (citing PJI); *De La Cruz v Ock Wee Leong*, 16 AD3d 199, 791 NYS2d 102 (1st Dept 2005); *Ortega v New York*, 281 AD2d 466, 721 NYS2d 790 (2d Dept 2001); *Pena v Allen*, 272 AD2d 311, 707 NYS2d 643 (2d Dept 2000); *Mendiola v Novinski*, 268 AD2d 462, 703 NYS2d 49 (2d Dept 2000); *Mailler v Mayer*, 89 AD2d 784, 453 NYS2d 500 (4th Dept 1982).

A driver is under a duty to maintain a safe distance between his or her vehicle and the vehicle in front, VTL § 1129(a); see *Malone v Morillo*, 6 AD3d 324, 775 NYS2d 312 (1st Dept 2004); *Reed v New York City Transit Authority*, 299 AD2d 330, 749 NYS2d 91 (2d Dept 2002); *Shamah v Richmond County Ambulance Service, Inc.*, 279 AD2d 564, 719 NYS2d 287 (2d Dept 2001); *Filippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 (2d Dept 2000). The failure to do so constitutes negligence as a matter of law in the absence of an adequate non-negligent explanation,

Lifshits v Variety Poly Bags, 278 AD2d 372, 717 NYS2d 630 (2d Dept 2000); Leonard v New York, 273 AD2d 205, 708 NYS2d 467 (2d Dept 2000); Pena v Allen, 272 AD2d 311, 707 NYS2d 643 (2d Dept 2000); Barile v Lazzarini, 222 AD2d 635, 635 NYS2d 694 (2d Dept 1995); Hernandez v Burkitt, 271 AD2d 648, 706 NYS2d 456 (2d Dept 2000); Aromando v New York, 202 AD2d 617, 609 NYS2d 637 (2d Dept 1994); Silberman v Surrey Cadillac Limousine Service, Inc., 109 AD2d 833, 486 NYS2d 357 (2d Dept 1985). The statute's protections extend beyond prevention of rear-end collisions, and the statute may be invoked in cases involving other types of accidents resulting from tailgating, Darmento v Pacific Molasses Co., Inc., 81 NY2d 985, 599 NYS2d 528, 615 NE2d 1012 (1993); Williams v New York, 240 AD2d 734, 659 NYS2d 302 (2d Dept 1997).

Where the evidence supports a claim that defendant was "tailgating" or following too closely, it is error to refuse to charge the provisions of Vehicle & Traffic Law (VTL) § 1129(a) and to rely instead on a mere recital of the general rules regarding a driver's duty of reasonable care, Schiffer v Korman, 40 AD2d 681, 336 NYS2d 169 (2d Dept 1972); see Krembs v Wetherbee, 205 AD2d 917, 613 NYS2d 722 (3d Dept 1994). However, a failure to charge PJI 2:26 ("Statutory Standard of Care—Vehicle and Traffic Law Violations") when plaintiff has alleged a violation of VTL § 1129(a) may be harmless error where the jury has found, based on sufficient proof, that defendants were not negligent under a "reasonable and prudent" standard, Stalikas v United Materials, L.L.C., 100 NY2d 626, 769 NYS2d 191, 801 NE2d 411 (2003).

A claim by defendant that plaintiff's vehicle abruptly slowed or stopped in front of defendant's vehicle is insufficient to raise a triable issue as to defendant's negligence under VTL § 1129(a), Reed v New York City Transit Authority, 299 AD2d 330, 749 NYS2d 91 (2d Dept 2002); Pena v Allen, 272 AD2d 311, 707 NYS2d 643 (2d Dept 2000); Mendiola v Novinski, 268 AD2d 462, 703 NYS2d 49 (2d Dept 2000); see Lifshits v Variety Poly Bags, 278 AD2d 372, 717 NYS2d 630 (2d Dept 2000) (claim that plaintiff's car stopped short when traffic light turned red insufficient); see also Shamah v Richmond County Ambulance Service, Inc., 279 AD2d 564, 719 NYS2d 287 (2d Dept 2001) (conclusory assertion that plaintiff's vehicle stopped suddenly insufficient where defendant was aware that plaintiff stopped to make left turn); Filippazzo v Santiago, 277 AD2d 419, 716 NYS2d 710 (2d Dept 2000) (claim that plaintiff's brake lights were not functioning and that plaintiff failed to use turn signal insufficient where defendant admitted that she did not see plaintiff's vehicle until she was only three feet away); Barile v Lazzarini, 222 AD2d 635, 635 NYS2d 694 (2d Dept 1995) (claim that defendant did not see signal lights or hand signals by plaintiff and that plaintiff was stopped at end of exit ramp insufficient where defendant admitted that he saw truck 54 feet in front of him and was unable to stop); but see Chepel v Meyers, 306 AD2d 235, 762 NYS2d 95 (2d Dept 2003) (sudden stop of lead vehicle is non-negligent explanation); DeCosmo v Hulse, 204 AD2d 953, 612 NYS2d 279 (3d Dept 1994) (claim that plaintiff's vehicle came to sudden and complete stop for no apparent

reason in stop and go traffic could be sufficient non-negligent explanation). Similarly insufficient is a claim that defendant's vehicle skidded on a wet road surface, *Shamah v Richmond County Ambulance Service, Inc.*, *supra*, or that his ability to see the vehicle in front of him was obstructed by sun glare and tree-trimming activity, *Johnson v Phillips*, 261 AD2d 269, 690 NYS2d 545 (1st Dept 1999). However, where the evidence permits, plaintiff's comparative negligence may be considered, *Gravagna v Greene*, 308 AD2d 563, 764 NYS2d 719 (2d Dept 2003).

With respect to charging the substance of traffic regulations relating to stopping distances, see *Sansivero v Garz*, 20 AD2d 723, 247 NYS2d 596 (2d Dept 1964). Judicial notice of stopping distances was taken by the Appellate Division in *Kelly v State*, 24 AD2d 831, 264 NYS2d 18 (4th Dept 1965), *aff'd*, 21 NY2d 901, 289 NYS2d 621, 236 NE2d 854 (1968). As to the admissibility of stopping distances charts, see Annot.: 9 ALR3d 976.

A charge on defendant's liability for violating VTL § 1129(a) should be combined with PJI 2:82 (Rear-End Collisions—Negligence). As to the liability of the driver of a lead vehicle for making a sudden stop, see PJI 2:83. With respect to an emergency stop, see PJI 2:14.

(6) SUDDEN STOPPING

PJI 2:83. Motor Vehicle Accidents—Sudden Stopping

A motorist, in stopping (his, her) car was required to do so with reasonable care and with due regard to others on the highway and to comply with Section 1163(c) of the Vehicle and Traffic Law, which provides:

“No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal . . . to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.”

Such a signal must be given either by hand and arm or by signal light. The signal must be given in enough time to give fair and adequate warning of the impending stop to the operators of other cars who are driving with reasonable care.

If you find that defendant CD made a sudden stop without first giving an appropriate signal, that fact is to be considered in deciding whether CD used reasonable care, but, standing alone it does not require that you find that CD was negligent.

Comment

[See also Introductory Statement to this division.]

Caveat: Local law, ordinance, rule or regulation may supersede or supplement the Vehicle & Traffic Law, see Introductory Statement to this division. In such a case the applicable provision, which constitutes only some evidence of negligence, PJI 2:29, should be substituted for the Vehicle & Traffic Law or added to the charge.

Based on Vehicle and Traffic Law § 1163(c) and § 1164; see *Thrower v Smith*, 62 AD2d 907, 406 NYS2d 513 (2d Dept 1978), *aff'd*, 46 NY2d 835, 414 NYS2d 124, 386 NE2d 1091 (1978) (citing PJI); *Becker v Beir*, 275 App Div 146, 89 NYS2d 536 (4th Dept 1949). Although virtually all motor vehicles are now equipped with mechanical turn signal lights, the charge includes a reference to “hand and arm” signals to conform to the language of Vehicle & Traffic Law §§ 1163(c) and 1164.

The driver of a motor vehicle has a duty to keep proper control of that vehicle and not to stop suddenly or slow down without proper signaling so as to avoid a collision, *Niemiec v Jones*, 237 AD2d 267, 654 NYS2d 163 (2d Dept 1997).

Where a defendant contends that a vehicle in front of defendant's car came to an unexplained sudden stop, questions of fact are raised that should be submitted to the jury, *id*; see *Carhuayano v J & R Hacking*, 28 AD3d 413, 813 NYS2d 162 (2d Dept 2006); but see *Tumminello v New York*, 148 AD3d 1084, 49 NYS3d 739 (2d Dept 2017) (defendant's testimony that accident was caused by lead vehicle's stop at yellow traffic light was insufficient to rebut presumption of negligence in rear-end collision); *Danza v Longieliere*, 256 AD2d 434, 681 NYS2d 603 (2d Dept 1998) (same). However, in a rear-end collision where plaintiff was able to come to a complete stop without hitting the vehicle in front of her, defendant cannot rely on the negligence on the part of the front vehicle's driver to rebut the presumption of his or her own negligence, since any negligence by the front-vehicle's driver could not have been a proximate cause of the accident, *Hyeon Hee Park v Hi Taek Kim*, 37 AD3d 416, 831 NYS2d 422 (2d Dept 2007); *Calabrese v Kennedy*, 28 AD3d 505, 813 NYS2d 202 (2d Dept 2006). In *Tutrani v Suffolk*, 10 NY3d 906, 861 NYS2d 610, 891 NE2d 726 (2008), the Court held that this principle does not relieve a driver whose negligence caused plaintiff to come to a sudden stop from liability to the driver of the vehicle that was struck in the rear.

To establish a right to recover from the driver of the front vehicle, plaintiff must prove that the driver of the front vehicle was negligent, *Baez-Pena v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 56 NYS3d 307 (1st Dept 2017) (issue of fact requiring trial where lead vehicle stopped suddenly after failing to clear overpass and driver of lead vehicle allegedly should have known that truck was too tall); *Mankiewicz v Excellent*, 25 AD3d 591, 807 NYS2d 643 (2d Dept 2006). In *Mankiewicz*, where the front vehicle came to a stop on the highway because of a mechanical problem that caused its lights to fail, its driver could not be charged with negligence and could not be held responsible for a rear-end collision which plaintiff claimed occurred because he was unable to see the defendant's stopped vehicle, *id*; see *Prine v Santee*, 101 AD3d 1601, 956 NYS2d 716 (4th Dept 2012) (defendant entitled to summary judgment on basis that she brought her vehicle, the lead vehicle in a multi-vehicle-chain-reaction accident, to a safe and complete stop at traffic light immediately before accident), *aff'd*, 21 NY3d 923, 967 NYS2d 684, 989 NE2d 966 (2013).

A driver is not negligent in applying the brakes when the drivers of the cars in front of the driver applied their brakes, *Sekuler v Limnos Taxi, Inc.*, 264 AD2d 389, 694 NYS2d 100 (2d Dept 1999); see *Carhuayano v J & R Hacking*, 28 AD3d 413, 813 NYS2d 162 (2d Dept 2006) (driver forced to brake and stop suddenly to avoid striking vehicle in front due to that vehicle's sudden stopping not liable for his or her own sudden stopping). It is error to refuse to charge the provisions of Vehicle and

Traffic Law § 1163(c) and merely to instruct on a duty of reasonable care, *Schiffer v Korman*, 40 AD2d 681, 336 NYS2d 169 (2d Dept 1972) (citing PJI). Note that when defendant claims to have stopped because of a stop or yield sign or because the traffic light changed, the jury should be informed that the following driver is under a duty to observe and obey such sign or traffic light and that the presence of the sign or the change of the light may be sufficient warning of the stop, *Gass v Flynn*, 57 Misc2d 893, 293 NYS2d 791 (Sup 1968); see VTL §§ 1110, 1111, 1142, 1172; *Carter v Castle Elec. Contracting Co.*, 26 AD2d 83, 271 NYS2d 51 (2d Dept 1966).

As to emergency situations, see PJI 2:14. As to following too closely, see PJI 2:82 and 2:82A.

(7) SKIDDING

PJI 2:84. Motor Vehicle Accidents—Skidding

The fact that defendant's motor vehicle skidded, if you find that to be the fact, should be taken into consideration in determining whether the defendant exercised reasonable care in its operation, but does not, standing alone, require that you find the defendant negligent. If, taking into consideration all of the facts and circumstances existing at the time of the accident, including the condition of the road and of the tires on the defendant's car, the condition of the weather and the speed at which the defendant was operating (his, her) vehicle, you decide that the defendant's car skidded because of (his, her) failure to use reasonable care, you will find that (he, she) was negligent. If, however, you decide that the skidding of the defendant's car was not caused by (his, her) failure to exercise reasonable care, the fact that the car skidded cannot be the basis of a finding that the defendant was negligent.

Comment

[See also Introductory Statement to this division.]

Based on *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966); see *Abbott v Page Airways, Inc.*, 23 NY2d 502, 297 NYS2d 713, 245 NE2d 388 (1969).

Proof of skidding which causes an automobile to deviate from its course of travel makes out a prima facie case, the factual evaluation of the evidence as a whole being for the jury, *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966); *Vadala v Carroll*, 91 AD2d 865, 458 NYS2d 382 (4th Dept 1982), *aff'd*, 59 NY2d 751, 463 NYS2d 432, 450 NE2d 238 (1983); *Canfield v Giles*, 182 AD2d 1075, 585 NYS2d 242 (4th Dept 1992); *Fox v Lyte*, 143 AD2d 390, 532 NYS2d 432 (2d Dept 1988); see *Feeley v St. Lawrence University*, 13 AD3d 782, 788 NYS2d 179 (3d Dept 2004); *Novis v Sheinkin*, 60 AD2d 623, 400 NYS2d 161 (2d Dept 1977) (citing PJI); *Evans v S. J. Groves & Sons Co.*, 315 F2d 335 (2d Cir 1963); see also Comments to PJI 2:65 and to PJI 2:77. Absent any explanation by defendant the jury may, but is not required to, infer negligence from the fact that defendant's car crossed over the center line of the road into the opposing lane of traffic, *Coury v Safe Auto Sales, Inc.*, 32 NY2d 162, 344 NYS2d 347, 297 NE2d

88 (1973) (citing PJI); see *Forbes v Plume*, 202 AD2d 821, 609 NYS2d 387 (3d Dept 1994); *Pretto v Leiwant*, 80 AD2d 579, 435 NYS2d 778 (2d Dept 1981) (upon the facts, contrary to weight of evidence for jury to find that skid was not result of defendant's negligence); *Phelps v Fiordilino*, 67 AD2d 1032, 413 NYS2d 484 (3d Dept 1979) (skidding on patch of ice, in and of itself, is not negligence). That skidding plus other factors may present a question for the jury is supported by *Feeley v St. Lawrence University*, supra; *Dubois v Vanderwalker*, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997); *Fagle v Bell*, 65 AD2d 887, 410 NYS2d 422 (3d Dept 1978); *Novis v Sheinkin*, 60 AD2d 623, 400 NYS2d 161 (2d Dept 1977) (citing PJI); *Di Salvo v New York*, 254 App Div 886, 5 NYS2d 264 (2d Dept 1938); see *Jump v Jump*, 69 AD2d 947, 415 NYS2d 499 (3d Dept 1979), *aff'd*, 49 NY2d 783, 426 NYS2d 731, 403 NE2d 454 (1980). The course and distance traveled by a vehicle after it begins to skid may be factors to be considered, *Gambino v State*, 28 AD2d 629, 280 NYS2d 91 (3d Dept 1967), *aff'd*, 24 NY2d 906, 301 NYS2d 639, 249 NE2d 479 (1969). VTL § 375(35) requires that a motor vehicle be equipped with tires in safe operating condition based on standards prescribed by the Commissioner.

For a charge where the car left the road, see PJI 2:85.

(8) CAR LEAVING ROAD

PJI 2:85. Motor Vehicle Accidents—Car Leaving Road

The fact that defendant CD's motor vehicle left the road and struck (*specify object, as:—*] a tree), should be taken into consideration in deciding whether CD used reasonable care in driving. That fact permits you to find that CD was negligent, but, standing alone, does not require such a finding. If, taking into consideration all of the facts and circumstances existing at the time of the accident, including the condition of the road, the condition of the weather and the speed at which CD was driving you find that CD's car left the road as a result of (his, her) failure to use reasonable care, your finding will be that (he, she) was negligent. If you find that the car did not leave the road as a result of CD's failure to use reasonable care, the fact that the car left the road cannot be the basis of a finding that CD was negligent.

Comment

[See also Introductory Statement to this division.]

Based on *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966); *Czekala v Meehan*, 27 AD2d 565, 276 NYS2d 279 (2d Dept 1966), *aff'd*, 20 NY2d 686, 282 NYS2d 553, 229 NE2d 230 (1967); see *Abbott v Page Airways, Inc.*, 23 NY2d 502, 297 NYS2d 713, 245 NE2d 388 (1969); *Bishop v Metropolitan Transp. Authority*, 60 AD2d 519, 400 NYS2d 2 (1st Dept 1977); Annot: 79 ALR2d 6; Forkosch, Summary Judgment in Automobile Negligence Cases, 53 Cornell L Rev 814, 819–831.

The earlier cases requiring direct proof of negligence, though the vehicle departed from the normal course of operation, *Cole v Swagler*, 308 NY 325, 125 NE2d 592 (1955); *Lahr v Tirrill*, 274 NY 112, 8 NE2d 298 (1937); *Galbraith v Busch*, 267 NY 230, 196 NE 36 (1935), have been overruled by *Pfaffenbach v White Plains Exp. Corp.*, 17 NY2d 132, 269 NYS2d 115, 216 NE2d 324 (1966) and *Czekala v Meehan*, 27 AD2d 565, 276 NYS2d 279 (2d Dept 1966), *aff'd*, 20 NY2d 686, 282 NYS2d 553, 229 NE2d 230 (1967); see *Dubois v Vanderwalker*, 245 AD2d 758, 665 NYS2d 460 (3d Dept 1997).

For a charge where the car skidded, see PJI 2:84.

Note that VTL § 1123(b) generally prohibits passing another vehi-

cle on the right by driving off the pavement or main-traveled portion of the roadway, see *McKenna v Ether*, 177 AD2d 756, 575 NYS2d 739 (3d Dept 1991).

(9) FALLING ASLEEP AT THE WHEEL

PJI 2:85A. Motor Vehicle Accidents—Driver Falling Asleep

It is within a driver's control to stay awake or stop driving. A driver of a car does not ordinarily fall asleep without some warning such as sleepiness. If you find that defendant CD fell asleep while driving, you must presume that defendant CD was negligent. However, defendant CD may overcome this presumption of negligence by evidence of circumstances that excuse or explain defendant CD's conduct. Defendant CD claims (he/she) fell asleep because [*Here state circumstances that excuse or explain defendant CD's conduct that create a factual issue regarding reasonable care*]. You must decide, in view of this evidence and all other evidence, whether defendant CD used reasonable care under the circumstances.

Comment

Caveat: This charge is appropriate for actions pending in the Second and Fourth Departments, see *Spivak v Heyward*, 248 AD2d 58, 679 NYS2d 156 (2d Dept 1998); *Kilburn v Bush*, 223 AD2d 110, 646 NYS2d 429 (4th Dept 1996). The Third Department has specifically rejected the proposition that falling asleep at the wheel gives rise to a presumption of negligence, *Barney v Barney*, 205 AD2d 1017, 614 NYS2d 70 (3d Dept 1994). In the Third Department, the burden is on the plaintiff to show that the defendant driver continued to drive despite having had warnings of the likelihood of falling asleep, *id.*

Based on *Spivak v Heyward*, 248 AD2d 58, 679 NYS2d 156 (2d Dept 1998); *Kilburn v Bush*, 223 AD2d 110, 646 NYS2d 429 (4th Dept 1996). Earlier cases stated that falling asleep at the wheel does not constitute negligence as a matter of law, concluding that the issue is a question of fact for the jury, see *Aiello v Garahan*, 91 AD2d 839, 458 NYS2d 398 (4th Dept 1982), *aff'd* on other grounds, 58 NY2d 1078, 462 NYS2d 638, 449 NE2d 418 (1983); *Smith v McIntyre*, 20 AD2d 711, 247 NYS2d 361 (2d Dept 1964); *Vignola v Britts*, 11 AD2d 801, 205 NYS2d 215 (2d Dept 1960). The Aiello court concluded that a defendant driver may be exculpated from liability for a sudden and unforeseen loss of consciousness that results in an accident, *Aiello v Garahan*, *supra*.

In the Second and Fourth Departments, where no excuse or explanation for falling asleep has been offered to create a factual issue regarding defendant's reasonable care, a directed verdict should be

awarded to plaintiff, *Kilburn v Bush*, 223 AD2d 110, 646 NYS2d 429 (4th Dept 1996); see *Romero v Romero*, 266 AD2d 367, 698 NYS2d 324 (2d Dept 1999); *Dillon v Kaminsky*, 256 AD2d 483, 682 NYS2d 104 (2d Dept 1998).

c. MOTORIST'S DUTY RE MAINTENANCE

PJI 2:86. Motor Vehicle Accidents—Motorist's Duty Re Maintenance

It is the duty of the (owner, operator) of a motor vehicle to use reasonable care to have it in a reasonably safe condition and properly equipped for operation so that the vehicle may be controlled and not be a source of danger to others. It is the (owner's, operator's) duty to use such care in the inspection, maintenance and repair of the vehicle that a reasonably prudent (owner, operator) would use under the same circumstances.

Comment

[See also Introductory Statement to this division.]

Based on *Fried v Korn*, 286 App Div 107, 141 NYS2d 529 (1st Dept 1955), *aff'd*, 1 NY2d 691, 150 NYS2d 798, 134 NE2d 67 (1956); *Schaeffer v Caldwell*, 273 App Div 263, 78 NYS2d 652 (4th Dept 1948); 8B NYJur2d, Automobiles §§ 921–926; Annot. 62 ALR3d 844; 23 ALR2d 539; 24 ALR2d 161; 79 ALR3d 346.

The above charge states the common law duty. It applies to both the owner and operator of the vehicle, *Fried v Korn*, 286 App Div 107, 141 NYS2d 529 (1st Dept 1955), *aff'd*, 1 NY2d 691, 150 NYS2d 798, 134 NE2d 67 (1956); 3 Huddy's *Cyclopedia of Automobile Law* (9th Ed) pp 127–128. In *Fried* the Court held that the "An operator of an automobile, be he the owner or the driver for a substantial distance, owes to himself and to others a duty of inspection and is negligent for failure to discover patent defects in equipment." The Court distinguished the situation of a "short-haul driver" without reasonable opportunity to inspect. Thus, a lessee briefly using an automobile or golf cart is under no duty to inspect its internal mechanism, *Vander Veer v Tyrrell*, 27 AD2d 958, 278 NYS2d 916 (3d Dept 1967). Therefore, factors to be considered in determining what is reasonable care include length of time of operation or of trip and patency of defect. As to the duty of an owner of a vehicle to warn an individual servicing the vehicle of dangers presented by it, see *Chambers v Evans*, 104 AD3d 1301, 961 NYS2d 693 (4th Dept 2013).

In addition to the common law duty, VTL § 375 requires that every motor vehicle operated or driven on the public highway shall be provided with equipment as specified in that section, and VTL § 381 contains similar provisions applicable to motorcycles, see *Lalomia v Bankers & Shippers Ins. Co.*, 35 AD2d 114, 312 NYS2d 1018 (2d Dept 1970), *aff'd*, 31 NY2d 830, 339 NYS2d 680, 291 NE2d 724 (1972); *McAllister v Adam Packing Corp.*, 66 AD2d 975, 412 NYS2d 50 (3d Dept 1978); *Zapp v Ross Pontiac, Inc.*, 39 AD2d 739, 332 NYS2d 121 (2d Dept 1972).

VTL § 383 and regulations promulgated thereunder mandate that vehicles be equipped with functional seat belts. Failure to furnish a passenger with an operational seat belt, where the vehicle was manufactured after January 1, 1968, is a violation of VTL § 383 and, thus, negligence as a matter of law, *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). In the absence of contrary proof, it should be presumed that all of the seatbelts with which a vehicle has been equipped are both operable and available, *Barnes v Paulin*, 73 AD3d 1107, 900 NYS2d 886 (2d Dept 2010). Thus, in opposition to a defendant's *prima facie* showing that the seatbelt was in excellent mechanical condition at the time of the accident, a plaintiff's speculative conclusory affidavit without supporting evidence claiming that the seatbelt was defective was insufficient to raise a triable issue of fact, *Skura v Wojtowski*, 165 AD3d 1196, 87 NYS3d 100 (2d Dept 2018). The jury may not consider whether the owner of an old vehicle, not subject to the statutory requirement, should have retrofitted the vehicle with seat belts, *Ramundo v Guilderland*, 142 AD2d 50, 534 NYS2d 543 (3d Dept 1988). VTL § 383 is not to be confused with VTL § 1229(c) which mandates use of seat belts or other safety restraint devices and further provides that non-compliance with the statute is not "admissible as evidence in any civil action" on the issue of liability but may be received in mitigation of damages, *Baker v Keller*, 241 AD2d 947, 661 NYS2d 330 (4th Dept 1997); *Hamilton v Purser*, 162 AD2d 91, 563 NYS2d 163 (3d Dept 1990); see *Stewart v Taylor*, 193 AD2d 1078, 598 NYS2d 627 (4th Dept 1993); PJI 2:87.

The failure of the person in charge of the vehicle to comply with the statutory requirement to maintain the vehicle's brakes, steering mechanism and other specified equipment in good working order may be excused if the jury finds that he or she exercised reasonable care in an effort to comply, *Alfano v Amchir*, 23 AD2d 659, 257 NYS2d 2 (2d Dept 1965); *Alongi v Beuter*, 286 App Div 990, 144 NYS2d 756 (4th Dept 1955); *Schaeffer v Caldwell*, 273 App Div 263, 78 NYS2d 652 (4th Dept 1948). A defendant seeking to blame a collision on brake failure has the obligation to show that the brake problem was unanticipated and that reasonable care was exercised to keep the brakes in good working order, *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 (1st Dept 2010); *Hubert v Tripaldi*, 307 AD2d 692, 763 NYS2d 165 (3d Dept 2003). Although the burden of going forward with evidence concerning the care exercised is on the offender, it is error to charge that the burden of proof is on defendant, *Listengart v Ell*, 30 AD2d 536, 291 NYS2d 271 (2d Dept 1968), see Comment to PJI 2:27. In such a case, unless the evidence establishes defendant's negligence as a matter of law, as where he knew four hours before the accident that the vehicle's brakes were not working properly and made no attempt to correct the defect, *Slavinskis v Clinton Warehouse, Inc.*, 40 AD2d 840, 337 NYS2d 337 (2d Dept 1972), the jury should be charged in accordance with the following example:

PJI 2:86.1

Vehicle and Traffic Law § 375(1) provides:

“Every motor vehicle . . . shall be provided with adequate brakes . . . in good working order and sufficient to control such vehicle at all times when the same is in use. . . .” If you find that the defendant’s brakes were not in good working order, your finding will be that the defendant was negligent unless you further find that the failure of the brakes was unexpected and that the defendant had used reasonable care to keep the brakes in good working order.

d. COMPARATIVE NEGLIGENCE OF PASSENGER

PJI 2:87. Motor Vehicle Accidents—Comparative Negligence of Passenger

Generally, a passenger is not responsible for the negligence of the driver of the vehicle. A passenger is entitled to assume that the driver will use reasonable care and will obey the traffic laws until the passenger has knowledge of facts indicating that the driver will not do so. A passenger must, however, use reasonable care for (his, her) own safety. Reasonable care means that degree of care that a reasonably prudent passenger would use under the same circumstances. In deciding whether the plaintiff used reasonable care, you should consider all the circumstances in connection with the accident and the facts as you find them, including (*use factors which the evidence supports, such as:*) the condition of the highway, the traffic conditions, the condition of the weather and of visibility, the plaintiff's knowledge and experience with respect to the highway, his/her knowledge of the competency, ability, skill and condition of the driver, and the driver's apparent awareness of potential dangers). If you find that the plaintiff failed to use reasonable care for (his, her) own safety you will find that (he, she) was negligent and you must then consider whether such failure was a substantial factor in causing the plaintiff's injury.

Comment

[See also Introductory Statement to this division.]

Based on *Nelson v Nygren*, 259 NY 71, 181 NE 52 (1932); *Johnson v Thompson*, 149 AD3d 1530, 53 NYS3d 435 (4th Dept 2017); *Purchase v Jeffrey*, 33 AD2d 620, 304 NYS2d 619 (3d Dept 1969); *Sheehan v Coffey*, 205 App Div 388, 200 NYS 55 (3d Dept 1923); see *Ciserano v Sforza*, 130 AD2d 618, 515 NYS2d 548 (2d Dept 1987) (citing PJI); *Miller v Maslow*, 60 AD2d 909, 401 NYS2d 564 (2d Dept 1978).

When the speed of an automobile is unlawful, or excessive, or the competency of the operator of the car is impaired, and the passenger knows or has reason to be aware of the fact, he or she has the duty of

exercising reasonable care to protect against injury therefrom, *Purchase v Jeffrey*, 33 AD2d 620, 304 NYS2d 619 (3d Dept 1969); *Sheehan v Coffey*, 205 App Div 388, 200 NYS 55 (3d Dept 1923); see 8B NYJur2d, *Automobiles* § 900; see also *Ciserano v Sforza*, 130 AD2d 618, 515 NYS2d 548 (2d Dept 1987) (citing PJI). The passenger should, in such case, call the attention of the operator of the car to the danger apprehended and protest against it unless to do so under the circumstances would not be helpful or would distract the driver, see *Dick v Brodesser*, 81 AD2d 825, 438 NYS2d 600 (2d Dept 1981) (not negligence if passenger tells driver to “watch out” unless “it was uttered in so imprudent a manner as to foreseeably cause a panicked or unnerved reaction on the part of the driver”); see also *Pitts v Dunn*, 63 AD2d 671, 404 NYS2d 680 (2d Dept 1978). Unless the driver’s dangerous conduct is corrected, the passenger should quit the car if that can be done with safety, or direct that the vehicle be stopped and, when stopped get out of it, *Glendenning v Feld*, 285 App Div 604, 605, 606, 139 NYS2d 670 (4th Dept 1955), *aff’d*, 309 NY 867, 131 NE2d 285 (1955); *Clark v Traver*, 205 App Div 206, 207, 200 NYS 52 (3d Dept 1923), *aff’d*, 237 NY 544, 143 NE 736 (1923); *Reilly v Rawleigh*, 245 App Div 190, 281 NYS 366 (4th Dept 1935). However, in the absence of special circumstance, it is not negligence as a matter of law for a passenger to go to sleep, *Nelson v Nygren*, 259 NY 71, 181 NE 52 (1932); although it may be negligent to ride with an obviously sleepy driver, *Purchase v Jeffrey*, 33 AD2d 620, 304 NYS2d 619 (3d Dept 1969); nor must the driver be reminded to watch out for every curve in the highway, *Rossi v Naccarato*, 286 App Div 940, 142 NYS2d 805 (3d Dept 1955). Furthermore, negligence should not be charged as to a fifteen year old passenger riding with her mother, for such a plaintiff is entitled to assume that her mother will drive carefully and cannot reasonably be expected to tell her mother how to drive, *Meyer v Brown-Harter Cadillac Inc.*, 32 AD2d 1045, 303 NYS2d 746 (2d Dept 1969), nor as to a wife-passenger riding in the back seat and exercising no control over the operation of the car, *Young v Hackett*, 49 AD2d 1013, 374 NYS2d 83 (4th Dept 1975), nor as to a passenger who is neither aware of the danger nor given an opportunity to warn the operator of the imprudence of his actions, *Knorr v Albany*, 68 AD2d 982, 414 NYS2d 819 (3d Dept 1979).

The question of comparative negligence in failing to warn the driver is ordinarily for the jury, *Nelson v Nygren*, 259 NY 71, 181 NE 52 (1932); *Plummer v Brodnax*, 54 AD2d 692, 387 NYS2d 282 (2d Dept 1976); *Piarulli v Lason*, 35 AD2d 605, 313 NYS2d 613 (2d Dept 1970). However, in the absence of competent evidence that plaintiff’s failure to exercise reasonable care for his or her own safety was a substantial factor in bringing about the injury, the issue should not be submitted to the jury, *Petryszyn v Di Fulvio*, 185 AD2d 405, 585 NYS2d 808 (3d Dept 1992) (citing PJI); see *Duffy v Chautauqua*, 225 AD2d 261, 649 NYS2d 297 (4th Dept 1996) (citing PJI). When there is a jury question concerning whether the passenger should have asked to be let out, the pattern charge should be modified.

A passenger who is aware that intoxication has deprived the driver

of reasonable control of the automobile may be found to be negligent, *Strychalski v Dailey*, 65 AD3d 546, 883 NYS2d 586 (2d Dept 2009); *Bergeron v Hyer*, 55 AD2d 1001, 391 NYS2d 767 (4th Dept 1977); *Verdino v Hayes*, 10 AD2d 978, 201 NYS2d 853 (2d Dept 1960); *Burnell v La Fountain*, 6 AD2d 586, 180 NYS2d 52 (3d Dept 1958), but to take the issue to the jury there must be evidence, in addition to the fact that the parties drank together, from which impairment of driving ability can reasonably be inferred, *Eisenberg v Green*, 33 AD2d 756, 305 NYS2d 769 (1st Dept 1969); see *Coleman v New York City Transit Authority*, 37 NY2d 137, 371 NYS2d 663, 332 NE2d 850 (1975).

The above charge concerns the passenger's acts or failure to act as negligence on his or her part. Where comparative negligence and implied assumption of risk are both jury issues, the jury should be instructed to consider plaintiff's fault in its totality and assign a single percentage to that fault, *Ciserano v Sforza*, 130 AD2d 618, 515 NYS2d 548 (2d Dept 1987); see *Smith v Lebanon Valley Auto Racing Inc.*, 194 AD2d 946, 598 NYS2d 858 (3d Dept 1993); *McCabe v Easter*, 128 AD2d 257, 516 NYS2d 515 (3d Dept 1987); PJI 2:36. In actions against third parties, the negligence of the driver will not be imputed to a passenger, *Webber v Graves*, 234 App Div 579, 255 NYS 726 (4th Dept 1932), even though the passenger requested the trip and it was for her purpose, *Rarick v Bristol*, 181 Misc 1068, 47 NYS2d 258 (Sup 1944), *aff'd*, 268 App Div 953, 51 NYS2d 753 (4th Dept 1944). The rule is the same with respect to an owner-passenger, see PJI 2:250. As to a passenger engaged in a joint enterprise with the driver, see PJI 2:265.

When an available seat belt is not used and there is expert testimony from which the jury could find that some or all of plaintiff's injuries would not have been incurred had the seat belt been worn, plaintiff cannot recover for such injuries, *Spier v Barker*, 35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974); *Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 933 NYS2d 208 (1st Dept 2011); *Latta v Siefke*, 60 AD2d 991, 401 NYS2d 937 (4th Dept 1978); see *Robles v Polytemp, Inc.*, 127 AD3d 1052, 7 NYS3d 441 (2d Dept 2015). VTL § 1229-c(3) mandates the use of a seatbelt by an operator and any front seat passenger 16 years of age or older. Further, VTL § 1229-c(3-a) states that, with the exception of passengers under the age of four (who are otherwise provided for in the statute), all individuals "seated in a sitting position equipped with both a lap safety belt and a shoulder harness belt" must utilize both.

The fact that the law did not require plaintiff to wear a seat belt at the time of the accident does not remove the issue from the case, see *Ruiz v Rochester Telephone Co.*, 195 AD2d 981, 600 NYS2d 879 (4th Dept 1993). In addition to the statutory duty, each passenger has an independent common law duty to exercise reasonable care for his or her own safety that may include the duty to wear an available seat belt, *Stewart v Taylor*, 193 AD2d 1078, 598 NYS2d 627 (4th Dept 1993). The question is one of reasonable care under the circumstances and does not turn upon the position of the plaintiff in the vehicle or the existence of a

statutory mandate, *Diehl v Ogorewac*, 836 F Supp 88 (EDNY 1993). A vehicle operator has no duty to insure that a passenger sixteen years or older is restrained by a safety belt before operating the vehicle, *Stewart v Taylor*, *supra*; see *Asantewaa v New York*, 90 AD3d 537, 935 NYS2d 18 (1st Dept 2011).

Where a properly functioning seat belt may be found at an unoccupied seating position in the vehicle, the voluntary decision of a passenger to sit at a seating position where, to the passenger's knowledge, the seat belt is not functional constitutes a failure to use an available seat belt within the meaning of the *Spier* case, *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). The *Spier* case classifies the matter as a partial defense of avoidable consequences, see *Prosser and Keeton, Torts*, (5th Ed) § 65; 2 *Harper & James, The Law of Torts* 1231, § 22.10; *Restatement Second, Torts*, § 465, Comment § 918; Annot: 80 ALR3d 1033; 22 *Am Jur 2d* 50, *Damages*, §§ 30–32. The burden of pleading and proof is on the defendant, CPLR 3018(b); *Davis v Davis*, 49 AD2d 1024, 374 NYS2d 482 (4th Dept 1975); see *DiMauro v Metropolitan Suburban Bus Authority*, *supra* (allegation of negligent operation of vehicle insufficient to raise issue concerning seat belt); *Caiazzo v Volkswagenwerk A. G.*, 647 F2d 241 (2d Cir 1981) (extensive discussion of New York law). Evidence that plaintiff failed to wear a seat belt is admissible only if defendant is prepared to offer competent evidence showing that any of plaintiff's injuries were caused by failure to wear a seat belt, *Siegfried v Siegfried*, 123 AD2d 621, 507 NYS2d 20 (2d Dept 1986); see also *Schrader v Carney*, 180 AD2d 200, 586 NYS2d 687 (4th Dept 1992).

The failure to wear seat belts is relevant only on the issue of damages, VTL § 1229-c; *Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 933 NYS2d 208 (1st Dept 2011) (citing PJI 2:87.1); *Martinez v Novin*, 303 AD2d 653, 757 NYS2d 317 (2d Dept 2003); *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984), and therefore, in a bifurcated trial, evidence of the plaintiff's failure to wear an available seat belt should be excluded if offered during the liability phase of the trial, *Siegfried v Siegfried*, 123 AD2d 621, 507 NYS2d 20 (2d Dept 1986); see *Boyd v Trent*, 297 AD2d 301, 746 NYS2d 191 (2d Dept 2002); see also VTL § 1229-c; but see *Costello by Hines v Marchese*, 137 AD2d 482, 524 NYS2d 232 (2d Dept 1988).

Seat belts are required on vehicles registered in New York, manufactured or assembled after June 30, 1962, *Vehicle and Traffic Law* § 383, and the failure to equip the vehicle with seat belts is negligence as a matter of law, *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984) (proper to charge jury that failure to furnish operational seat belt is violation of statute which would constitute negligence as a matter of law, citing PJI); *McMahon v Butler*, 73 AD2d 197, 426 NYS2d 326 (3d Dept 1980). In the absence of contrary proof, it should be presumed that all of the seatbelts with which a vehicle has been equipped are both operable and available, *Barnes v Paulin*, 73 AD3d 1107, 900 NYS2d 886 (2d Dept

2010). The jury may not consider whether the owner of an old vehicle, not subject to the statutory requirement, should have retrofitted the vehicle with seat belts, *Ramundo v Guilderland*, 142 AD2d 50, 534 NYS2d 543 (3d Dept 1988). The provisions of VTL § 383 requiring the furnishing of seat belts should not be confused with the provisions of VTL § 1229-c which mandate the use of seat belts or other safety restraints. VTL § 383 contains no provision requiring use and the courts have refused to imply such a statutory duty, *Spier v Barker*, 35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974); see *Cousins v Instrument Flyers, Inc.*, 58 AD2d 336, 396 NYS2d 655 (1st Dept 1977), *aff'd*, 44 NY2d 698, 405 NYS2d 441, 376 NE2d 914 (1978); *Frozzitta v Freeport*, 57 AD2d 827, 394 NYS2d 64 (2d Dept 1977) (citing PJI); *Uribe v Armstrong Rubber & Tire Co., Inc.*, 55 AD2d 869, 390 NYS2d 419 (1st Dept 1977); *Baker v Hlavachek*, 51 AD2d 739, 379 NYS2d 481 (2d Dept 1976). Although VTL § 1229-c mandates the use of seat belts, it prohibits presentation of evidence in support of any statutory or common law cause of action against the owner and operator of the vehicle in which a child is a passenger, based upon the failure to use the child's seat belt, *Baker v Keller*, 241 AD2d 947, 661 NYS2d 330 (4th Dept 1997); *Hamilton v Purser*, 162 AD2d 91, 563 NYS2d 163 (3d Dept 1990); see *Stewart v Taylor*, 193 AD2d 1078, 598 NYS2d 627 (4th Dept 1993). It should be noted that VTL § 1229-c, by its language, does not apply to a passenger or operator with a physically disabling condition whose disability prevents use of the seatbelt, VTL § 1229-c(7).

Crash helmets are required to be worn in New York by a motorcyclist or rider, *Vehicle & Traffic Law* § 381(6); see also *Annot*: 32 ALR3d 1270. Prior to the decision in *Spier v Barker*, 35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974), the cases decided under the crash helmet section have concerned its constitutionality, *People v Carmichael*, 56 Misc2d 388, 288 NYS2d 931 (Co Ct 1968) and *People v Bielmeyer*, 54 Misc2d 466, 282 NYS2d 797 (NY City Ct 1967), holding it constitutional (accord: *Com. v Howie*, 354 Mass 769, 238 NE2d 373 (1968); *Everhardt v New Orleans*, 253 La 285, 217 So 2d 400 (1968)), and *People v Smallwood*, 52 Misc2d 1027, 277 NYS2d 429 (Sp Sess 1967), holding it unconstitutional.

Spier v Barker, 35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974), was based on the plaintiff's duty to mitigate injury, see *Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 933 NYS2d 208 (1st Dept 2011) (citing PJI 2:87.1). In *Curry v Moser*, 89 AD2d 1, 454 NYS2d 311 (2d Dept 1982), the plaintiff was not wearing a seat belt when the car door sprung open and she fell out into the path of another vehicle which struck her. Noting that the *Spier* opinion, 35 NY2d at 451, n. 3 left open the question of what result obtains in the unusual case where failure to wear a seat belt is a cause of the accident, the court in *Curry* held that failure to wear a seat belt may be found to be comparative fault, which under CPLR Art. 14-A proportionally reduces damages, see *Mattott v Renault USA*, 105 AD2d 697, 481 NYS2d 387 (2d Dept 1984) (since plaintiff's theory of recovery was predicated upon defective design or manufacture of windshield, seat belt defense would apply only to miti-

gate damages); see also *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). Except in unusual circumstances, the failure to use an available seat belt is to be considered only in mitigation of damages and should not be considered by the trier of fact in resolving the issue of liability, *Spier v Barker*, supra; *Cummins v Rose*, 185 AD2d 839, 586 NYS2d 988 (2d Dept 1992) (citing PJI); *Stein v Penatello*, 185 AD2d 976, 587 NYS2d 37 (2d Dept 1992).

Though ordinarily there can be no recovery for negligent parental supervision, *Costello* by *Hines v Marchese*, 137 AD2d 482, 524 NYS2d 232 (2d Dept 1988), held that a grandparent who operates a vehicle in which an infant grandchild is a passenger may be held liable to the grandchild for the failure to fasten the child's seatbelt. However, *Costello* does not apply where the accident occurred on or after January 1, 1985, the effective date of VTL § 1229-c. VTL § 1229-c prohibits the presentation of evidence in support of any statutory or common law cause of action based upon the failure of a driver to make sure that seat belts are used by a child, *Baker v Keller*, 241 AD2d 947, 661 NYS2d 330 (4th Dept 1997) (prohibiting amendment of complaint predicated upon noncompliance with VTL § 1229-c(1)); *Hamilton v Purser*, 162 AD2d 91, 563 NYS2d 163 (3d Dept 1990) (dismissing claims based upon driver's failure to assure that child in back seat was using seat belt); see *Stewart v Taylor*, 193 AD2d 1078, 598 NYS2d 627 (4th Dept 1993).

The existence of both a statutory and common law duty to wear an available seatbelt requires two different charges. Where plaintiff was under a statutory duty to wear a seatbelt at the time the accident occurred and there is expert testimony from which the jury could find that some or all of plaintiff's injuries would not have been sustained had the seatbelt been worn, the following instruction should be included in the damages portion of the charge, in addition to an instruction conforming with PJI 2:26. If there is an issue of fact as to whether plaintiff's disability prevents the use of a seat belt, that issue should be submitted to the jury, see VTL § 1229-c(7).

PJI 2:87.1

The defendant claims that some or all of the plaintiff's claimed injuries were caused by (his, her) failure to use an available seatbelt and that plaintiff cannot recover for those injuries.

The defendant has the burden of proving that some or all of the plaintiff's injuries were caused by (his, her) failure to use an available seatbelt.

If you find that plaintiff failed to use an available seatbelt and that some or all of the plaintiff's

injuries resulted from (his, her) failure to use the seatbelt, you may not make any award for those injuries you find (he, she) sustained because of such failure to use the seatbelt.

You will be given a verdict sheet containing several questions. The first question asks that you insert the total damages sustained by the plaintiff, that is, the total of all damages, both past and future, which you have itemized. The second question asks whether defendant has proved that some or all of plaintiff's injuries were caused by the failure to use an available seatbelt. If you have answered "Yes" to the second question, you will answer the third question that asks you to compute the amount of money by which the plaintiff's damages should be reduced because of the plaintiff's failure to use an available seatbelt.

It should be noted that VTL § 1229-c(3) provides that "No person sixteen years of age or over shall be a passenger in the front seat of a motor vehicle unless such person is restrained by a safety belt approved by the commissioner." This section makes no reference to whether the prohibition applies when an approved seat belt is not available. The word "available" in the charge was adopted from *Spier v Barker*, 35 NY2d 44, which was decided before the statute was enacted. Therefore, there is a question as to whether the word "available" in the charge should be used.

In 2002, the Legislature added VTL § 1229-c(3-a), which states that, with the exception of passengers under the age of four (who are otherwise provided for in the statute), all individuals "seated in a sitting position equipped with both a lap safety belt and a shoulder harness belt" must utilize both. Thus, since there are few vehicles now on the road that are not equipped with both lap belts and shoulder harnesses, most individuals sitting in either the front or rear seats of a vehicle are under a statutory duty to use such safety equipment. In those rare cases where plaintiff was not under a statutory duty to use an available seat belt at the time of the accident but there is evidence that plaintiff was under a common law duty to wear an available seatbelt, and there is expert testimony from which the jury could find that some or all of plaintiff's injuries would not have been sustained had the seat belt been worn, the following instruction should be included in the damages portion of the charge:

PJI 2:87.2

The defendant claims that some or all of the

plaintiff's claimed injuries were caused by (his, her) failure to use an available seat belt and that plaintiff cannot recover for those injuries.

If you find that a reasonably prudent passenger would have used an available seat belt and that some or all of the plaintiff's injuries resulted from (his, her) failure to use an available seat belt, you may not make any award for those injuries you find (he, she) sustained because of such failure to use the seatbelt.

The defendant has the burden of proving that a reasonably prudent passenger in plaintiff's position would have used an available seat belt and that some or all of the plaintiff's injuries were caused by (his, her) failure to use an available seatbelt.

You will be given a verdict sheet containing several questions. The first question asks that you insert the total damages sustained by the plaintiff, that is, the total of all damages, both past and future, that you have itemized. The second question asks whether a reasonably prudent passenger in plaintiff's position would have used an available seatbelt. If you have answered "Yes" to the second question, you will answer the third question that asks whether the defendant has proved that some or all of plaintiff's injuries were caused by the failure to use an available seatbelt. If you have answered "Yes" to the third question, you will answer the fourth question that asks you to compute the amount of money by which the plaintiff's damages should be reduced because of the plaintiff's failure to use an available seatbelt.

The charge assumes that plaintiff knew, or should have known, there was a seat belt and failed to use it. Where there is a factual dispute on either issue, the charge must be modified accordingly. Where the above charge is used, care should be taken to charge comparative fault, see PJI 2:36, only with respect to culpable conduct other than failure to wear a seat belt, in order to prevent the jury from apportioning the same conduct twice, see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). Except in

unusual circumstances, the failure to use an available seat belt is to be considered only in mitigation of damages and should not be considered by the trier of fact in resolving the issue of liability, *Spier v Barker*, 35 NY2d 444, 363 NYS2d 916, 323 NE2d 164 (1974); *Stein v Penatello*, 185 AD2d 976, 587 NYS2d 37 (2d Dept 1992) (citing PJI); *Cummins v Rose*, 185 AD2d 839, 586 NYS2d 988 (2d Dept 1992).

Evidence that plaintiff failed to wear a seat belt is admissible only if defendant is prepared to offer competent evidence showing that any of plaintiff's injuries were caused by failure to wear a seat belt, *Siegfried v Siegfried*, 123 AD2d 621, 507 NYS2d 20 (2d Dept 1986). In a wrongful death action, failure to wear an available seat belt may be asserted as a defense only if there is evidence that decedent would have survived had he or she worn the seat belt, *Baginski v New York Telephone Co.*, 130 AD2d 362, 515 NYS2d 23 (1st Dept 1987). In *Baginski*, decedent was a passenger in a car struck in the side by another vehicle and, although a seat belt might have prevented a fatal head injury, there was no evidence that the seat belt would have prevented internal injuries that decedent also sustained and no evidence that decedent could have survived those internal injuries, see *Stein v Penatello*, 185 AD2d 976, 587 NYS2d 37 (2d Dept 1992) (citing PJI) (error to preclude testimony that decedent would have been killed or would have suffered serious injury even if wearing a seat belt).

In connection with the above charges, written interrogatories such as the following should be used, see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984) (citing PJI); *Frozzitta v Freeport*, 57 AD2d 827, 394 NYS2d 64 (2d Dept 1977) (citing PJI). The existence of both a statutory and common law duty to wear an available seat belt requires two different sets of interrogatories. When the verdict form is prepared, signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a court exhibit.

Interrogatories Where Plaintiff Is Under A Statutory Duty To Wear An Available Seatbelt

If your verdict is in favor of the plaintiff, answer the following:

1. What are the total damages sustained by the plaintiff?

At least five jurors must agree on the answer to this question.

\$ _____

2. Were any of the plaintiff's injuries caused by (his, her) failure to use an available seat belt?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

Do not answer Question “3” unless your answer to Question “2” is “Yes”

3. By what amount should plaintiff’s total damages be reduced because of (his, her) failure to use an available seat belt?

At least five jurors must agree on the answer to this question.

\$____

Interrogatories Where Plaintiff Is Under A Common Law Duty To Wear An Available Seatbelt

If your verdict is in favor of the plaintiff, answer the following:

1. What are the total damages sustained by the plaintiff?

At least five jurors must agree on the answer to this question.

\$____

2. Would a reasonably prudent passenger in plaintiff’s position have used an available seatbelt?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

Do not answer Question “3” unless your answer to Question “2” is “Yes.”

3. Were any of the plaintiff’s injuries caused by (his, her) failure to use an available seat belt?

At least five jurors must agree on the answer to this question?

Yes ____ No ____

Do not answer Question “4” unless your answer to Question “3” is “Yes.”

4. By what amount should plaintiff's total damages be reduced because of (his, her) failure to use an available seat belt.

At least five jurors must agree on the answer to this question.

\$_____

In a comparative negligence case the apportionment must be applied to the amount remaining after the total damages have been reduced by reason of the failure to wear a seat belt.

In a bifurcated trial of a comparative negligence case the jury must, in the first or liability phase, determine the percentages of fault, if any. In the damage phase, the jury must fix total damages and decide the amount of reduction of the total damages attributable to the seat belt defense.

Where the verdict awards both past and future damages, see CPLR 4111(f), and Article 50-B, the seat belt reduction should be allocated by the judge between past and future damages and among the individual items of future damages in accordance with the jury's apportionment of those damages. Thus, if the jury apportions 75% for past damages and 25% for future damages, the seat belt reduction expressed in dollars should be applied using the same percentages. With respect to the individual items of future damages, the seat belt reduction expressed in dollars should be applied using the percentages computed by dividing the individual itemized awards for future damages by the total amount awarded for future damages. For example, if the total award for future damages is \$600,000 and the award for future pain and suffering is \$300,000, 50% of the dollar amount of the seat belt reduction allocated to future damages should be deducted from the award for future pain and suffering. The complexity suggested by this formula makes use of special verdicts mandatory. Indeed, there may be cases where it is particularly important to ascertain the amount of damages attributable to the failure to wear a seat belt, such as where an owner-third party defendant failed to properly provide a seat belt to a passenger-plaintiff. A failure to obtain from the jury a precise amount attributable to the seat belt issue may result in a new trial, see *DiMauro v Metropolitan Suburban Bus Authority*, 105 AD2d 236, 483 NYS2d 383 (2d Dept 1984). For forms of a special verdict in comparative negligence case see PJI 2:36.

In a full trial of a comparative negligence case, the charge at PJI 2:36 must be modified so as to instruct the jury to reduce the total amount of damages by the amount attributable to the seat belt defense before applying percentages of negligence to arrive at the final dollar amount of plaintiff's verdict. Use of written interrogatories or special verdicts is also mandatory in this situation.

e. SERIOUS INJURY UNDER THE NO-FAULT LAW

Introductory Statement**I.**

The No-Fault Law precludes recovery for pain and suffering and other non-monetary detriment (“non-economic” loss), between covered persons, unless the plaintiff pleads and proves a “serious injury,” Ins. Law § 5104(a); CPLR 3016(g); CPLR 3043(a)(6); *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 (2001); *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982). A person claiming benefits for non-economic loss under a policy’s uninsured motorist coverage, see Ins. Law § 3420(f)(1), must also establish serious injury as defined in Insurance Law § 5102(d). However, the requirement that serious injury as defined in Insurance Law § 5102(d) applies only if the accident arose out of the use or operation of a motor vehicle in New York, *Ofori v Green*, 74 AD3d 474, 901 NYS2d 835 (1st Dept 2010) (serious injury requirement inapplicable to accident occurring in New Jersey between two New York residents whose vehicles were registered in New York). In *Raffellini v State Farm Mut. Auto. Ins. Co.*, 9 NY3d 196, 848 NYS2d 1, 878 NE2d 583 (2007), the Court of Appeals upheld 11 NYCRR 60-2.3, which imposes the same requirement for claims for non-economic loss under supplementary uninsured/underinsured motorist (SUM) endorsements, see Ins. Law § 3420(f)(2). In light of the replacement of former Ins. Law § 671(4) with Ins. Law Art. 51, the current No-Fault Law, care should be used in relying upon serious injury cases which arose prior to November 30, 1977.

Insurance Law § 5102(d) defines serious injury as an injury resulting in:

- (i) death;
- (ii) dismemberment;
- (iii) significant disfigurement;
- (iv) fracture;
- (v) loss of a fetus;
- (vi) permanent and total loss of use of a body organ, member, function or system;
- (vii) permanent consequential limitation of use of a body organ or member;
- (viii) significant limitation of use of a body function or system;

(ix) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

For charges and comments on the frequently litigated categories of "serious injury," see 2:88A (injury resulting in death); 2:88B (significant disfigurement); 2:88C (fracture); PJI 2:88D (permanent and total loss of body organ, member, function or system); 2:88E (permanent consequential limitation of use of body organ or member); 2:88F (significant limitation of use of body function or system); and 2:88G (non-permanent medically determined injury that prevents performance of usual and customary daily activities for 90 of 180 days immediately subsequent to injury). The various categories of serious injury are read in the disjunctive, so that the failure of a plaintiff to qualify for damages under one category does not necessarily preclude a recovery for the same alleged injuries under another category, *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 (2d Dept 2011).

A. Nature of the Serious Injury Element

Serious injury has been viewed as either an element of liability or an element of damages, *Ruzycki v Baker*, 301 AD2d 48, 750 NYS2d 680 (4th Dept 2002). When the issue is raised and how the issue is classified may have an impact on the effect of an order granting plaintiff judgment on the issue of "liability." The issue's classification also affects the point from which prejudgment interest under CPLR 5002 is computed in a bifurcated trial, *Van Nostrand v Froehlich*, 44 AD3d 54, 844 NYS2d 293 (2d Dept 2007). For example, where serious injury is treated as a damages issue, interest runs from the liability verdict, even if serious injury is decided later as a damages issue, *id* (citing *Love v State*, 78 NY2d 540, 577 NYS2d 359, 583 NE2d 1296 (1991)).

The views of the First, Second and Third Departments are similar. The First Department has held that, unless the issue of serious injury has specifically been raised, defendant's default on a motion for summary judgment on "liability" settles only the question of fault, leaving the issue of serious injury to be determined, *Reid v Brown*, 308 AD2d 331, 764 NYS2d 260 (1st Dept 2003) (overruling *Maldonado v DePalo*, 277 AD2d 21, 715 NYS2d 245 (1st Dept 2000), and *Porter v SPD Trucking*, 284 AD2d 181, 727 NYS2d 70 (1st Dept 2001)). The Second Department has held that serious injury is a matter that must be established as part of the damages inquiry, *Van Nostrand v Froehlich*, 44 AD3d 54, 844 NYS2d 293 (2d Dept 2007), and that a plaintiff who has been granted summary judgment on liability without opposition still has the burden of establishing "serious injury," *Zecca v Riccardelli*, 293 AD2d 31, 742 NYS2d 76 (2d Dept 2002). Moreover, the Second Department has held that a default judgment resulting from the striking of an

answer or the failure to answer ordinarily does not resolve the question whether plaintiff sustained a serious injury and, consequently, that threshold element must be proven in the damages inquest, *Abbas v Cole*, 44 AD3d 31, 840 NYS2d 388 (2d Dept 2007). However, where entry of a default judgment was opposed with defense papers that set forth a claimed “meritorious defense” but omitted mention of the serious injury question, the resulting judgment for plaintiff represented a final adjudication on the merits of that question, *Beresford v Waheed*, 302 AD2d 342, 754 NYS2d 350 (2d Dept 2003); see *Abbas v Cole*, *supra*. Courts within the Third Department try the issue of serious injury as part of the damages question where defendant’s liability has been conceded, *Kelley v Balasco*, 226 AD2d 880, 640 NYS2d 652 (3d Dept 1996); *Ives v Correll*, 211 AD2d 899, 621 NYS2d 179 (3d Dept 1995).

In the Fourth Department, a finding of “liability” includes a determination for plaintiff on the serious injury question, *Ruzycki v Baker*, 301 AD2d 48, 750 NYS2d 680 (4th Dept 2002). However, where plaintiff has moved for summary judgment on “liability” and has established defendant’s negligence as a matter of law, the court should grant “partial summary judgment” on the issue of fault alone if the serious injury issue was “not raised or established as a matter of law,” *id*; see *De Petres v Kaiser*, 244 AD2d 851, 665 NYS2d 221 (4th Dept 1997); see also *Barrow v Dubois*, 82 AD3d 1685, 920 NYS2d 507 (4th Dept 2011); *Manzano v O’Neil*, 298 AD2d 829, 747 NYS2d 813 (4th Dept 2002).

B. Requirement of Objective Medical Evidence

The “legislative intent underlying the No-Fault Law was to weed out frivolous claims,” *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900, 647 NE2d 105 (1995). In light of this goal, the courts have required plaintiffs to establish serious injury through the use of objective medical evidence, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011). Subjective complaints of pain or other symptoms are not sufficient, *Perl v Meher*, *supra*; *Toure v Avis Rent A Car Systems, Inc.*, *supra*; see *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); *Melino v Lauster*, 195 AD2d 653, 599 NYS2d 713 (3d Dept 1993), *aff’d*, 82 NY2d 828, 605 NYS2d 4, 625 NE2d 589 (1993); *Downie v McDonough*, 117 AD3d 1401, 984 NYS2d 710 (4th Dept 2014); *Palmeri v Zurn*, 55 AD3d 1017, 871 NYS2d 393 (3d Dept 2008); *Van Nostrand v Regina*, 212 AD2d 883, 622 NYS2d 150 (3d Dept 1995); *King v Johnston*, 211 AD2d 907, 621 NYS2d 402 (3d Dept 1995); *Lanuto v Constantine*, 192 AD2d 989, 596 NYS2d 944 (3d Dept 1993), nor is medical opinion based only upon subjective complaints of pain sufficient, *Crandall v Sledziewski*, 260 AD2d 754, 687 NYS2d 812 (3d Dept 1999); *Barrett v Howland*, 202 AD2d 383, 608 NYS2d 681 (2d Dept 1994).

Thus, headaches reported by the patient, which cannot be observed by a treating physician, do not qualify as objectively demonstrable,

medically-determined non-permanent injuries or impairments, at least in the absence of tests revealing such an injury, *Alcombrack v Swarts*, 49 AD3d 1170, 856 NYS2d 357 (4th Dept 2008); see *Palmeri v Zurn*, 55 AD3d 1017, 871 NYS2d 393 (3d Dept 2008) (complaints of generalized pain and depression). Likewise, medical testimony concerning observations of a spasm suffice only if the spasm is objectively ascertained through specific medical tests, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); see *Rissew v Smith*, 89 AD3d 1383, 932 NYS2d 291 (4th Dept 2011); *Harris v Ariel Transp. Corp.*, 55 AD3d 323, 865 NYS2d 73 (1st Dept 2008); *Parks v Miclette*, 41 AD3d 1107, 838 NYS2d 717 (3d Dept 2007); but see *MacMillan v Cleveland*, 82 AD3d 1388, 918 NYS2d 263 (3d Dept 2011). A finding of serious injury is not warranted where there is no indication that the diagnosis of tinnitus rested on anything other than plaintiff's subjective complaints of ringing in the ear, which were not accompanied by hearing loss or any other manifestation of an injury, *Congdon v Preisman*, 263 AD2d 808, 693 NYS2d 757 (3d Dept 1999); *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997). The mere existence of a tear in tendons, as well as a tear in a ligament, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration, *Resek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 (2d Dept 2010); see *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 (2d Dept 2011) (torn menisci, standing alone, not evidence of serious injury). Similarly, a dislocation, unaccompanied by objective medical evidence of a permanent or significant limitation resulting from the dislocation, is not a serious injury, *Jno-Baptiste v Buckley*, 82 AD3d 578, 919 NYS2d 22 (1st Dept 2011).

1. Objective Evidence of Inability to Perform Usual and Customary Activities During 90/180 Period

Claims asserted under the 90/180-day category of serious injury must be established through objective evidence of a medically-determined, non-permanent injury or impairment, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); *Parks v Miclette*, 41 AD3d 1107, 838 NYS2d 717 (3d Dept 2007); *Sougstad v Meyer*, 40 AD3d 839, 835 NYS2d 722 (2d Dept 2007); *Taylor v Jerusalem Air, Inc.*, 280 AD2d 466, 721 NYS2d 67 (2d Dept 2001); *DiNunzio v Suffolk*, 256 AD2d 498, 682 NYS2d 406 (2d Dept 1998); *Kimball v Baker*, 174 AD2d 925, 571 NYS2d 621 (3d Dept 1991). Plaintiff's own statements regarding inability to return to work are not sufficient unless accompanied by competent medical evidence, *Blake v Portexit Corp.*, 69 AD3d 426, 893 NYS2d 28 (1st Dept 2010); *Alcombrack v Swarts*, 49 AD3d 1170, 856 NYS2d 357 (4th Dept 2008); *Parks v Miclette*, 41 AD3d 1107, 838 NYS2d 717 (3d Dept 2007); *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 (2d Dept 2005); *June v Gonet*, 298 AD2d 811, 750 NYS2d 143 (3d Dept 2002), such as medical records, affidavits of treating physicians and employment records, *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998), see *Williams v Jones*, 139 AD3d

1346, 31 NYS3d 348 (4th Dept 2016); *Padilla v Style Management Co., Inc.*, 256 AD2d 27, 681 NYS2d 20 (1st Dept 1998) (medically corroborated testimony by plaintiff that she was confined to bed for approximately seven months after accident and was unable to work or care for her child for several years sufficient to establish serious injury). The Second Department has concluded that, to qualify as a serious injury under the 90/180-day category, the injury must be substantiated by a physician, *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 (2d Dept 2011); but see *Barrow v Dubois*, 82 AD3d 1685, 920 NYS2d 507 (4th Dept 2011) (nurse practitioner's diagnosis of cervical sprain, supported by nurse's observations that plaintiff had limited range of motion in his neck and objective evidence that plaintiff experienced crepitus in his neck, constituted objective evidence of plaintiff's claim of serious injury under 90/180-day category). Where the plaintiff seeks to establish serious injury under the 90/180-day category through the affidavit of a treating physician, the physician should aver that the plaintiff was unable to work or engage in normal activities during the statutory time or thereafter, and describe the medically indicated limitations on the plaintiff's activities, *Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 (3d Dept 2001).

2. Objective Medical Evidence of Permanent Consequential and Significant Limitation of Use

Where plaintiff is claiming serious injury arising from “permanent consequential limitation of use of a body organ, member, function or system” or “significant limitation of use of a body function or system” the determination of whether the limitation is “significant” or “consequential” (i.e., important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); see *Caraballo v Kim*, 63 AD3d 976, 882 NYS2d 211 (2d Dept 2009); *Tornatore v Haggerty*, 307 AD2d 522, 763 NYS2d 344 (3d Dept 2003). Thus, to establish a claim under either of these categories, plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitation to the normal function, purpose and use of the affected body organ, member, function or system, *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011); *Toure v Avis Rent A Car Systems, Inc.*, *supra*; *Rodman v Deangeles*, 148 AD3d 119, 47 NYS3d 747 (3d Dept 2017); *Tandoi v Clarke*, 75 AD3d 896, 906 NYS2d 628 (3d Dept 2010); *Pugh v DeSantis*, 37 AD3d 1026, 830 NYS2d 823 (3d Dept 2007); *Guzman v Paul Michael Management*, 266 AD2d 508, 698 NYS2d 719 (2d Dept 1999); see *Assael v Marth*, 300 AD2d 329, 751 NYS2d 315 (2d Dept 2002); *Brehaut v Laveck*, 266 AD2d 927, 697 NYS2d 418 (4th Dept 1999); *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998) (“significant limitation of use of a body function or system” based on emotional injuries established, *prima facie*, through medical records and affidavits

of treating psychiatrist and psychologist documenting plaintiff's impairment and through employment records showing that, upon resuming work, plaintiff was unable to function in her job).

The "expert" medical evidence must be provided by a practitioner who is qualified to opine on the subject, *Tornatore v Haggerty*, 307 AD2d 522, 763 NYS2d 344 (3d Dept 2003) (affidavits by physical therapists, who cannot by definition diagnose or make prognosis and are not competent to determine permanency or duration of physical limitation, insufficient); see *Evans v Beebe*, 267 AD2d 828, 699 NYS2d 803 (3d Dept 1999) (physical therapists not competent to determine permanency or duration of limitation). Further, where the proof takes the form of a physician's qualitative assessment, it should be supported by such objective medical evidence as MRI reports, CT scan reports and observations during an examination, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); see *Moat v Kizale*, 149 AD3d 1308, 52 NYS3d 554 (3d Dept 2017) (objective medical evidence from treating physician raised issue of fact whether accident was substantial factor in causing significant aggravation of extensive pre-existing injuries); *Tandoi v Clarke*, 75 AD3d 896, 906 NYS2d 628 (3d Dept 2010); *Jones v Davis*, 307 AD2d 494, 763 NYS2d 136 (3d Dept 2003) (jury was entitled to infer permanent limitation of plaintiff's use of his left knee based on plaintiff's testimony regarding debilitating pain and evidence of objective medical findings of skin discoloration, swelling and surface coldness).

MRI results are often used to establish "serious injury." An expert's conclusion based on a review of MRI films and reports can provide objective evidence of a serious injury, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); see *Assael v Marth*, 300 AD2d 329, 751 NYS2d 315 (2d Dept 2002) (medical expert's affirmation discussing MRI films he reviewed and range of motion testing he performed sufficient to raise triable issue of fact on serious injury issue). However, it is not sufficient for an expert merely to mention an MRI report without discussing its findings or stating that its finding is supported by the expert's diagnosis, particularly where the MRI report has not been admitted in evidence, *Toure v Avis Rent A Car Systems, Inc.*, *supra*; see *Adkins v Queens Van-Plan, Inc.*, 293 AD2d 503, 740 NYS2d 389 (2d Dept 2002); *Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept 2002); but see *Vaughan v Leon*, 94 AD3d 646, 943 NYS2d 63 (1st Dept 2012) (no requirement that expert submit or describe the contents of referenced MRI report).

To prove the extent or degree of physical limitation, plaintiff may use an expert's designation of a numeric percentage of the loss of range of motion, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); see *Assael v Marth*, 300 AD2d 329, 751 NYS2d 315 (2d Dept 2002), provided that the expert explains the objective tests on which the measurements were based, *Brown v Dunlap*, 6 AD3d 159, 774 NYS2d 147 (1st Dept 2004), *rev'd on other grounds*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); see *Carota v Wu*, 284

AD2d 614, 725 NYS2d 453 (3d Dept 2001) (providing examples of objective physical evidence of limitation of range of motion). When relying on the quantitative prong of *Toure* to establish “serious injury,” plaintiff is not required to submit quantitative range of motion findings “contemporaneous” to the accident, *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011). Rather, plaintiff may submit qualitative medical evidence establishing plaintiff’s symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation, *id.* The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff’s injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff’s injuries, *id.*

a. Objective Evidence of Limitations Arising from Spinal Injury

Proof that plaintiff suffered a herniated disc is not alone sufficient to establish serious injury within the meaning of Insurance Law § 5102(d), *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Quagliarello v Paladino*, 40 AD3d 836, 835 NYS2d 724 (2d Dept 2007); *Toulson v Young Han Pae*, 13 AD3d 317, 788 NYS2d 334 (1st Dept 2004); *Durham v New York East Travel, Inc.*, 2 AD3d 1113, 769 NYS2d 324 (3d Dept 2003); *Noble v Ackerman*, 252 AD2d 392, 675 NYS2d 86 (1st Dept 1998). Thus, as is true with any claimed serious injury arising from a limitation of use, an MRI finding of disc herniation or bulging is not alone sufficient and must be accompanied by objective evidence of the extent of the resulting physical limitations, *Garcia v Solbes*, 41 AD3d 426, 838 NYS2d 146 (2d Dept 2007); *Kearse v New York City Transit Authority*, 16 AD3d 45, 789 NYS2d 281 (2d Dept 2005); *Meely v 4 G’s Truck Renting Co., Inc.*, 16 AD3d 26, 789 NYS2d 277 (2d Dept 2005); see *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 858 NYS2d 171 (1st Dept 2008); see also *Mahar v Bartnick*, 91 AD3d 1163, 936 NYS2d 770 (3d Dept 2012). Further, an expert’s statement regarding a decreased range of motion in plaintiff’s spine is not sufficient if it does not specify the extent or degree of the decrease, *Brehaut v Laveck*, 266 AD2d 927, 697 NYS2d 418 (4th Dept 1999).

In *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002), the required showing was sufficiently made through the introduction of MRI films and the testimony of a treating physician, who interpreted the films, described the qualitative nature of plaintiff’s limitations based on the normal function, purpose and use of her body parts and specifically correlated plaintiff’s herniated discs with her inability to perform certain normal daily tasks.

In most cases, serious injury arising from a herniated disc is established through a quantitative comparison with a normal range of motion. In *Assael v Marth*, 300 AD2d 329, 751 NYS2d 315 (2d Dept 2002), for example, an affirmation from a medical expert was deemed

sufficient where it discussed, among other things, the MRI films he reviewed showing cervical herniations and the range of motion testing he performed during a recent examination, which indicated specific limitations in the range of motion of plaintiff's cervical spine. Similarly, where reports were submitted from plaintiff's treating physicians indicating that plaintiff's range of motion of the thoraco/lumbar spine was limited in all planes of movement and the physician's conclusion was supported by specific measurements, plaintiff established a serious injury, *Mendola v Demetres*, 212 AD2d 515, 622 NYS2d 309 (2d Dept 1995); see *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 (2d Dept 1994) (plaintiffs established prima facie case of serious injury through submission of two affidavits from chiropractor who examined injured plaintiff and performed tests that quantified limitation of plaintiff's range of motion resulting from her spinal injury). While evidence of a herniated disc standing alone is not sufficient to demonstrate a serious injury, serious injury arising from a herniated disc may be established through a qualitative assessment comparing plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system, *Tandoi v Clarke*, 75 AD3d 896, 906 NYS2d 628 (3d Dept 2010).

When relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002), to establish "serious injury," plaintiff is not required to submit quantitative range of motion findings "contemporaneous" to the accident, *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011). Rather, plaintiff may submit qualitative medical evidence establishing plaintiff's symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation, *id.* The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff's injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff's injuries, *id.*

The First Department has held that straight-leg raising tests, when coupled with positive MRI and nerve conduction test results, constitute objective evidence of serious injury resulting from spinal injury, *Brown v Achy*, 9 AD3d 30, 776 NYS2d 56 (1st Dept 2004); see *Otero v 971 Only U, Inc.*, 36 AD3d 430, 828 NYS2d 331 (1st Dept 2007). The question whether straight-leg raising tests alone constitute sufficient evidence was left open in *Brown v Achy*, *supra*. The Second Department has consistently held that positive straight-leg raising tests constitute objective evidence of serious injury, *Carroll v Jennings*, 264 AD2d 494, 694 NYS2d 458 (2d Dept 1999); *Risbrook v Coronamos Cab Corp.*, 244 AD2d 397, 664 NYS2d 75 (2d Dept 1997); *Kim v Cohen*, 208 AD2d 807, 618 NYS2d 386 (2d Dept 1994); see *Seecoomar v Ly*, 43 AD3d 900, 841 NYS2d 624 (2d Dept 2007). Electrodiagnostic nerve conduction tests can also constitute objective evidence of serious injury, *Cassagnol v Williamsburg Plaza Taxi Inc.*, 234 AD2d 208, 651 NYS2d 518 (1st Dept 1996).

3. *Timing of Medical Examination*

To succeed in proving that he or she sustained a "serious injury," a

plaintiff claiming restrictions in range of motion must submit evidence of an objective medical assessment (qualitative or quantitative) made shortly after the accident, see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011). Moreover, a plaintiff must submit evidence of an objective medical assessment (qualitative or quantitative) that is recent in relation to the judicial proceeding, see *Bent v Jackson*, 15 AD3d 46, 788 NYS2d 56 (1st Dept 2005); *Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 (1st Dept 2005); see also *Henry v Sorge*, 90 AD3d 1355, 935 NYS2d 381 (3d Dept 2011). When relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002), to establish serious injury, plaintiff is not required to submit quantitative range of motion findings “contemporaneous” to the accident, *Perl v Meher*, *supra*. Rather, plaintiff may submit qualitative medical evidence establishing plaintiff’s symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation, *id*. The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff’s injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff’s injuries, *id*. In cases decided prior to *Perl*, it was held that the requirement of an objective medical assessment that is contemporaneous with the accident exists even where the plaintiff has had surgery on the injured body part, *DeJesus v Cruz*, 73 AD3d 539, 902 NYS2d 503 (1st Dept 2010). Similarly, in a pre-*Perl* case, it was held that the requirement of an objective medical assessment that is contemporaneous with the injury applied to claimed psychological injuries such as post-traumatic stress disorder, *Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 895 NYS2d 394 (1st Dept 2010).

Any significant lapse of time between the cessation of the plaintiff’s medical treatments following the accident and the physical examination conducted by the plaintiff’s expert physician must be adequately explained, *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 (2d Dept 2000); see *Kim v Budhu*, 273 AD2d 204, 709 NYS2d 440 (2d Dept 2000). A recent examination is not a required element of plaintiff’s proof where plaintiff’s physician concluded at the last examination that her injury was permanent and that there was no benefit to further treatment, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002).

The requirement of an examination that is contemporaneous with the accident poses special difficulties for defendants seeking to challenge claims of “serious injury,” since the defense expert may not have an opportunity to examine plaintiff until months or even years after the accident. The lapse of time between the accident and the defense examination is particularly problematic where plaintiff claims an inability to perform usual and customary daily activities for at least 90 days during the 180 days immediately following the accident, *Colavito v Steyer*, 65 AD3d 735, 883 NYS2d 807 (3d Dept 2009) (defendant’s expert, who

examined plaintiff 18 months after accident, failed to address plaintiff's condition during 6 months immediately following accident); *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 (1st Dept 2005) (defense examination conducted six years after accident insufficient to raise question of fact as to serious injury claim based on 90/180 day impairment, since defendant's physician failed to address plaintiff's condition during 6 months immediately following accident); see *Coley v DeLarosa*, 105 AD3d 527, 964 NYS2d 25 (1st Dept 2013) (defendants made prima facie showing on 90/180-day claim; defendants' physicians, who authored their reports years after the accident, interpreted operative report and MRIs created within 180 days of accident and opined on plaintiff's condition as of the dates of the operative report and MRIs).

4. *Termination of and Gaps in Treatment*

In *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005), the Court of Appeals held that a plaintiff who has terminated treatment following an accident must offer some reasonable explanation for having done so. In the companion case, *Brown v Dunlap*, the Court held that a treating physician's affirmation that therapy was terminated after it became clear that further treatment "would be only palliative" was sufficient to raise a question of fact on the issue, see *Cook v Peterson*, 137 AD3d 1594, 28 NYS3d 501 (4th Dept 2016) (gap in treatment adequately explained where plaintiff's treating physician provided plaintiff medication and exercise regimen that was to be performed in self-managed fashion); *Clausi v Hall*, 127 AD3d 1324, 6 NYS3d 771 (3d Dept 2015) (gap in treatment adequately explained by plaintiff's averment that she stopped treatment for approximately 15 months because she could not afford to bear cost after her no-fault benefits expired); *Clark v Aquino*, 113 AD3d 1076, 978 NYS2d 546 (4th Dept 2014) (cessation of treatment adequately explained where plaintiff had maximized potential improvement from two courses of physical therapy, and chiropractic treatment provided only temporary relief); *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 909 NYS2d 699 (1st Dept 2010) (gap in treatment adequately explained by plaintiff's proof of the termination of her health insurance and her inability to pay out of pocket for physical therapy); *Wadford v Gruz*, 35 AD3d 258, 826 NYS2d 57 (1st Dept 2006) (cessation in treatment adequately explained by stoppage in plaintiff's no-fault benefits); but see *Brown v New York*, 29 AD3d 447, 815 NYS2d 88 (1st Dept 2006) (cessation in treatment not adequately explained by assertion by expert, who examined plaintiff four years after accident, that further treatment not likely to be efficacious); *Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 (1st Dept 2005) (cessation in treatment not adequately explained by plaintiff's statement that treatment provided only temporary relief and his chiropractor told him he had attained maximum potential).

There is no need for documentary proof to support plaintiff's own sworn explanation for terminating treatment, *Ramkumar v Grand Style Transp. Enterprises Inc.*, 22 NY3d 905, 976 NYS2d 1, 998 NE2d 801 (2013). Thus, although documentary proof or even an affidavit by

plaintiff is preferable, plaintiff's depositions statement that "they cut me off like five months" when he was asked when he was last treated was sufficient to withstand summary judgment, *id*; see *Perez v Vasquez*, 71 AD3d 531, 897 NYS2d 412 (1st Dept 2010) (gap in treatment adequately explained by plaintiff's sworn statement that no-fault benefits had been terminated and that he did not then have private health insurance); but see *Whisenant v Farazi*, 67 AD3d 535, 891 NYS2d 13 (1st Dept 2009) (orthopedist's attempt to explain gaps in treatment by citing lack of insurance and lack of financial means was hearsay and insufficient).

Some courts have held that short gaps in the treatment of the condition giving rise to plaintiff's serious injury claim affect the weight rather than the sufficiency of plaintiff's medical evidence, *Akamnonu v Rodriguez*, 12 AD3d 187, 784 NYS2d 516 (1st Dept 2004); *Cruz v Castanos*, 10 AD3d 277, 781 NYS2d 23 (1st Dept 2004); see *Brown v Achy*, 9 AD3d 30, 776 NYS2d 56 (1st Dept 2004) (treatment gap explained "with minimal adequacy" affects weight, not sufficiency, of the medical evidence). However, more significant gaps in treatment, if unexplained, may be deemed to go beyond factors affecting the "weight" of the evidence and may warrant dismissal in a proper case, *McCarthy v Bellamy*, 39 AD3d 1166, 834 NYS2d 800 (4th Dept 2007) (unexplained 15-month gap in treatment); *Jaromin v Northrup*, 39 AD3d 1264, 833 NYS2d 813 (4th Dept 2007) (unexplained 3½ year gap in treatment); *Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 (1st Dept 2005) (no competent proof of treatment other than two visits to neurologist 2½-years apart); *Toulson v Young Han Pae*, 13 AD3d 317, 788 NYS2d 334 (1st Dept 2004) (two-year unexplained gap); see *Dean v Brown*, 67 AD3d 1097, 891 NYS2d 165 (3d Dept 2009); see also *Bent v Jackson*, 15 AD3d 46, 788 NYS2d 56 (1st Dept 2005) (although some gaps in treatment may affect only weight of evidence, dismissal required where there was unexplained cessation of treatment). A plaintiff who alleges serious injury has the burden of explaining any significant gaps in treatment, *Rivera v Francis*, 7 AD3d 690, 776 NYS2d 840 (2d Dept 2004); *Arjona v Calcano*, 7 AD3d 279, 776 NYS2d 49 (1st Dept 2004); *Slasor v Elfaiz*, 275 AD2d 771, 713 NYS2d 742 (2d Dept 2000); see *McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 (2d Dept 2004) (physician's affidavit's reference to plaintiff's lack of financial resources did not adequately explain 2½-year gap in treatment where plaintiff's affidavit did not state that he was unable to afford medical treatment).

C. Causation

In addition to establishing the existence of a serious injury, plaintiff must present competent, nonconclusory expert evidence that the injury was proximately caused by the accident in issue and not by a different accident or a pre-existing condition, *Donoso v Motor Vehicle Accident Indemn. Corp.*, 118 AD3d 461, 988 NYS2d 139 (1st Dept 2014); *Carter v Full Service, Inc.*, 29 AD3d 342, 815 NYS2d 41 (1st Dept 2006); *Jimenez v Rojas*, 26 AD3d 256, 810 NYS2d 449 (1st Dept 2006); *Agard v Bryant*, 24 AD3d 182, 805 NYS2d 348 (1st Dept 2005); *Montgomery v Pena*, 19

AD3d 288, 798 NYS2d 17 (1st Dept 2005); see *Roach v Citywide Mobile Response Corp.*, 102 AD3d 576, 959 NYS2d 47 (1st Dept 2013) (physician's statement did not sufficiently address plaintiff's past medical history where observations based on incomplete medical history); *Hernandez v Almanzar*, 32 AD3d 360, 821 NYS2d 30 (1st Dept 2006) (physician's statement that plaintiff's injury caused by accident in issue rather than by two others insufficient where basis for conclusion not explained); see also *Germain v Irizarry*, 82 AD3d 833, 918 NYS2d 523 (2d Dept 2011) (regardless of extent to which plaintiff's expert must address prior accidents and review medical records related to those accidents to raise a triable issue of fact to defeat summary judgment, plaintiff's burden at trial is to establish that he or she sustained a serious injury, and plaintiff's expert at trial is not necessarily required to address all prior accident and related medical records to satisfy that burden).

The existence of a pre-existing condition does not always preclude a finding of serious injury. A serious injury may exist where the alleged negligence aggravated a pre-existing condition, *Greenman v Poll*, 197 AD2d 502, 602 NYS2d 410 (2d Dept 1993); *Schaming v Saunders Const. Carriers*, 172 AD2d 957, 568 NYS2d 239 (3d Dept 1991); see *Colavito v Steyer*, 65 AD3d 735, 883 NYS2d 807 (3d Dept 2009); *Matthews v Cupie Transp. Corp.*, 302 AD2d 566, 758 NYS2d 66 (2d Dept 2003). Likewise, where a plaintiff did not sustain a serious injury in an initial automobile accident but did sustain a serious injury in a second accident a few days later, the subsequent injuries may be used to satisfy the statutory threshold in an action arising from the initial accident if plaintiff establishes a causal connection between the two accidents, *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 (2d Dept 1989) (question of fact existed where plaintiff submitted expert opinion that concussion sustained in first accident contributed to second accident). For a charge on liability for subsequent injuries, see PJI 2:306.

On a motion for summary judgment where there is evidence that plaintiff's symptoms could have been related to a condition separate from the condition resulting from the accident, plaintiff must make a showing that the condition giving rise to the serious injury claim was, in fact, the product of the accident, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011); *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 (2003); *Briody v Melecio*, 91 AD3d 1328, 937 NYS2d 516 (4th Dept 2012); *Foley v Cunzio*, 74 AD3d 1603, 903 NYS2d 599 (3d Dept 2010); see also *Elshaarawy v U-Haul Co. of Mississippi*, 72 AD3d 878, 900 NYS2d 321 (2d Dept 2010) (question of fact as to causation raised where ambulance report and hospital records following accident indicated that plaintiff did not complain of knee pain). However, there is no such requirement when defendant has submitted only a conclusory physician's statement that plaintiff's spinal condition was "chronic and degenerative in origin," *Brown v Dunlap*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278.

Where plaintiff's physician's affidavit does not account for the effect

of prior accidents or pre-existing conditions, a conclusion by the physician that the accident in issue was the cause of plaintiff's injuries may be rejected as "speculative" and insufficient, *Lopez v American United Transp., Inc.*, 66 AD3d 407, 886 NYS2d 157 (1st Dept 2009) (plaintiff's expert's opinion "speculative" where it failed to rebut defendant's physician's assertion that condition was degenerative and failed to explain how condition was not caused by plaintiff's age, morbid obesity or prior occupation as furniture installer); *Cantave v Gelle*, 60 AD3d 988, 877 NYS2d 129 (2d Dept 2009) (plaintiff's physician's affirmation speculative where it did not indicate review of medical records arising from plaintiff's prior accident that had resulted in serious back injury); *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 (2d Dept 2006) (plaintiff's treating physician's affidavit "speculative" and insufficient on question of causation where physician failed to indicate awareness of plaintiff's on-the-job injuries in the three years preceding accident); *Tudisco v James*, 28 AD3d 536, 813 NYS2d 482 (2d Dept 2006) (plaintiff's physician's affidavit "speculative" and insufficient where physician who conducted recent examination did not address either degenerative changes in plaintiff's cervical spine which appeared on MRI or effect of post-accident fall that caused neck injury); *Bennett v Genas*, 27 AD3d 601, 813 NYS2d 446 (2d Dept 2006) (plaintiff's physicians' affidavits "speculative" and insufficient where neither indicated awareness that plaintiff had been involved in two prior automobile accidents in which he sustained neck and back injuries); see *DeJesus v Cruz*, 73 AD3d 539, 902 NYS2d 503 (1st Dept 2010).

However, in *Linton v Nawaz*, 62 AD3d 434, 879 NYS2d 82 (1st Dept 2009), *aff'd*, 14 NY3d 821, 900 NYS2d 239, 926 NE2d 593 (2010), a physician's affirmation stating that plaintiff's symptoms were related to the accident was held sufficient to raise a question of fact even though the physician did not specifically address defendant's expert's opinion that plaintiff's condition was degenerative in nature. The Appellate Division in *Linton* noted that plaintiff's physician had indirectly addressed defendant's expert's conclusion by attributing plaintiff's injury to a cause other than a degenerative condition, that is, to the accident itself. The Appellate Division in *Linton* also noted that plaintiff's physician's opinion was not speculative since it was based on an examination conducted soon after the onset of plaintiff's symptoms, which plaintiff reported had occurred after the accident, *Linton v Nawaz*, *supra*; see *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 909 NYS2d 699 (1st Dept 2010) (defendant's evidence that plaintiff had a preexisting degenerative disc condition rebutted, and issue of fact raised, by the statement of plaintiff's expert, based on a physical examination of plaintiff just days after the accident, that plaintiff sustained injuries as a result of the accident).

In the First Department, three separate lines of decisions have formed in the wake of *Linton v Nawaz*, 62 AD3d 434, 879 NYS2d 82 (1st Dept 2009), *aff'd*, 14 NY3d 821, 900 NYS2d 239, 926 NE2d 593 (2010). The first line follows the Appellate Division's decision in *Linton*, which was affirmed by the Court of Appeals without discussion of this

issue, and holds that a plaintiff's expert need not specifically address a defendant's expert's opinion that the plaintiff's condition was degenerative in nature, see *Vaughan v Leon*, 94 AD3d 646, 943 NYS2d 63 (1st Dept 2012); *Williams v Tatham*, 92 AD3d 472, 938 NYS2d 75 (1st Dept 2012); *Grant v United Pavers Co., Inc.*, 91 AD3d 499, 937 NYS2d 20 (1st Dept 2012); *Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 915 NYS2d 529 (1st Dept 2011).

The second line requires a plaintiff's expert to specifically address a defendant's expert's opinion that the plaintiff's condition was degenerative, *Torres v Triboro Services, Inc.*, 83 AD3d 563, 921 NYS2d 240 (1st Dept 2011) (plaintiff's medical evidence failed to raise triable issue of fact as to causation since plaintiff's physician failed to address the non-conclusory opinions of defendant's expert that the new conditions revealed in MRIs taken after accident were degenerative in nature); *Turner v Benycol Transp. Corp.*, 78 AD3d 506, 911 NYS2d 51 (1st Dept 2010) (although plaintiff's chiropractor quantified her limitations of motion, concluded that they were significant and related the injuries to the subject accident, he failed to address defendants' evidence that plaintiff's disc dessication was pre-existing); *DeJesus v Cruz*, 73 AD3d 539, 902 NYS2d 503 (1st Dept 2010) (plaintiff's physician failed to address findings of defendants' experts that plaintiff's knee and spinal conditions were due to preexisting, degenerative changes unrelated to any traumatic injury attributable to accident); see *Velez v Almonte*, 85 AD3d 561, 925 NYS2d 471 (1st Dept 2011) (plaintiff failed to raise triable issue of fact because her treating physician, while stating in conclusory language that her injuries were caused by the accident, did not rebut defendants' evidence that plaintiff's knee and spine conditions were degenerative in nature).

The third line requires a plaintiff's expert to specifically address a defendant's expert's opinion that the plaintiff's condition was degenerative if the plaintiff's medical records indicate or the plaintiff's treatment provider or expert acknowledges that plaintiff had a degenerative condition in the relevant body part or system, see *Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 999 NYS2d 37 (1st Dept 2014), *aff'd*, 25 NY3d 1222, 16 NYS3d 515, 37 NE3d 1159 (2015); *Alvarez v NYLL Management Ltd.*, 120 AD3d 1043, 993 NYS2d 1 (1st Dept 2014), *aff'd*, 24 NY3d 1191, 3 NYS3d 757, 27 NE3d 471 (2015); *Franklin v Gareyua*, 136 AD3d 464, 24 NYS3d 304 (1st Dept 2016); *Farmer v Ventkate Inc.*, 117 AD3d 562, 986 NYS2d 98 (1st Dept 2014); *Mena v White City Car & Limo Inc.*, 117 AD3d 441, 985 NYS2d 234 (1st Dept 2014); *Paduani v Rodriguez*, 101 AD3d 470, 955 NYS2d 48 (1st Dept 2012); *Rosa v Mejia*, 95 AD3d 402, 943 NYS2d 470 (1st Dept 2012).

The Second Department has two lines of authority on the issue of whether, at the summary judgment stage, the plaintiff's expert must specifically respond to the defendant's expert's opinion that the plaintiff's injuries were preexisting or degenerative in nature.

Under the first line, a plaintiff's expert need not specifically address

a defendant's expert's opinion that the plaintiff's condition was preexisting or degenerative in nature, see *Greenberg v Macagnone*, 126 AD3d 937, 7 NYS3d 185 (2d Dept 2015); *Johnson v Cristino*, 91 AD3d 604, 936 NYS2d 275 (2d Dept 2012); *Khaimov v Armanious*, 85 AD3d 978, 925 NYS2d 623 (2d Dept 2011); *Jilani v Palmer*, 83 AD3d 786, 920 NYS2d 424 (2d Dept 2011); *Fraser-Baptiste v New York City Transit Authority*, 81 AD3d 878, 917 NYS2d 670 (2d Dept 2011).

The second line requires a plaintiff's expert to specifically address, in nonconclusory terms, a defendant's expert's opinion that the plaintiff's condition was preexisting or degenerative, *Henry v Hartley*, 119 AD3d 528, 989 NYS2d 94 (2d Dept 2014); *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 (2d Dept 2013); *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 (2d Dept 2012); *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328, 904 NYS2d 743 (2d Dept 2010); *Singh v New York*, 71 AD3d 1121, 898 NYS2d 218 (2d Dept 2010); *Barry v Future Cab Corp.*, 71 AD3d 710, 896 NYS2d 423 (2d Dept 2010); *Rodriguez v Grant*, 71 AD3d 659, 896 NYS2d 143 (2d Dept 2010); *Chery v Jones*, 62 AD3d 742, 879 NYS2d 170 (2d Dept 2009); see *John v Linden*, 124 AD3d 598, 1 NYS3d 274 (2d Dept 2015); *Inzalaco v Consalvo*, 115 AD3d 807, 982 NYS2d 165 (2d Dept 2014); see also *Young Chool Yoo v Rui Dong Wang*, 88 AD3d 991, 931 NYS2d 373 (2d Dept 2011); *Harris v Boudart*, 70 AD3d 643, 893 NYS2d 631 (2d Dept 2010).

In the Third Department, if a defendant makes a *prima facie* showing that a plaintiff's injuries are related to a preexisting condition, the plaintiff is required to submit objective medical evidence distinguishing his or her preexisting condition from the injuries claimed to have been caused by the motor vehicle accident giving rise to the lawsuit, see *Eason v Blacker*, 155 AD3d 1180, 63 NYS3d 615 (3d Dept 2017); *Cross v Labombard*, 127 AD3d 1355, 9 NYS3d 413 (3d Dept 2015); *Dudley v Imbesi*, 121 AD3d 1461, 995 NYS2d 810 (3d Dept 2014); *Vandetta v Adams*, 121 AD3d 1328, 995 NYS2d 766 (3d Dept 2014); *Thomas v Ku*, 112 AD3d 1200, 977 NYS2d 481 (3d Dept 2013).

D. Summary Judgment Motion Practice

1. Moving Defendant's Burden of Proof

Plaintiff has the burden of proof on the threshold serious injury issue, see CPLR 3016(g), 3043(a)(6); *Joyce v Winkler*, 71 AD2d 28, 421 NYS2d 480 (4th Dept 1979); see also *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982). However, when defendant seeks summary judgment, defendant must establish a *prima facie* case through evidence in admissible form that plaintiff's injuries were not serious within the meaning of Insurance Law § 5102(d), *Baez v Rahamatali*, 6 NY3d 868, 817 NYS2d 204, 850 NE2d 19 (2006); *Perez v Ali*, 23 AD3d 363, 804 NYS2d 115 (2d Dept 2005); *Dillon v Thomas*, 266 AD2d 183, 697 NYS2d 336 (2d Dept 1999). In the Second Department, defendant may prevail on a motion for summary judgment without submitting a physician's affidavit if plaintiff's serious injury claim is

patently meritless, *Grier v Kuhn*, 187 AD2d 559, 591 NYS2d 330 (2d Dept 1992); *Popp v Kremer*, 124 AD2d 720, 508 NYS2d 470 (2d Dept 1986); see *Wright v Melendez*, 140 AD2d 337, 528 NYS2d 84 (2d Dept 1988); *Padron v Hood*, 124 AD2d 718, 508 NYS2d 472 (2d Dept 1986); see also *Dudley v Imbesi*, 121 AD3d 1461, 995 NYS2d 810 (3d Dept 2014) (defendant made prima facie showing of entitlement to judgment as a matter of law by submitting plaintiff's deposition testimony and his medical and Social Security disability records). A defendant seeking summary judgment is not required to address injuries the plaintiff neither asserted in the complaint or bill of particulars, nor sought to assert by way of a motion to amend the bill of particulars, *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 (2d Dept 2010); see *Boone v Elizabeth Taxi, Inc.*, 117 AD3d 515, 986 NYS2d 62 (1st Dept 2014) (court erred in considering serious-injury claim not pleaded in bill of particulars, especially since claimed injury never diagnosed and new claim contradicted both existing bill of particulars and plaintiff's deposition testimony).

In range of motion cases, defendant's medical expert must set forth the objective tests performed during the examination that led the expert to conclude that plaintiff did not suffer a serious injury, *Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 (2d Dept 2005); *Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 (2d Dept 2003); *Gamberg v Romeo*, 289 AD2d 525, 736 NYS2d 64 (2d Dept 2001); *Junco v Ranzi*, 288 AD2d 440, 733 NYS2d 897 (2d Dept 2001); see *Offman v Singh*, 27 AD3d 284, 813 NYS2d 56 (1st Dept 2006). An affidavit by defendant's medical expert is insufficient if it does not compare plaintiff's range of motion with a normal range of motion, *Hernandez v Stanley*, 34 AD3d 428, 824 NYS2d 149 (2d Dept 2006); *Kouvaras v Hertz Corp.*, 27 AD3d 529, 813 NYS2d 144 (2d Dept 2006); *Fakhoury v Kinlock*, 27 AD3d 416, 812 NYS2d 591 (2d Dept 2006); *Kennedy v Brown*, *supra*, or address the significance of a considerable course of treatment performed on plaintiff, including the impact of those procedures on plaintiff, whether they were medically necessary and whether they were intended to correct conditions causally related to the accident, *Hubert v Tripaldi*, 307 AD2d 692, 763 NYS2d 165 (3d Dept 2003). Likewise, defendant's burden on his motion for summary judgment was not satisfied by an orthopedic expert's statement that plaintiff demonstrated "voluntary resistance" during his cervical spine range of motion testing and that plaintiff was able to move his head and neck without restriction when not being tested, *Colon v Chuen Sum Chu*, 61 AD3d 805, 878 NYS2d 127 (2d Dept 2009); *Washington v Delossantos*, 44 AD3d 748, 843 NYS2d 186 (2d Dept 2007). To satisfy defendant's burden, a defense expert asserting that plaintiff's spinal motion was "self-restricted" must substantiate the assertion with objective medical evidence, *Cuevas v Compote Cab Corp.*, 61 AD3d 812, 878 NYS2d 124 (2d Dept 2009).

A moving defendant may rely on medical records and reports prepared by the plaintiff's treating physicians to establish, prima facie, the lack of serious injury, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 (2003); see *Picott v Lewis*, 26 AD3d 319, 809 NYS2d

541 (2d Dept 2006) (plaintiff's deposition testimony combined with defendant's examining physician's affirmed report); see also *Alcombrack v Swarts*, 49 AD3d 1170, 856 NYS2d 357 (4th Dept 2008) (defendant's burden may be satisfied by qualified physician's opinion based on review of plaintiff's medical records); *Alexander v Garcia*, 40 AD3d 274, 835 NYS2d 147 (1st Dept 2007) (although defendant's expert's affirmation failed to establish prima facie that plaintiff did not sustain 90/180 injury, necessary showing was made by plaintiff's deposition testimony that he was not confined to bed or home following accident). However, where defendant's expert relies on plaintiff's medical records, those records must be included in defendant's submissions, *Cariddi v Hassan*, 45 AD3d 516, 845 NYS2d 426 (2d Dept 2007).

Where there is a claim that plaintiff's pre-existing condition was asymptomatic before the accident, a defense medical report that does not address the issue of aggravation of the pre-existing condition is insufficient, *Colavito v Steyer*, 65 AD3d 735, 883 NYS2d 807 (3d Dept 2009).

2. *Plaintiff's Burden in Opposing Summary Judgment*

If defendant fails to carry the burden of rebutting prima facie plaintiff's serious injury claim, the sufficiency of plaintiff's opposition papers need not be considered, *Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 (2d Dept 2003); see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); see also *Tchjevaskaia v Chase*, 15 AD3d 389, 790 NYS2d 175 (2d Dept 2005) (plaintiff's opposition papers need not be considered where, despite its ultimate conclusion that plaintiff did not sustain serious injury, affidavit of defendant's examining orthopedist disclosed recorded limitations on plaintiff's ranges of motion). On the other hand, if defendant carries his or her burden, the burden then shifts to plaintiff to come forward with sufficient evidence to overcome defendant's motion claims, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005); *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 (2003); *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992). Conclusory averments of serious injury will not suffice to defeat a motion for summary judgment, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101, 484 NE2d 130 (1985); see *Giannakis v Paschilidou*, 212 AD2d 502, 622 NYS2d 112 (2d Dept 1995); *Cannizzaro v King*, 187 AD2d 842, 589 NYS2d 698 (3d Dept 1992). Similarly, plaintiffs cannot rely solely on allegations contained in pleadings and bills of particulars, *Schultz v Von Voight*, 86 NY2d 865, 635 NYS2d 167, 658 NE2d 1040 (1995).

Where plaintiff seeks to establish a serious injury based on permanent or significant limitation of use, see PJI 2:88E and 2:88F, plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use, *Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198 (3d Dept 1986). Additionally, a plaintiff claiming serious injury based on a claimed inability to

perform usual and customary daily activities during the prescribed 90/180-day period, see PJI 2:88G, cannot rely on his or her own statements and must adduce competent medical evidence of inability to perform substantially all daily activities for not less than 90 of the first 180 days from and as a result of the accident, *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 (2d Dept 2005). A physical therapist, who cannot diagnose or make prognoses, cannot provide competent medical evidence of a significant loss of use, *Howard v Espinosa*, 70 AD3d 1091, 898 NYS2d 267 (3d Dept 2010). In *Barrow v Dubois*, 82 AD3d 1685, 920 NYS2d 507 (4th Dept 2011), the court concluded that a nurse practitioner's diagnosis of a cervical sprain, supported by the nurse's observations that plaintiff had limited range of motion in his neck and objective evidence that plaintiff experienced crepitus in his neck, constituted objective evidence of plaintiff's claim of serious injury under the 90/180-day category.

Where plaintiff claims that the accident exacerbated a pre-existing condition, plaintiff's physician's report must provide a basis for determining the extent of the exacerbation, *Kendig v Kendig*, 115 AD3d 438, 981 NYS2d 411 (1st Dept 2014); *Nova v Fontanez*, 112 AD3d 435, 976 NYS2d 72 (1st Dept 2013); *Brand v Evangelista*, 103 AD3d 539, 962 NYS2d 52 (1st Dept 2013); see *Inzalaco v Consalvo*, 115 AD3d 807, 982 NYS2d 165 (2d Dept 2014) (plaintiff's physicians failed to explain in specific nonconclusory manner how accident exacerbated her pre-existing condition).

3. *Need for Sworn Expert Statements*

A party seeking or opposing summary judgment on the question of serious injury must submit medical proof in admissible form and, consequently, unsworn and unaffirmed physicians' reports are insufficient, *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178, 588 NE2d 76 (1991); *Lowe v Bennett*, 122 AD2d 728, 511 NYS2d 603 (1st Dept 1986), *aff'd*, 69 NY2d 700, 512 NYS2d 364, 504 NE2d 691 (1986); *McLoyrd v Pennypacker*, 178 AD2d 227, 577 NYS2d 272 (1st Dept 1991); but see *Introductory Statement to 2:88A-G*, section (D)(1) (noting that, in the Second Department, a defendant may prevail on a motion for summary judgment without submitting a physician's affirmation or other medical affidavit if the serious injury claim is patently meritless). Unsworn and unaffirmed medical reports are not competent evidence when they are submitted through an attorney's affirmation, *Dann v Yeh*, 55 AD3d 1439, 865 NYS2d 472 (4th Dept 2008); *Henkin v Fast Times Taxi, Inc.*, 307 AD2d 814, 763 NYS2d 297 (1st Dept 2003). The failure of a party to submit expert proof in proper evidentiary form is waived if not contested at the time the motion is made, *Long v Taida Orchids, Inc.*, 117 AD3d 624, 986 NYS2d 469 (1st Dept 2014); *Akamnonu v Rodriguez*, 12 AD3d 187, 784 NYS2d 516 (1st Dept 2004); *Shinn v Catanzaro*, 1 AD3d 195, 767 NYS2d 88 (1st Dept 2003).

A physician's affirmed statement, which is the equivalent of a sworn statement, is competent evidence, CPLR 2106; *Addison v New York*

City Transit Authority, 208 AD2d 368, 618 NYS2d 526 (1st Dept 1994). However, an affirmation from an expert physician who is not authorized by law to practice in the state is not the equivalent of an affidavit and therefore does not constitute proof in evidentiary form, *Palo v Latt*, 270 AD2d 323, 704 NYS2d 143 (2d Dept 2000). Similarly, the affirmation of a chiropractor does not constitute competent evidence under CPLR 2106, *Hartley v White*, 63 AD3d 1689, 881 NYS2d 583 (4th Dept 2009); *Caraballo v Kim*, 63 AD3d 976, 882 NYS2d 211 (2d Dept 2009); *Feggins v Fagard*, 52 AD3d 1221, 860 NYS2d 346 (4th Dept 2008); *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 (2d Dept 2008); *Daus v Cassavaugh*, 17 AD3d 837, 793 NYS2d 589 (3d Dept 2005); *Ramos v Dekhtyar*, 301 AD2d 428, 753 NYS2d 489 (1st Dept 2003); *Young v Ryan*, 265 AD2d 547, 697 NYS2d 150 (2d Dept 1999), but the First Department has held that it may be considered if it is not the sole basis for a plaintiff's opposition to summary judgment, *Long v Taida Orchids, Inc.*, 117 AD3d 624, 986 NYS2d 469 (1st Dept 2014); see *Pietropinto v Benjamin*, 104 AD3d 617, 961 NYS2d 461 (1st Dept 2013). An affirmation containing an electronic signature (e.g. electronic sound, symbol or process attached to electronic record and executed or adopted by person with intent to sign record, State Technology Law § 302(3)) complies with CPLR 2106 and is admissible, *Martin v Portexit Corp.*, 98 AD3d 63, 948 NYS2d 21 (1st Dept 2012); but see *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778, 860 NYS2d 532 (2d Dept 2008).

A defendant moving for summary judgment may not prevail on the basis of unsworn medical reports of its own experts, *Loadholt v New York City Transit Authority*, 12 AD3d 352, 783 NYS2d 660 (2d Dept 2004); *Baig v Taman*, 299 AD2d 305, 749 NYS2d 81 (2d Dept 2002); *Miller v Metropolitan Suburban Bus Authority*, 186 AD2d 116, 587 NYS2d 440 (2d Dept 1992); *Marsh v Wolfson*, 186 AD2d 115, 587 NYS2d 695 (2d Dept 1992); *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 (2d Dept 1992); *Pollard v Brown*, 127 AD2d 882, 511 NYS2d 704 (3d Dept 1987); *Savage v Delacruz*, 100 AD2d 707, 474 NYS2d 850 (3d Dept 1984); but see *Ilkhanizadeh v Axelrod*, 258 AD2d 441, 684 NYS2d 593 (2d Dept 1999) (unsworn physician's report incorporated by reference into same physician's affirmation sufficient to render unsworn report admissible). However, a moving defendant may rely on medical records and reports supplied directly by plaintiff's attorney, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 (2003); *Cook v Franz*, 309 AD2d 1234, 765 NYS2d 537 (4th Dept 2003). Likewise, a defendant may rely on unsworn reports of plaintiff's own physician in support of summary judgment, *McNamara v Wood*, 19 AD3d 921, 797 NYS2d 606 (3d Dept 2005); *Dumont v D.L. Peterson Trust*, 307 AD2d 709, 762 NYS2d 743 (4th Dept 2003); *McElroy v Sivasubramaniam*, 305 AD2d 944, 761 NYS2d 688 (3d Dept 2003); *Seymour v Roe*, 301 AD2d 991, 755 NYS2d 452 (3d Dept 2003); *Itkin v Devlin*, 286 AD2d 477, 729 NYS2d 537 (2d Dept 2001); *Cody v Parker*, 263 AD2d 866, 693 NYS2d 769 (3d Dept 1999); *Tankersley v Szesnat*, 235 AD2d 1010, 653 NYS2d 184 (3d Dept 1997); *Pagano v Kingsbury*, *supra*; see *Tuna v Babendererde*, 32 AD3d 574, 819 NYS2d 613 (3d Dept 2006) (defendant's motion supported by emergency room notes, records of plaintiff's treating and

consulting physicians and plaintiff's deposition testimony); see also *McNamara v Wood*, supra (defendant's motion supported by plaintiff's deposition testimony, plaintiff's unsworn medical records and affirmed independent medical examination report); *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 (2d Dept 1993) (defendant may rely on plaintiff's bill of particulars, deposition testimony and medical report); *Gleason v Huber*, 188 AD2d 581, 591 NYS2d 69 (2d Dept 1992) (defendant may rely on plaintiff's medical records and treating physician's reports). While plaintiff's unsworn medical records may be used, the fact that those records lack objective medical evidence of serious injury is not alone sufficient to satisfy defendant's burden on summary judgment, *McElroy v Sivasubramaniam*, supra. A defendant who submits unsworn medical reports in support of summary judgment opens the door for plaintiff to rely on the same unsworn report, *Womack v Wilhelm*, 96 AD3d 1308, 948 NYS2d 163 (3d Dept 2012); *Caulkins v Vicinanza*, 71 AD3d 1224, 895 NYS2d 600 (3d Dept 2010); *Elder v Stokes*, 35 AD3d 799, 828 NYS2d 138 (2d Dept 2006); *Kearse v New York City Transit Authority*, 16 AD3d 45, 789 NYS2d 281 (2d Dept 2005); see *Cook v Peterson*, 137 AD3d 1594, 28 NYS3d 501 (4th Dept 2016); *Clausi v Hall*, 127 AD3d 1324, 6 NYS3d 771 (3d Dept 2015); *Dietrich v Puff Cab Corp.*, 63 AD3d 778, 881 NYS2d 463 (2d Dept 2009); *Djetoumani v Transit, Inc.*, 50 AD3d 944, 857 NYS2d 601 (2d Dept 2008); *Zarate v McDonald*, 31 AD3d 632, 819 NYS2d 288 (2d Dept 2006).

Plaintiffs opposing summary judgment motions must also submit expert proof in evidentiary form, *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178, 588 NE2d 76 (1991); *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 (2d Dept 2005); *Lewis v Unique Van Service, Inc.*, 10 AD3d 599, 781 NYS2d 767 (2d Dept 2004); *Mendoza v Whitmire*, 6 AD3d 675, 775 NYS2d 171 (2d Dept 2004); *Copeland v Kasalica*, 6 AD3d 253, 775 NYS2d 276 (1st Dept 2004). The Grasso Court reserved the question of whether an unsworn report proffered by plaintiff would be sufficient if an acceptable excuse for the absence of a sworn statement is offered. However, the Court of Appeals had previously held that a party opposing summary judgment may be permitted to demonstrate an acceptable excuse for his or her failure to meet the requirement of tendering evidence in admissible form, *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 (1979), and other courts have suggested that the absence of sworn expert evidence is a defect that may be excused in a proper case, *Parmisani v Grasso*, 218 AD2d 870, 629 NYS2d 865 (3d Dept 1995); *Mitchell v New York City Housing Authority*, 204 AD2d 91, 611 NYS2d 535 (1st Dept 1994); *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 (2d Dept 1992).

Plaintiffs' physicians' affirmations that rely upon unsworn medical reports of other physicians are not competent proof of "serious injury," *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 (2d Dept 2008); see *Nkhereanye v Hillaire*, 35 AD3d 419, 826 NYS2d 372 (2d Dept 2006); *Brobeck v Jolloh*, 32 AD3d 526, 819 NYS2d 840 (2d Dept 2006); *Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 (2d Dept 2005); *Monaco v*

Davenport, 277 AD2d 209, 715 NYS2d 731 (2d Dept 2000); Merisca v Alford, 243 AD2d 613, 663 NYS2d 853 (2d Dept 1997); see Casiano v Zedan, 66 AD3d 730, 887 NYS2d 613 (2d Dept 2009) (portions of plaintiff's physician's affirmed report reciting unsworn findings of other doctors must be disregarded). However, plaintiff's physician's affirmation that relied on an unsworn report describing the tests conducted and the qualitative limitations found by another physician should have been considered in opposition to a defense motion for summary judgment, since otherwise inadmissible evidence may be considered to deny summary judgment provided it is not the sole basis of the court's determination, Hammett v Diaz-Frias, 49 AD3d 285, 852 NYS2d 128 (1st Dept 2008); see Johnson v KS Transp., Inc., 115 AD3d 425, 982 NYS2d 15 (1st Dept 2014) (unaffirmed medical records reviewed by defendant's expert may be taken into consideration if not sole basis of plaintiff's opposition to summary judgment); Pietropinto v Benjamin, 104 AD3d 617, 961 NYS2d 461 (1st Dept 2013) (same).

In Pommells v Perez, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (2005), the Court of Appeals held that sworn physician statements that rely on unsworn MRI reports are competent evidence. The First Department has held that unsworn MRI reports, nerve conduction studies and other unsworn medical reports are properly before the court when they are specifically referred to in a physician's affirmation or chiropractor's affidavit, Peluso v Janice Taxi Co., Inc., 77 AD3d 491, 909 NYS2d 699 (1st Dept 2010); Byong Yol Yi v Canela, 70 AD3d 584, 895 NYS2d 397 (1st Dept 2010); Navedo v Jaime, 32 AD3d 788, 822 NYS2d 43 (1st Dept 2006); Brown v Achy, 9 AD3d 30, 776 NYS2d 56 (1st Dept 2004); Gonzalez v Vasquez, 301 AD2d 438, 754 NYS2d 7 (1st Dept 2003); see Mercado-Arif v Garcia, 74 AD3d 446, 902 NYS2d 72 (1st Dept 2010); see also Clemmer v Drah Cab Corp., 74 AD3d 660, 905 NYS2d 31 (1st Dept 2010). The Third Department has concluded that a plaintiff's medical expert's sworn opinion that relies on an unsworn MRI report is competent evidence, Caulkins v Vicinanza, 71 AD3d 1224, 895 NYS2d 600 (3d Dept 2010). The Second and Fourth Departments, in contrast, generally hold that plaintiffs' physicians' affirmations that rely on unsworn MRI reports, as well as the unsworn MRI reports themselves, are without probative value and are not sufficient to raise a triable question of fact, Ferebee v Sheika, 58 AD3d 675, 873 NYS2d 93 (2d Dept 2009); Dann v Yeh, 55 AD3d 1439, 865 NYS2d 472 (4th Dept 2008); Uribe-Zapata v Capallan, 54 AD3d 936, 864 NYS2d 118 (2d Dept 2008); Benavides v Peralta, 52 AD3d 755, 862 NYS2d 518 (2d Dept 2008); Tarhan v Kabashi, 44 AD3d 847, 844 NYS2d 89 (2d Dept 2007), unless the MRI reports were first submitted by defendant, Zarate v McDonald, 31 AD3d 632, 819 NYS2d 288 (2d Dept 2006); Ayzen v Melendez, 299 AD2d 381, 749 NYS2d 445 (2d Dept 2002). However, in Cook v Peterson, 137 AD3d 1594, 28 NYS3d 501 (4th Dept 2016), the Fourth Department determined that plaintiff's physician's sworn expert opinions that were based, at least in some measure, on unsworn and uncertified medical reports and records that were not submitted by the defendant, were competent evidence. Unaffirmed experts' reports submitted as certified business records are not admissible under CPLR 4518 to the extent that they contain medical opinions and diagnoses, Rickert v Diaz, 112 AD3d 451, 976 NYS2d 80 (1st Dept 2013).

E. Jury's Role in Determining Serious Injury

Satisfaction of the threshold serious injury question may present a question of fact for the jury, *Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101, 484 NE2d 130 (1985); *Meireles v Lakeland Cent. School Dist.*, 208 AD2d 508, 617 NYS2d 42 (2d Dept 1994); *DeFreese by DeFreese v Grau*, 192 AD2d 1019, 597 NYS2d 230 (3d Dept 1993). Where the parties proffer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for the jury's determination, *Noble v Ackerman*, 252 AD2d 392, 675 NYS2d 86 (1st Dept 1998); *Greene v Frontier Central Dist. School Dist.*, 214 AD2d 947, 627 NYS2d 491 (4th Dept 1995). In contrast, where there is no factual dispute, the issue is one for the court, *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982); see *Thrall v Syracuse*, 60 NY2d 950, 471 NYS2d 51, 459 NE2d 160 (1983); *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 (1st Dept 1994).

The issue of serious injury should be submitted to the jury via a special verdict sheet, *Newland v Juneau*, 62 AD2d 1125, 404 NYS2d 701 (3d Dept 1978); *Sanders v Rickard*, 51 AD2d 260, 380 NYS2d 811 (3d Dept 1976). Since the serious injury threshold can be established under any of nine categories, the court must submit each category for which there is evidentiary support and the special verdict sheet should contain separate interrogatories for each such category, *Rice v Hale*, 9 AD3d 845, 780 NYS2d 259 (4th Dept 2004); *Velez v Svehla*, 229 AD2d 528, 645 NYS2d 842 (2d Dept 1996); *Tortorello v Landi*, 136 AD2d 545, 523 NYS2d 165 (2d Dept 1988); see *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 (2d Dept 2011) (various categories of serious injury are read in disjunctive, so failure of plaintiff to qualify for damages under one category does not necessarily preclude recovery for same alleged injuries under another category).

In general, a jury's finding that plaintiff sustained an injury within any of the categories set forth in Insurance Law § 5102(d), separately listed on the verdict sheet, satisfies the no-fault threshold, thereby eliminating that issue from the case and permitting the plaintiff to recover any damages for all injuries proximately caused by the accident, *Trezza v Metropolitan Transp. Authority*, 113 AD3d 402, 978 NYS2d 40 (1st Dept 2014); *Obdulio v Fabian*, 33 AD3d 418, 822 NYS2d 276 (1st Dept 2006); *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997); *Kelley v Balasco*, 226 AD2d 880, 640 NYS2d 652 (3d Dept 1996); *Prieston v Massaro*, 107 AD2d 742, 484 NYS2d 104 (2d Dept 1985); see *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept 2004) (error to instruct the jury that it must find that plaintiff sustained a permanent injury in order to award plaintiff future damages); but see *Wymer v National Fuel Gas Distribution Corp.*, 217 AD2d 920, 629 NYS2d 929 (4th Dept 1995). The Second Department holds that where plaintiff establishes on summary judgment a prima facie case that any one of several injuries sustained in an accident constituted a serious injury, plaintiff is entitled to seek recovery for all injuries incurred in the accident, *Bonner v Hill*, 302 AD2d 544, 756 NYS2d 82 (2d Dept 2003);

O'Neill v O'Neill, 261 AD2d 459, 690 NYS2d 277 (2d Dept 1999). The First Department generally follows the approach taken by the Second Department, Diaz v Guzman, 115 AD3d 448, 982 NYS2d 21 (1st Dept 2014); Lee v Cornell University, 112 AD3d 466, 976 NYS2d 85 (1st Dept 2013), Paulino v Rodriguez, 91 AD3d 559, 937 NYS2d 198 (1st Dept 2012); Singer v Gae Limo Corp., 91 AD3d 526, 937 NYS2d 39 (1st Dept 2012); Baez v Boyd, 90 AD3d 524, 934 NYS2d 313 (1st Dept 2011); McClelland v Estevez, 77 AD3d 403, 908 NYS2d 192 (1st Dept 2010); Rubin v SMS Taxi Corp., 71 AD3d 548, 898 NYS2d 110 (1st Dept 2010), as does the Third Department, Schmidt v Meehan, 97 AD3d 940, 948 NYS2d 736 (3d Dept 2012). The Court of Appeals has not addressed the question. However, in a case involving more than one discrete injury claim, the Court noted that it was unnecessary to address the sufficiency of plaintiff's proof with respect to his "other injuries," since his proof regarding his shoulder and spinal injuries raised a triable question of fact as to whether he had sustained serious injury, Linton v Nawaz, 14 NY3d 821, 900 NYS2d 239, 926 NE2d 593 (2010); see Johnson v KS Transp., Inc., 115 AD3d 425, 982 NYS2d 15 (1st Dept 2014); Delgado v Papert Transit, Inc., 93 AD3d 457, 939 NYS2d 457 (1st Dept 2012).

With respect to damages, a jury verdict will generally be considered flawed, i.e. inconsistent, when a serious injury is found or conceded, but the jury makes no award for pain and suffering, Campopiano v Volcko, 82 AD3d 1587, 920 NYS2d 492 (4th Dept 2011); Nguyen v Kiraly, 82 AD3d 1579, 921 NYS2d 417 (4th Dept 2011); Zgrodek v McInerney, 61 AD3d 1106, 876 NYS2d 227 (3d Dept 2009); Hayes v Byington, 2 AD3d 1468, 769 NYS2d 764 (4th Dept 2003); see also Sanfilippo v New York, 272 AD2d 201, 708 NYS2d 17 (1st Dept 2000).

The following charges should be given, as appropriate, where the evidence gives rise to questions of fact as to the applicability of various categories of serious injury:

**PJI 2:88A. No-Fault Law—Serious Injury—Injury
Resulting in Death**

You must answer the following question: Did the plaintiff's decedent AB die from an injury sustained as a result of the accident occurring on [state date of accident]?

If you find from the evidence that AB sustained an injury as a result of the accident on [state date of accident], and that the injury was a substantial factor in bringing about AB's death, that is, if the injury had such effect in producing AB's death that a reasonable person would regard the injury as a cause of death, you must answer the question "yes." If you find that AB sustained no injury as a

result of the accident on [state date of accident], or that AB sustained an injury as a result of the accident on [state date of accident] but that the injury was not a substantial factor in bringing about AB's death, you must answer the question "no."

Comment

[For a discussion of the No-Fault Law, see Introductory Statement preceding 2:75]

Based on Ins. Law § 5102(d). This charge should be used only if there is a question of fact as to whether the injury caused the decedent's death.

Note: Since its amendment in 1984, Insurance Law § 5102(d) has provided for loss of a fetus as a separate category of serious injury. Where such a loss is asserted, the above charge should be adapted to include a loss-of-fetus claim.

Although Insurance Law § 5102(d) defines serious injury as including "a personal injury which results in death," the charge has been framed in terms of the more familiar proximate-cause formula, see PJI 2:70-2:72. Using this causation formula ensures that the jury finding on serious injury in the personal-injury action will be consistent with its finding on the causation question in any accompanying wrongful-death action.

In general, a jury's finding that plaintiff sustained an injury within any of the serious injury categories set forth in Insurance Law § 5102(d) satisfies the no-fault threshold, thereby eliminating the serious injury issue from the case and permitting plaintiff to recover any damages proximately caused by the accident, *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997); *Kelley v Balasco*, 226 AD2d 880, 640 NYS2d 652 (3d Dept 1996). Likewise, if plaintiff establishes on summary judgment a prima facie case that any one of several injuries sustained in an accident constituted a serious injury under Insurance Law § 5102(d), plaintiff is entitled to seek recovery for all injuries incurred in the accident, *Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548, 898 NYS2d 110 (1st Dept 2010); *Bonner v Hill*, 302 AD2d 544, 756 NYS2d 82 (2d Dept 2003); *O'Neill v O'Neill*, 261 AD2d 459, 690 NYS2d 277 (2d Dept 1999); but see *Blake v Portexit Corp.*, 69 AD3d 426, 893 NYS2d 28 (1st Dept 2010); see also *Linton v Nawaz*, 14 NY3d 821, 900 NYS2d 239, 926 NE2d 593 (2010). It thus appears that, where decedent died as a result of injuries received in an accident, decedent's estate may be awarded damages for decedent's pain and suffering in a survival action, even if the injury itself would not have satisfied any of the other statutory threshold criteria for "serious injury."

PJI 2:88B. No-Fault Law—Serious Injury—Significant Disfigurement

You must answer the following question: Did AB sustain an injury that resulted in a significant disfigurement as a result of the accident on [state date of accident]?

An injury is disfiguring if it alters for the worse a person's natural appearance. A disfigurement is significant if a reasonable person viewing the person's body in its altered state would regard the condition as unattractive, objectionable, or as the object of pity or scorn.

If you find that AB sustained a disfigurement as a result of the accident on [state date of accident] and that the disfigurement is significant as I have defined that term, you must answer the question "yes." If you find that AB did not sustain a disfigurement as a result of the accident on [state date of accident], or that any disfigurement AB sustained is trivial or inconsequential, you must answer the question "no."

Comment

[For a discussion of the No-Fault Law, see Introductory Statement preceding 2:75]

Based on Ins. Law § 5102(d).

In *Montgomery v Daniels*, 38 NY2d 41, 378 NYS2d 1, 340 NE2d 444 (1975), the Court of Appeals rejected a claim that the term "significant disfigurement" is unconstitutionally vague, but the Court did not provide a specific definition for the term. The definition of significant disfigurement in the pattern charge was adopted in *Pecora v Lawrence*, 41 AD3d 1212, 840 NYS2d 851 (4th Dept 2007) and *Waldron v Wild*, 96 AD2d 190, 468 NYS2d 244 (4th Dept 1983) (citing PJI); see *Wiegand v Schunck*, 294 AD2d 839, 741 NYS2d 360 (4th Dept 2002) (severe facial bruising which subsided few weeks after accident not "unattractive, objectionable, or . . . the subject of pity or scorn"); *Loiseau v Maxwell*, 256 AD2d 450, 682 NYS2d 74 (2d Dept 1998) (scar five centimeters in length and one centimeter in width on lower part of leg not "unattractive, objectionable or . . . the subject of pity or scorn"). The pattern charge reflects the principle that the jury's finding of significant disfigurement must be based on the reaction of a reasonable person viewing the injury rather than on plaintiff's subjective assessment, *Pecora v Lawrence*,

supra. The charge should be used only if the evidence raises an issue of fact about the significance of the disfigurement. No separate pattern charge has been provided for the “dismemberment” category of serious injury because the issue of dismemberment will seldom be presented as an independent issue of fact and often overlaps the criterion of permanent loss of use of a body member or organ, see PJI 2:88D.

The following cases provide examples of the manner in which the “significant disfigurement” test has been applied: *Mahar v Bartnick*, 91 AD3d 1163, 936 NYS2d 770 (3d Dept 2012) (plaintiff failed to raise issue of fact as to “significant disfigurement” where scar was on back of her head and could be covered by her hair); *Pecora v Lawrence*, 28 AD3d 1136, 816 NYS2d 772 (4th Dept 2006) (jury could rationally find no significant disfigurement where initial injury subsided to point where noticeable only to those acquainted with plaintiff); *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998) (affidavit demonstrating that plaintiff had permanent visible seven-inch scar on her head raised question of fact as to whether plaintiff’s scar constituted significant disfigurement); *Jordan v Baine*, 241 AD2d 894, 660 NYS2d 509 (3d Dept 1997) (plaintiff failed to raise question of fact as to “significant disfigurement” where scar was not described in record in terms of length, width, texture or density, and was not visible in post-accident photos contained in record); *Spevak v Spevak*, 213 AD2d 622, 624 NYS2d 232 (2d Dept 1995) (jury’s finding that one-inch scar on plaintiff’s face would not be regarded by a reasonable person as unattractive, objectionable, or as the subject of pity or scorn upheld where jurors were able to see scar and determine its effect for themselves); *Hutchinson v Beth Cab Corp.*, 204 AD2d 151, 207 AD2d 283, 612 NYS2d 10 (1st Dept 1994) (two-inch healed laceration above plaintiff’s eyebrow not “significant disfigurement”); *Siegle v Fulton*, 174 AD2d 930, 571 NYS2d 626 (3d Dept 1991) (upholding jury finding that hypertrophic scar, similar to swollen lip, not “significant disfigurement”); *Zulawski v Zulawski*, 170 AD2d 979, 566 NYS2d 141 (4th Dept 1991) (setting aside as against weight of evidence finding that 2 to 2 1/2-inch scar on forehead not “significant disfigurement”); *Landsman v Bunker*, 142 AD2d 986, 530 NYS2d 407 (4th Dept 1988) (setting aside as against weight of evidence finding that depressed 1 1/4-inch scar on chin not “significant disfigurement”); *Koppelman by Koppelman v Lepler*, 135 AD2d 507, 522 NYS2d 12 (2d Dept 1987) (1/8-inch scar near infant’s left eye and scar in scalp obscured by hair not “significant disfigurement”); *Matula v Clement*, 132 AD2d 739, 517 NYS2d 100 (3d Dept 1987) (jury question as to whether six-inch surgical scar on shoulder qualified as “significant disfigurement”); *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 (3d Dept 1986) (question of fact as to whether scar in eyebrow, visible only on close examination, qualified as “significant disfigurement”); *Prieston v Massaro*, 107 AD2d 742, 484 NYS2d 104 (2d Dept 1985) (question of fact whether scar on forehead, which was barely noticeable except when sunburnt, qualified as “significant disfigurement”); *Cohen v Lizza*, 63 AD2d 557, 404 NYS2d 600 (1st Dept 1978) (evidence of injury to leg and thigh and limp sufficient to create jury question).

As is apparent from the foregoing, the “significant disfigurement”

criterion is not limited to facial or head injuries, see *Cook v Peterson*, 137 AD3d 1594, 28 NYS3d 501 (4th Dept 2016) (triable issue of fact regarding whether five surgical scars measuring two-and-one-half inches to three inches each on spine constituted significant disfigurement); *Cross v Labombard*, 127 AD3d 1355, 9 NYS3d 413 (3d Dept 2015) (triable issue of fact regarding whether one-half-inch and three-inch surgical scars on shoulder constituted significant disfigurement); *Lewis v General Elec. Co.*, 145 AD2d 728, 535 NYS2d 260 (3d Dept 1988) (1½ inch scar on knee significant disfigurement); *McGovern v Martin*, 122 AD2d 333, 504 NYS2d 304 (3d Dept 1986) (scars on foot and ankle). However, morbid obesity does not constitute a “significant disfigurement,” *Howard v Rogalski*, 291 AD2d 909, 738 NYS2d 278 (4th Dept 2002).

The No Fault Law does not require that the disfigurement be permanent, *Pecora v Lawrence*, 28 AD3d 1136, 816 NYS2d 772 (4th Dept 2006).

PJI 2:88C. No-Fault Law—Serious Injury—Fracture

You must answer the following question: Did AB sustain a fracture of the [*specify the bone involved*] as a result of the accident on [*state date of accident*]?

A fracture is a break of a bone or of a part of a bone. On the basis of the evidence you have heard, you must decide whether AB sustained a fracture of the [*specify the bone involved*].

If you find that AB sustained a fracture as a result of the accident on [*state date of accident*], you must answer the question “yes.” If you find that AB did not sustain a fracture as a result of the accident on [*state date of accident*], you must answer the question “no.”

Comment

[For a discussion of the “No-Fault” Law, see Introductory Statement preceding 2:75]

Based upon Ins. Law § 5102(d).

This charge should be used only if the evidence raises an issue of fact about whether plaintiff sustained a fracture within the meaning of the statute. Where there is medical evidence to support plaintiff’s claim of a fracture, it is fundamental error not to instruct the jury that a fracture is a serious injury, *Redmond v Schultz*, 152 AD2d 823, 544 NYS2d 33 (3d Dept 1989) (citing PJI).

The term “fracture” as used in Insurance Law § 5102(d) must be read in light of the legislative purpose of reducing the number of litigated automobile personal injury actions, *Catalan v Empire Storage Warehouse Inc.*, 213 AD2d 366, 623 NYS2d 311 (2d Dept 1995). In *Catalan*, the court held that this purpose would not be served by expanding the term “fracture” to include a fracture in something other than a bone, *id.* (tear in knee cartilage not “fracture”); see *Jordan v Baine*, 241 AD2d 894, 660 NYS2d 509 (3d Dept 1997) (deviated septum not “fracture”); *Ives v Correll*, 211 AD2d 899, 621 NYS2d 179 (3d Dept 1995) (same). However, in *Gonzalez v Brayley*, 199 AD2d 1013, 605 NYS2d 585 (4th Dept 1993), the Fourth Department held that a fracture of the cartilage of the nose may be deemed a fracture under the statute.

Where a chipped or broken tooth requires future medical or dental attention, it constitutes a “fracture” under Insurance Law § 5102(d), *Autiello v Cummins*, 66 AD3d 1072, 890 NYS2d 652 (3d Dept 2009); *Moffitt v Murray*, 2 AD3d 1110, 768 NYS2d 685 (3d Dept 2003); *Kennedy v Anthony*, 195 AD2d 942, 600 NYS2d 980 (3d Dept 1993). Where a cracked or chipped tooth requires no further medical or dental attention, it does not constitute a “serious injury,” *Sanchez v Romano*, 292 AD2d 202, 739 NYS2d 368 (1st Dept 2002); *Spevak v Spevak*, 213 AD2d 622, 624 NYS2d 232 (2d Dept 1995); *Epstein v Butera*, 155 AD2d 513, 547 NYS2d 374 (2d Dept 1989).

In *Bednar v Eaton*, 294 AD2d 780, 743 NYS2d 185 (3d Dept 2002), the court questioned whether an expert’s general reference to a “fractured middle back” sufficed to establish serious injury where there was no evidence that a particular bone was broken. On the other hand, a compression fracture of the T-8 vertebra, which was permanent and pain producing, constituted a “serious injury,” *Ciccarella v Graf*, 116 AD2d 615, 497 NYS2d 704 (2d Dept 1986), as did a fractured nose sustained in a head-on collision, *Davino v Jacoby*, 253 AD2d 784, 677 NYS2d 606 (2d Dept 1998).

PJI 2:88D. No-Fault Law—Serious Injury—Permanent Total Loss of Use of Body Organ, Member, Function or System

You must answer the following question: Did AB permanently lose the use of a body (organ, member, function, system) as a result of the accident on [state date of accident]?

To answer yes to this question, you must find that the loss of use of the (organ, member, system, function) is total as well as permanent. It is not sufficient if you find that the (organ, member, system, function) operates in some limited way.

If you find that there has been a total loss of

use as a result of the accident on [state date of accident], and that the loss is permanent, you must answer the question “yes.” If you find that there has been no loss of use as a result of the accident on [state date of accident], or that the loss is not total and permanent, you must answer the question “no.”

Comment

[For a discussion of the No-Fault Law, see Introductory Statement preceding 2:75]

Based on Ins. Law § 5102(d); *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 (2001); *Bugge v Sweet*, 90 AD2d 858, 456 NYS2d 496 (3d Dept 1982), *aff’d*, 61 NY2d 710, 472 NYS2d 619, 460 NE2d 1104 (1984).

Other categories of serious injury set forth in Insurance Law § 5102(d) refer to the limitation of use of a body organ, member, function or system. The foregoing charge applies to the category for the “permanent loss of use” exception to the no-fault remedy.

Only a total permanent loss of use is compensable under this category, *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 (2001). Losses that are merely significant or consequential are not sufficient, *id*; *Geloso v Monster*, 289 AD2d 746, 734 NYS2d 340 (3d Dept 2001).

PJI 2:88E. No-Fault Law—Serious Injury—Permanent Consequential Limitation of Use of Body Organ or Member

You must answer the following question: Did AB sustain a permanent consequential limitation of use of a body organ or member as a result of the accident on [state date of accident]?

A limitation of use of a body organ or member means that the body organ or member does not operate at all or operates only in some limited way. It is not necessary for you to find that there has been a total loss of the use of the body organ or member. The limitation of use must be consequential, which means that it is significant, important or of consequence. A minor, mild or slight limitation of use is not significant, important or of consequence.

If you find that, AB sustained a permanent limitation of use as a result of the accident on [state date of accident], and that the limitation is consequential, as I have defined it, you must answer the question “yes.” If you find that there is no permanent limitation as a result of the accident on [state date of accident], or that the limitation is not consequential, you must answer the question “no.”

Comment

[For a discussion of the No-Fault Law, see Introductory Statement preceding 2:75]

Based on Ins. Law § 5102(d); *Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198 (3d Dept 1986); *Dwyer v Tracey*, 105 AD2d 476, 480 NYS2d 781 (3d Dept 1984). The pattern charge was adopted in *Pecora v Lawrence*, 41 AD3d 1212, 840 NYS2d 851 (4th Dept 2007).

Like the category of “significant limitation of use,” see Ins. Law § 5102(d), “permanent consequential limitation of use of a body organ or member” requires a showing of the significance of the injury. To qualify as a “permanent consequential limitation of use of a body organ or member,” the limitation must be important or significant, as well as permanent, *Counterline v Galka*, 189 AD2d 1043, 593 NYS2d 113 (3d Dept 1993); *Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198 (3d Dept 1986). Where the limitation of use is non-permanent, the injury may still qualify as a serious injury under Ins. L. § 5102(d), *Decker v Rassaert*, 131 AD2d 626, 516 NYS2d 710 (2d Dept 1987), see PJI 2:88G. To establish a “permanent consequential limitation,” plaintiff must demonstrate more than a “mild, minor or slight limitation of use,” *Booker v Miller*, 258 AD2d 783, 685 NYS2d 837 (3d Dept 1999). Minor, intermittent pain is not “significant” within the meaning of Insurance Law § 5102(d), *Pecora v Lawrence*, 41 AD3d 1212, 840 NYS2d 851 (4th Dept 2007); *King v Johnston*, 211 AD2d 907, 621 NYS2d 402 (3d Dept 1995); *Lanuto v Constantine*, 192 AD2d 989, 596 NYS2d 944 (3d Dept 1993). A psychological or emotional injury may constitute a significant limitation of use (either alone or in combination with a physical injury), but plaintiff must establish through expert proof that the alleged mental condition was causally related to the accident, *Smith v Besanceney*, 61 AD3d 1336, 877 NYS2d 538 (4th Dept 2009). It should be noted that there is considerable overlap in the case law addressing what injuries rise to the level of “significant” or “consequential” limitations.

For both categories of serious injury involving loss of use, the Court of Appeals has held that a determination of whether the loss is “significant” or “consequential” (i.e., important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746

NYS2d 865, 774 NE2d 1197 (2002); see *Rodman v Deangeles*, 148 AD3d 119, 47 NYS3d 747 (3d Dept 2017); *Tornatore v Haggerty*, 307 AD2d 522, 763 NYS2d 344 (3d Dept 2003). Thus, a diagnosis of a bulging or herniated disc, by itself, does not constitute a permanent consequential limitation of use of body organ or member, *Manzano v O'Neil*, 285 AD2d 966, 727 NYS2d 231 (4th Dept 2001), rev'd on other grounds, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Rose v Furgerson*, 281 AD2d 857, 721 NYS2d 873 (3d Dept 2001); *Noble v Ackerman*, 252 AD2d 392, 675 NYS2d 86 (1st Dept 1998); see *Toure v Avis Rent A Car Systems, Inc.*, supra. However, while the court is not required to so instruct the jury, if it does, it must also tell the jury that a herniation together with other objective clinical quantitative or qualitative test results may establish a serious injury, *Scudera v Mahbubur*, 39 AD3d 620, 833 NYS2d 239 (2d Dept 2007); see also *Perez v Vasquez*, 71 AD3d 531, 897 NYS2d 412 (1st Dept 2010) (plaintiff's physician's statement that surgery occasioned by accident resulted in permanent alteration of load distribution of plaintiff's knee and resulted in knee's lessened ability to sustain load of walking, running and other daily activities constituted sufficient qualitative assessment of injury to defeat defense motion for summary judgment).

Where limitation of movement from cervical injury is at issue, objective medical evidence of a plaintiff's injury is required, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Paolini v Sienkiewicz*, 262 AD2d 1020, 691 NYS2d 836 (4th Dept 1999). Such evidence may take the form of an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or an expert's qualitative assessment of a plaintiff's condition, provided that the qualitative evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system, *Toure v Avis Rent A Car Systems, Inc.*, supra. While no specific numerical percentage is required, the case law indicates that injuries resulting in losses of range of motion that are 15% or less are generally not deemed sufficient to constitute "serious injury," *Arrowood v Lowinger*, 294 AD2d 315, 742 NYS2d 294 (1st Dept 2002) (2–4% impairment of whole person, 5–10% impairment of lower limb and 7–14% impairment of ankle not "significant" or "important" limitation of use); *Bandoian v Bernstein*, 254 AD2d 205, 679 NYS2d 123 (1st Dept 1998) (10% restriction of extension and/or rotation not "significant" or "important" limitation of use under circumstances of case); *Waldman v Dong Kook Chang*, 175 AD2d 204, 572 NYS2d 79 (2d Dept 1991) (15% limitation in range of motion of plaintiff's cervical spine and back not "significant limitation"). On the other hand, limitations of 20% and higher have been held to constitute "serious injury," *Garner v Tong*, 27 AD3d 401, 811 NYS2d 400 (1st Dept 2006) (medical expert's affidavit demonstrating 20% limitation in cervical range and 25% limitation in lumbar range raises question of fact as to existence of serious injury); *Ferguson v Budget Rent-A-Car*, 21 AD3d 730, 800 NYS2d 693 (1st Dept 2005) (evidence that plaintiff had loss-of-range-of-motion percentages ranging from 25 to 50% sufficient to raise issue of fact).

When relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002), to establish a permanent consequential limitation of use based on a limitation of movement, plaintiff is not required to submit quantitative range of motion findings “contemporaneous” to the accident, *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011). Rather, plaintiff may submit qualitative medical evidence establishing plaintiff’s symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation, *id.* The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff’s injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff’s injuries, *id.*

For a detailed discussion of the requirement of objective evidence of “serious injury,” see Introductory Statement preceding 2:75.

PJI 2:88F. No-Fault Law—Serious Injury—Significant Limitation of Use of Body Function or System

You must answer the following question: Did AB sustain a significant limitation of use of a body function or system as a result of the accident on [state date of accident]?

A limitation of use of a body function or system means that the function or system does not operate at all or operates only in some limited way. It is not necessary for you to find that there has been a total loss of the body function or system or that the limitation of use is permanent. However, the limitation of use must be significant, meaning that the loss is important or meaningful. A minor, mild or slight limitation of use is not significant.

If you find that AB sustained a limitation of use as a result of the accident on [state date of accident] and that the limitation is significant, you must answer the question “yes.” If you find that AB did not sustain a limitation of use as a result of the accident on [state date of accident], or that the limitation is not significant, you must answer the question “no.”

Comment

[For a discussion of the “No-Fault” Law, see Introductory Statement preceding 2:75]

Based on Ins. Law § 5102(d); *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982); *Decker v Rassaert*, 131 AD2d 626, 516 NYS2d 710 (2d Dept 1987); *Colvin v Maille*, 127 AD2d 926, 511 NYS2d 982 (3d Dept 1987); *Hezekiah v Williams*, 81 AD2d 261, 440 NYS2d 274 (2d Dept 1981).

Insurance Law § 5102(d) includes as a serious injury a personal injury which results in the “significant limitation of use of a body function or system.” This category of serious injury should be contrasted with the categories of “permanent loss of use of a body organ, member, function or system,” see PJI 2:88D, and “permanent consequential limitation of use of a body organ or member,” see PJI 2:88F. The essential difference between the “significant limitation” category and the other two categories is that “significant limitation of use” does not require that the limitation be total or permanent, *Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101, 484 NE2d 130 (1985); *Estrella v Geico Ins. Co.*, 102 AD3d 730, 959 NYS2d 210 (2d Dept 2013); *Partlow v Meehan*, 155 AD2d 647, 548 NYS2d 239 (2d Dept 1989); *Velez v Svehla*, 229 AD2d 528, 645 NYS2d 842 (2d Dept 1996) (error to imply in charge that serious injury based upon significant limitation of use of body function or system requires finding of permanent loss of body function or system); *Decker v Rassaert*, 131 AD2d 626, 516 NYS2d 710 (2d Dept 1987) (same); see *Vasquez v Almanzar*, 107 AD3d 538, 967 NYS2d 361 (1st Dept 2013), although permanent injuries are not excluded, *Bellamy v Kaplan*, 309 AD2d 583, 765 NYS2d 365 (1st Dept 2003); *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997).

I. Significant Limitation in General

“Significant limitation of use,” like “permanent consequential limitation of use,” requires a showing of the significance of the injury, see *Baker v Thorpe*, 43 AD3d 535, 840 NYS2d 834 (3d Dept 2007) (test for “significant limitation of use” not satisfied where plaintiff had no significant problems after successful surgery and residual symptoms were mild, minor or slight); *Monette v Keller*, 281 AD2d 523, 721 NYS2d 839 (2d Dept 2001) (two percent loss of cervical rotation not significant limitation of use of body function or system). In determining whether the limitation of use claimed by plaintiff is prima facie “significant,” the court is not bound by the characterization given by plaintiff’s expert, *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); *Giannakis v Paschilidou*, 212 AD2d 502, 622 NYS2d 112 (2d Dept 1995); see *Fillette v Lundberg*, 150 AD3d 1574, 55 NYS3d 783 (3d Dept 2017); *Cannizzaro v King*, 187 AD2d 842, 589 NYS2d 698 (3d Dept 1992); *Leschen v Kollarits*, 144 AD2d 122, 534 NYS2d 233 (3d Dept 1988). A psychological or emotional injury may constitute a significant limitation of use (either alone or in combination with a physical injury), but the

injury must be established through expert evidence that the alleged mental condition was causally related to the accident, *Smith v Besanceney*, 61 AD3d 1336, 877 NYS2d 538 (4th Dept 2009). Multiple mild cognitive impairments may be sufficient to demonstrate a serious injury in the significant limitation of use category when those impairments result in a combined impact that limits the plaintiff's ability to perform daily life functions, *Flanders v National Grange Mut. Ins. Co.*, 124 AD3d 1035, 1 NYS3d 542 (3d Dept 2015).

The determination of whether a limitation of use or function is "significant" or "consequential" (i.e., important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Tornatore v Haggerty*, 307 AD2d 522, 763 NYS2d 344 (3d Dept 2003); see *Tandoi v Clarke*, 75 AD3d 896, 906 NYS2d 628 (3d Dept 2010). Assessment of the limitation's significance requires consideration of its duration, extent and degree, *Vasquez v Almanzar*, 107 AD3d 538, 967 NYS2d 361 (1st Dept 2013). For a detailed discussion of the requirement of objective evidence of "serious injury," see Introductory Statement preceding 2:75.

With respect to significant-limitation claims, it is error to instruct the jury that it must find that plaintiff sustained a permanent injury before awarding future damages, *Rizzo v DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept 2004). If the jury determines that plaintiff sustained a non-permanent significant limitation of the use of a body function or system, the jury should be instructed to consider the issue of future damages, *id.*

Because of the legislative goal of reducing the number of cases involving minor injuries, the threshold criterion of "significant limitation of use" requires a showing of a limitation that is more than minor, mild or slight, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982); see *Downie v McDonough*, 117 AD3d 1401, 984 NYS2d 710 (4th Dept 2014) (10% to 11% restrictions in left lateral bending and bilateral rotation not significant limitations); *Sellitto v Casey*, 268 AD2d 753, 702 NYS2d 177 (3d Dept 2000) (10% loss of range of motion in one shoulder not significant limitation); *Decker v Stang*, 243 AD2d 1033, 663 NYS2d 448 (3d Dept 1997) (20% overall impairment in cervical spine and lumbar spine not "significant" or "consequential"). "Significant" in this context means "important," and not "mild" or "slight," *Charley v Goss*, 54 AD3d 569, 863 NYS2d 205 (1st Dept 2008), *aff'd*, 12 NY3d 750, 876 NYS2d 700, 904 NE2d 837 (2009); *Pecora v Lawrence*, 41 AD3d 1212, 840 NYS2d 851 (4th Dept 2007). Thus, where plaintiff suffered from hearing loss for up to two years after an automobile accident, there was evidence of a serious injury within the meaning of the Insurance Law, *Mauro v Mearsheimer*, 207 AD2d 872, 616 NYS2d 650 (2d Dept 1994); see *Baker v Thorpe*, 43

AD3d 535, 840 NYS2d 834 (3d Dept 2007) (although carpal tunnel syndrome may constitute significant limitation of use in some circumstances, threshold test not satisfied where plaintiff had no significant problems after successful surgery and residual symptoms were mild, minor or slight).

When relying on the quantitative prong of *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002), to establish a significant limitation of use based on a limitation of movement, plaintiff is not required to submit quantitative range of motion findings “contemporaneous” to the accident, *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655, 960 NE2d 424 (2011). Rather, plaintiff may submit qualitative medical evidence establishing plaintiff’s symptoms shortly after the accident, and quantitative measurements of range of motion taken later in preparation for litigation, *id.* The qualitative evidence generated shortly after the accident serves to establish that the accident was a proximate cause of plaintiff’s injuries, while the quantitative evidence generated in preparation for litigation serves to demonstrate the severity of plaintiff’s injuries, *id.*

The court must make a preliminary determination as to whether the limitation of use claimed by plaintiff may be viewed as a significant limitation as a matter of law, *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982); *Starosta v Pedzik*, 185 AD2d 308, 586 NYS2d 279 (2d Dept 1992); *Masi v Kiss*, 114 AD2d 442, 119 AD2d 611, 494 NYS2d 358 (2d Dept 1985); *Zoldas v Louise Cab Corp.*, 108 AD2d 378, 489 NYS2d 468 (1st Dept 1985).

II. Limitations Resulting From Pain

Scheer v Koubek, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 (1987), addressed the question whether a limitation of use resulting from pain may constitute a “serious injury.” *Scheer* held that a soft tissue injury, described by plaintiff’s medical expert as “mild,” which did not result in any restriction of plaintiff’s mobility, was not sufficient to satisfy the no-fault threshold. Plaintiff had testified that she had periodic episodes of severe pain and her expert concluded that plaintiff had scar tissue which, when irritated by fatigue or stress, would produce pain consistent with plaintiff’s complaints, *Scheer v Koubek*, 126 AD2d 922, 511 NYS2d 435 (3d Dept 1987), *rev’d*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 (1987). The Court of Appeals held that the “subjective quality of plaintiff’s transitory pain” did not fall within the objective definition of serious injury contemplated by the no-fault law, see *Lashway v Groshans*, 241 AD2d 832, 661 NYS2d 67 (3d Dept 1997) (soft tissue injury causing even persistent and protracted back pain will not qualify as serious injury in absence of competent medical evidence establishing meaningful impairment or limitation as result of pain).

Scheer v Koubek, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 (1987), and *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002) have been regarded as strong policy

statements by the Court of Appeals that were aimed at preventing a piecemeal evisceration of the threshold serious injury requirement. *Scheer v Koubek*, supra, establishes that subjective complaints of transitory pain, even when supported by expert medical evidence and claimed to be permanent, are not sufficient to establish the existence of a serious injury, *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); see *Zeyger v Litman*, 250 AD2d 841, 674 NYS2d 380 (2d Dept 1998) (mild diffuse cerebral dysfunction and headaches); *Velez v Cohan*, 203 AD2d 156, 610 NYS2d 257 (1st Dept 1994) (diagnosis of back pain based only on subjective complaints); *Duryea v Zung*, 185 AD2d 912, 587 NYS2d 384 (2d Dept 1992) (subjective complaints of intermittent discomfort); *Thomas by Thomas v Drake*, 145 AD2d 687, 535 NYS2d 229 (3d Dept 1988) (subjective loss of sensation); *Benitez v Sexton*, 139 AD2d 686, 527 NYS2d 803 (2d Dept 1988) (subjective complaints of dizziness and headaches and physician's notation of "continued pain in upper extremity with limitation of motion"); *Brennan v Bauman & Sons Buses, Inc.*, 107 AD2d 654, 484 NYS2d 25 (2d Dept 1985) ("cerebral concussion with postconcussion syndrome, cervical sprain with radiculitis, intermittent pain in the neck, back, and head regions, and blurring of vision").

However, a finding of serious injury was held justified where an orthopedic surgeon testified that claimant had "trigger points" in neck, back, shoulder and arm, which were areas of localized tenderness causing pain or spasm, which limited her activities and which were permanent in nature, *Larrabee v State*, 216 AD2d 772, 628 NYS2d 447 (3d Dept 1995). Similarly, plaintiff's knee pain, an aggravation of a preexisting arthritic condition resulting from contusions to both knees and the loss of a few degrees of flexion and extension were held to present jury question as to serious injury, *Guerra v Fuez*, 145 AD2d 873, 536 NYS2d 200 (3d Dept 1988); see *Cowley v Crocker*, 186 AD2d 939, 589 NYS2d 119 (3d Dept 1992) (upholding verdict for plaintiff where complaints of pain supported by objectively medically determined injury); *Spezia v De Marco*, 173 AD2d 462, 570 NYS2d 87 (2d Dept 1991) (question of fact existed where plaintiff submitted expert opinion that he suffered from permanent 10-degree limitation in mobility of neck, plaintiff could move neck only with pain, and plaintiff's subjective complaints were consistent with diagnosis of cervical radiculopathy, which was purportedly confirmed by electrodiagnostic studies).

A finding of serious injury is not warranted where there is no indication that the diagnosis of tinnitus rested on anything other than plaintiff's subjective complaints of ringing in the ear, which complaints were not accompanied by hearing loss or any other manifestation of an injury, *Congdon v Preisman*, 263 AD2d 808, 693 NYS2d 757 (3d Dept 1999); *Preston v Young*, 239 AD2d 729, 657 NYS2d 499 (3d Dept 1997).

PJI 2:88G. No-Fault Law—Serious Injury—Non-Permanent Medically Determined Injury That Prevents Performance of Usual and Customary Daily Activities For 90 of 180 Days Immediately Subsequent to Injury

You must answer the following question: Did AB sustain a medically determined injury or impairment of a non-permanent nature as a result of the accident on *[state date of accident]* that prevented (him, her) from performing substantially all of the material acts that constituted (his, her) usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident?

A medically determined injury is one that is supported by testimony by *[specify appropriate medical professional such as: doctor, osteopath, chiropractor]*. If you find that, as a result of the accident, there is a medically determined injury or impairment of a non-permanent nature that prevented AB from performing substantially all of the material acts that constituted (his, her) usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident, you must answer the question “Yes.” If you find that, as a result of the accident on *[state date of accident]*, AB did not sustain a medically determined injury or impairment of a non-permanent nature that prevented AB from performing substantially all of the material acts that constituted (his, her) usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident, you must answer the question “No.”

Comment

[For a discussion of the No-Fault Law, see Introductory Statement preceding 2:75]

Based on Ins. Law § 5102(d); *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002).

Under the 90/180 category, plaintiff need not show a limitation that

is “significant” or “consequential,” but must show, by objective evidence, the existence of a medically determined injury or impairment of a non-permanent nature that affected substantially all of the material acts that constitute his or her daily activities for at least 90 days during the 180 days following the occurrence, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (2002); *Blake v Portexit Corp.*, 69 AD3d 426, 893 NYS2d 28 (1st Dept 2010); *Cummings v Jiayan Gu*, 42 AD3d 920, 839 NYS2d 663 (4th Dept 2007). A causally related emotional injury, either alone or in combination with a physical injury, can constitute a serious injury, *Hill v Cash*, 117 AD3d 1423, 985 NYS2d 345 (4th Dept 2014). Post-traumatic stress (PTS) may qualify as a serious injury when it is demonstrated by objective medical evidence, *id.* PTS may be demonstrated without diagnostic testing if its symptoms have been observed by treating physicians and established by either plaintiff’s testimony or the testimony of others who have observed plaintiff, *id.* The running of the statute of limitations on the cause of action is not postponed even though it may take plaintiff 180 days to satisfy the threshold criterion, *Jackson v L.P. Transp., Inc.*, 72 NY2d 975, 534 NYS2d 362, 530 NE2d 1282 (1988); see CPLR 214(5).

The curtailment of plaintiff’s activities must be to a “great extent rather than some slight curtailment,” *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 (1992); see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 (1982); *Bennett v Reed*, 263 AD2d 800, 693 NYS2d 738 (3d Dept 1999); *Kim v Cohen*, 208 AD2d 807, 618 NYS2d 386 (2d Dept 1994); *Short v Shawn*, 188 AD2d 815, 590 NYS2d 943 (3d Dept 1992); *Starosta v Pedzik*, 185 AD2d 308, 586 NYS2d 279 (2d Dept 1992); *Kimball v Baker*, 174 AD2d 925, 571 NYS2d 621 (3d Dept 1991); see also *Hausman v Gourville*, 248 AD2d 674, 670 NYS2d 320 (2d Dept 1998); *King v Johnston*, 211 AD2d 907, 621 NYS2d 402 (3d Dept 1995). A showing that plaintiff missed more than 90 days of work is not determinative, *Amamedi v Archibala*, 70 AD3d 449, 895 NYS2d 42 (1st Dept 2010), and is, in fact, not sufficient to meet the “substantially all material acts” test even when coupled with plaintiff’s loss of the ability to play sports with his children and difficulty in walking, climbing stairs and getting into cars, *Blake v Portexit Corp.*, 69 AD3d 426, 893 NYS2d 28 (1st Dept 2010). Further, the threshold test was not satisfied where plaintiff was on “light duty” at work for four to six weeks and thereafter had no difficulties performing work and other daily activities apart from some limitations on his ability to care for his horses and to hold a golf club, *Baker v Thorpe*, 43 AD3d 535, 840 NYS2d 834 (3d Dept 2007). Nor was it satisfied where plaintiff high school student missed little or no school as a result of her injury and her education took the very same course that it would have had she not been injured, *Lashway v Groshans*, 241 AD2d 832, 661 NYS2d 67 (3d Dept 1997).

The 90/180-day threshold is satisfied by evidence that plaintiff’s physicians placed restrictions on his or her activities, *Cummings v Jiayan Gu*, 42 AD3d 920, 839 NYS2d 663 (4th Dept 2007). It may also be satisfied by evidence that plaintiff was unable to maintain his or her daily routines for the requisite number of days despite having made ef-

forts to resume those routines with the assistance of medication, *Gleissner v LoPresti*, 135 AD2d 494, 521 NYS2d 735 (2d Dept 1987), or was able to do some activities but only with increased pain, *Fortino v Fayetteville-Manlius Cent. School Dist.*, 16 AD3d 1124, 791 NYS2d 245 (4th Dept 2005). Likewise, even where plaintiff resumed his or her daily activities, the threshold may be satisfied if plaintiff's ability to perform activities remained substantially impaired, *Judd v Walton*, 259 AD2d 1016, 703 NYS2d 845 (4th Dept 1999) (mere fact that plaintiff was able to return to work within statutory period did not preclude finding of serious injury, particularly in light of evidence that plaintiff relied on assistants to carry all but lightest objects); *Cushing v Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept 1998) (issue of fact existed where plaintiff returned to work but was unable to function in job due to severe psychological trauma); *Nigro v Penree*, 238 AD2d 908, 661 NYS2d 137 (4th Dept 1997) (fact that plaintiff returned to work not dispositive of whether he could perform his usual and customary activities at work); *Vasquez v Weiss*, 234 AD2d 658, 650 NYS2d 60 (3d Dept 1996) (mere fact that plaintiff was able to return to work in some capacity one month after injury does not preclude finding of serious injury); *Westfall v Wyld*, 191 AD2d 866, 594 NYS2d 836 (3d Dept 1993) (plaintiff successfully established serious injury where she was unable to attend school, function as class president and pursue part-time employment); *Thomas v Thomas v Drake*, 145 AD2d 687, 535 NYS2d 229 (3d Dept 1988) (mere fact that plaintiff returned to school did not foreclose finding of substantial impairment of ability to perform usual and customary activities); but see *Ceruti v Abernathy*, 285 AD2d 386, 728 NYS2d 445 (1st Dept 2001) (no issue raised where plaintiff missed 20 days of school and doctor ordered plaintiff to refrain from gym class for remaining three months of school).

General statements by plaintiff or his or her physician that plaintiff was advised to avoid certain activities such as heavy lifting or that plaintiff was somewhat restricted in daily-living activities are insufficient to establish serious injury under the 90/180 category, *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 858 NYS2d 171 (1st Dept 2008); *Gorden v Tibulcio*, 50 AD3d 460, 855 NYS2d 515 (1st Dept 2008); see *Mercado-Arif v Garcia*, 74 AD3d 446, 902 NYS2d 72 (1st Dept 2010). Plaintiff must submit expert medical evidence supporting the disability for the requisite period of time, *Blake v Portexit Corp.*, 69 AD3d 426, 893 NYS2d 28 (1st Dept 2010); *Lanuto v Constantine*, 192 AD2d 989, 596 NYS2d 944 (3d Dept 1993); see *Decker v Stang*, 243 AD2d 1033, 663 NYS2d 448 (3d Dept 1997); see also *Barrow v Dubois*, 82 AD3d 1685, 920 NYS2d 507 (4th Dept 2011) (nurse practitioner's diagnosis of cervical sprain, supported by nurse's observations that plaintiff had limited range of motion in his neck and objective evidence that plaintiff experienced crepitus in his neck, constituted objective evidence of plaintiff's claim of serious injury under 90/180-day category). Moreover, a physician's testimony that plaintiff was prevented from performing his or her usual activities during the requisite period of time must be based on more than the patient's subjective complaints of pain, *Lagana v Shamsian*, 270 AD2d 313, 704 NYS2d 287 (2d Dept 2000).

A plaintiff's prolonged bed rest, upon the advice of a physician, to address pre-term labor, qualifies as a serious injury under the 90/180-days category if causally related to an automobile accident, *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 (2d Dept 2011).

2. LIABILITY FOR CONDITION OR USE OF LAND

a. TO PERSONS ON THE LAND

Introduction

I. Reasonable Standard of Care

Liability of an owner or possessor of land is measured by “the single standard of reasonable care under the circumstances,” *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976). The common law rule that the duty owed by the owner or possessor of land varied with the status of plaintiff as licensee, invitee, or trespasser was abolished by *Basso v Miller*, *supra*; *Scurti v New York*, *supra*; *Barker v Parnossa, Inc.*, 39 NY2d 926, 386 NYS2d 576, 352 NE2d 880 (1976); *Parish v Henneberry Road Farms, Inc.*, 39 NY2d 932, 386 NYS2d 580, 352 NE2d 884 (1976). Plaintiff’s status, nevertheless, continues to be relevant as one of several factors that the jury may consider in evaluating the reasonableness of defendant’s conduct, *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Basso v Miller*, *supra*; *Scurti v New York*, *supra*; see Comment to PJI 2:90.

The court, in the first instance, must decide as a matter of law whether the evidence, viewed in the most favorable light to plaintiff, will support a negligence verdict against the owner or possessor of land, *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981); *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977). If varying inferences are permissible, the case must go to the jury, *Quinlan v Cecchini*, *supra*. In deciding the question, the court “may consider whether the foreseeability of the presence of an entrant on land is too remote, given the nature of the risk and the burdens that would be imposed on a landowner to guard against it. It is also concerned with the weighing of the probability of the harm, the gravity of the harm against the burden of precaution, and other relevant and material considerations from which it can determine whether reasonable persons can differ as to whether the defendant was negligent,” *Quinlan v Cecchini*, *supra*, 41 NY2d at 689; see *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003).

Although some earlier cases indicated that the open and obvious character of a dangerous condition negates a landowner’s duty to maintain the premises in reasonably safe condition, *Sandler v Patel*, 288 AD2d 459, 733 NYS2d 131 (2d Dept 2001); *Bojovic v New York City Housing Authority*, 284 AD2d 356, 726 NYS2d 444 (2d Dept 2001); *Patrie v Gorton*, 267 AD2d 582, 699 NYS2d 218 (3d Dept 1999), that principle has now been rejected, see *Juoniene v H.R.H. Const. Corp.*, 6 AD3d 199, 774 NYS2d 525 (1st Dept 2004); *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 773 NYS2d 38 (1st Dept 2004); *Luksch v Blum-Rohl Fishing Corp.*, 3 AD3d 475, 771 NYS2d 136 (2d Dept 2004);

Cupo v Karfunkel, 1 AD3d 48, 767 NYS2d 40 (2d Dept 2003); Cohen v Shopwell, Inc., 309 AD2d 560, 765 NYS2d 40 (1st Dept 2003); MacDonald v Schenectady, 308 AD2d 125, 761 NYS2d 752 (3d Dept 2003); Soich v Farone, 307 AD2d 658, 763 NYS2d 168 (3d Dept 2003). Under this more recent line of cases, the open and obvious character of a defect does not absolve the landowner of the duty to maintain the premises in safe condition, but rather raises an issue of fact concerning comparative negligence, see Saretsky v 85 Kenmare Realty Corp., 85 AD3d 89, 924 NYS2d 32 (1st Dept 2011); Sportiello v New York, 6 AD3d 421, 774 NYS2d 353 (2d Dept 2004); Centeno v Regine's Originals, Inc., 5 AD3d 210, 773 NYS2d 62 (1st Dept 2004); DiVietro v Gould Palisades Corp., 4 AD3d 324, 771 NYS2d 527 (2d Dept 2004); Moloney v Wal-Mart Stores, Inc., 2 AD3d 508, 767 NYS2d 897 (2d Dept 2003); MacDonald v Schenectady, *supra*. However, a landowner is not liable for injuries caused by conditions that do not pose a reasonably foreseeable hazard, see Jones v Presbyterian Hosp. in City of New York, 3 AD3d 225, 771 NYS2d 109 (1st Dept 2004), or are not "inherently dangerous," regardless of whether the condition is open and obvious, Gerner v Shop-Rite of Uniondale, Inc., 148 AD3d 1122, 50 NYS3d 459 (2d Dept 2017); Jang Hee Lee v Sung Whun Oh, 3 AD3d 473, 771 NYS2d 134 (2d Dept 2004). For a detailed discussion of the open and obvious doctrine, see Comment to 2:90, *infra*, Duty to Warn.

The Second Department has held that a trespasser's misuse of a premises fixture such as a skylight may be an "extraordinary occurrence" against which, as a matter of law, the property owner is not required to guard, Tracey v Lord Baltimore Capital Corp., 298 AD2d 383, 751 NYS2d 244 (2d Dept 2002); Clifford v Sachem Cent. School Dist. at Holbrook, 271 AD2d 470, 707 NYS2d 133 (2d Dept 2000); Kurshals v Connetquot Cent. School Dist., 227 AD2d 593, 643 NYS2d 622 (2d Dept 1996); see also Freeman v Cobos, 240 AD2d 698, 659 NYS2d 424 (2d Dept 1997) (plaintiff attempted to use cement lip of stairwell wall to reach terminal box).

II. Predicate for Liability

Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or a special use of the property, Martuscello v Jensen, 134 AD3d 4, 18 NYS3d 463 (3d Dept 2015); Parslow v Leake, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014); Ruffino v New York City Transit Authority, 55 AD3d 817, 865 NYS2d 667 (2d Dept 2008); Seymour v David W. Mapes, Inc., 22 AD3d 1012, 803 NYS2d 250 (3d Dept 2005); Gibbs v Port Authority of New York, 17 AD3d 252, 794 NYS2d 320 (1st Dept 2005); Warren v Wilmorite Inc., 211 AD2d 904, 621 NYS2d 184 (3d Dept 1995); Turrisi v Ponderosa Inc., 179 AD2d 956, 578 NYS2d 724 (3d Dept 1992); see Gronski v Monroe, 18 NY3d 374, 940 NYS2d 518, 963 NE2d 1219 (2011) (reviewing control predicate). If none of these factors is present, liability cannot be imposed, Warren v Wilmorite Inc., *supra*; see Gibbs v Port Authority of New York, *supra* (license granting right to use events facility for limited purpose and time, which expressly precluded licensee from

engaging in cleaning activities, did not give rise to duty of care with respect to unsafe conditions at facility); *Bridgham v Fairview Plaza Inc.*, 257 AD2d 914, 684 NYS2d 317 (3d Dept 1999) (defendant bank located in shopping center neither exercised control over parking lot nor had right to possession of it and, therefore, owed no duty of care with respect to unsafe condition existing on lot); *Masterson v Knox*, 233 AD2d 549, 649 NYS2d 108 (3d Dept 1996) (license granting right to use parking lot does not establish control or give rise to duty to warn); see also *Nunez v 38 Sickles Street Corp.*, 269 AD2d 127, 703 NYS2d 16 (1st Dept 2000) (landowner under no duty to maintain adjoining landowner's chain link fence from which access to fire escape landing could be gained). With respect to the liability of an owner of real property, the duty of care imposed on the owner is premised on the owner's exercise of control over the property, as the individual or entity in possession and control is best situated to identify and prevent harm to others, *Gronski v Monroe*, 18 NY3d 374, 940 NYS2d 518, 963 NE2d 1219 (2011); *Kraft v Loso*, 154 AD3d 1265, 63 NYS3d 566 (3d Dept 2017) (no liability attaches to co-owner who exercises no possession or control over property for injuries to third persons by agreement). The fact that a deed conveying property to another is not recorded does not preclude a party from denying ownership of the property, *Woroniecki v Tzitzikalakis*, 255 AD2d 509, 680 NYS2d 606 (2d Dept 1998); *Riner v Texaco, Inc.*, 222 AD2d 571, 635 NYS2d 658 (2d Dept 1995). Similarly, where the injured party engages in a voluntary activity over which the landowner exercises no supervision or control, the law will not impose a duty upon the landowner to protect another from the consequences of his own acts, *Slater v Hitchcock*, 276 AD2d 998, 715 NYS2d 461 (3d Dept 2000).

Where a landowner and one in possession of the property enter into an agreement delineating the parties' respective rights and obligations, a court must scrutinize both the agreement and the parties' course of conduct to determine whether and to what extent a landowner surrendered control over the property sufficient to limit or extinguish the landowner's duty, *Gronski v Monroe*, 18 NY3d 374, 940 NYS2d 518, 963 NE2d 1219 (2011). This principle may not apply where a landowner owes a nondelegable duty to another, see e.g., *Multiple Dwelling Law* § 78; PJI 2:112 (blasting operations).

For purposes of imposing personal liability for defective conditions on premises owned by tenants in common, a co-tenant's right to use and enjoy the entire premises translates into a duty to maintain it safely, *Butler ex rel. Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567, 792 NE2d 1055 (2003); see *Kraft v Loso*, 154 AD3d 1265, 63 NYS3d 566 (3d Dept 2017). The common law doctrine of tenancy-in-common presumptively gives each co-tenant full possession of the entire premises and, therefore, a defective condition causing injury to a third party results in joint and several liability as to each co-tenant. These general rules of a tenancy-in-common will not control where there is a contrary agreement, *id.* Where co-tenants enter into an agreement regarding possession and control of the premises and are faithful to its terms, liability for personal injuries will fall only on the tenant who exercises posses-

sion and control over the area in question, *id*; see *Ritto v Goldberg*, 27 NY2d 887, 317 NYS2d 361, 265 NE2d 772 (1970); *Kraft v Loso*, *supra*.

There may be instances where, even though plaintiff has sued the wrong entity, the entity may be estopped, due to wrongful conduct, from asserting the error, see *Hitzfield v Wilmorite, Inc.*, 237 AD2d 879, 654 NYS2d 506 (4th Dept 1997).

The duty of reasonable care is owed by the persons in possession or control of the premises, including permittees operating special events on the premises, *Bynum v Keber*, 135 AD3d 1066, 23 NYS3d 654 (3d Dept 2016) (mass gathering permittee); see *Maheshwari v New York*, 2 NY3d 288, 778 NYS2d 442, 810 NE2d 894 (2004); *Stora v New York*, 117 AD3d 557, 986 NYS2d 81 (1st Dept 2014) (Volunteers of America operating homeless shelter). However, a volunteer organization that only performed services such as fixing holes and reporting fallen trees on a tract of recreational land owned by the State could be held liable only as one who voluntarily assumed a duty, *Rosen v Long Island Greenbelt Trail Conference, Inc.*, 19 AD3d 400, 796 NYS2d 130 (2d Dept 2005).

The lessee of an entire building stands in the same position as an owner, *Rohlfs v Weil*, 271 NY 444, 3 NE2d 588 (1936). A lessee of less than the entire building is liable for conditions which exist within the portion leased, *Lowenhar v Commercial Outfitting Co.*, 260 App Div 211, 21 NYS2d 112 (2d Dept 1940), *aff'd*, 285 NY 671, 34 NE2d 376 (1941); *Brownlee v Hot Shoppes, Inc.*, 23 AD2d 848, 259 NYS2d 271 (2d Dept 1965). However, where each defendant rented an individual room in a fraternity house but all exercised control over the bathrooms in the building and were required by lease to clean the bathrooms, each defendant had a duty to maintain the bathrooms in reasonably safe condition, *Parslow v Leake*, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014).

A lessee is not liable for conditions existing in an area outside of the demised premises over which the lessee has no right of possession, maintenance or control, *Bridgham v Fairview Plaza Inc.*, 257 AD2d 914, 684 NYS2d 317 (3d Dept 1999) (tenant in shopping center has no duty to warn of dangerous condition by virtue of customers' use of common area); *Warren v Wilmorite Inc.*, 211 AD2d 904, 621 NYS2d 184 (3d Dept 1995) (defendant lessee had no obligation to maintain sidewalk in front of its store, over which it had no right of control under lease); *Hoberman v Kids R Us, Inc.*, 187 AD2d 187, 593 NYS2d 39 (1st Dept 1993) (same); *Rosato v Foodtown*, 208 AD2d 705, 617 NYS2d 531 (2d Dept 1994) (supermarket tenant not liable for condition in parking lot which it did not own, occupy, possess, or put to a special use); *Smith v Fishkill Health-Related Center Inc.*, 184 AD2d 963, 584 NYS2d 949 (3d Dept 1992) (sublessee had no duty to maintain or illuminate parking lot over which it had exercised no dominion or control and shared with other tenants); *McGill v Caldors, Inc.*, 135 AD2d 1041, 522 NYS2d 976 (3d Dept 1987). Nor does a lessee who has no control over the premises

where the injury occurred have a duty to warn of dangerous or defective conditions, *Elmlinger v Board of Educ. of Town of Grand Island*, 132 AD2d 923, 518 NYS2d 257 (4th Dept 1987). A tenant, however, remains responsible for dangerous conditions on the demised premises, even though the lease may explicitly make the landlord responsible for keeping the premises in good repair, *Gatto v Coinmach Corp.*, 172 AD3d 1176, 101 NYS3d 390 (2d Dept 2019); *Parslow v Leake*, 117 AD3d 55, 984 NYS2d 493 (4th Dept 2014); *McNelis v Doubleday Sports, Inc.*, 191 AD2d 619, 595 NYS2d 118 (2d Dept 1993); *Chadis v Grand Union Co.*, 158 AD2d 443, 550 NYS2d 908 (2d Dept 1990). A private university that sponsored the creation of a pedestrian mall on city-owned streets has been held to owe a duty to design and create a mall that is safe, *Ramsammy v New York*, 216 AD2d 234, 628 NYS2d 693 (1st Dept 1995).

The duty to keep the premises in reasonably safe condition attaches to a mortgagee in possession and to any other person who assumes management and control of the property, *Pantano v Erie County Sav. Bank of Buffalo*, 257 App Div 451, 13 NYS2d 932 (4th Dept 1939); *Mortimer v East Side Sav. Bank*, 251 App Div 97, 295 NYS 695 (4th Dept 1937), such as a receiver of rents and profits appointed in a foreclosure action, GOL § 9-101. As to the liability of a receiver, see *Copeland v Salomon*, 56 NY2d 222, 451 NYS2d 682, 436 NE2d 1284 (1982). But where the receiver displaces the owner and the owner is no longer in possession and has no right to reenter to inspect and repair, then the owner is no longer liable for defects in the property, *Mazurick v Chalos*, 172 AD2d 805, 569 NYS2d 174 (2d Dept 1991). Where the defect existed prior to the appointment of the receiver, the owner ceases to be liable once the receiver has had a reasonable time to discover and repair the condition, *Gomez v DeJesus v Walton Realty Associates*, 258 AD2d 307, 685 NYS2d 201 (1st Dept 1999). Two years has been found to be a reasonable time, *Gomez by DeJesus v Walton Realty Associates*, *supra*; *Mazurick v Chalos*, *supra*. There may be circumstances where the owner or other person having a legal interest in the premises owes no duty, see PJI 2:100, 2:101, 2:105, 2:108.

The State and its political subdivisions are generally subject to the same duty of reasonable care imposed on private landowners, *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983); see Introductory Statement preceding PJI 2:225; see generally *Walter v State*, 185 AD2d 536, 586 NYS2d 391 (3d Dept 1992).

A hotel franchisor may be held vicariously liable for injuries caused by the negligent maintenance of the premises under certain circumstances, *Hart v Marriott Intern., Inc.*, 304 AD2d 1057, 758 NYS2d 435 (3d Dept 2003). The label that the franchise agreement assigns to the franchisee is not dispositive. The most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee and, more specifically, the manner of performing the work out of which the injury arose, *id*; see also *Abreu v Getty Refining and Marketing Co., Inc.*, 121 AD2d 419, 503 NYS2d 116 (2d Dept 1986). Thus, where the franchise agreement provided that the franchisee was

responsible for daily maintenance and operation of the hotel and the franchisee had its own written policy instructing employees on the handling of wet floors, the franchisor could not be held liable to a person who slipped on an allegedly wet floor in the hotel, *Hart v Marriott Intern., Inc.*, *supra*.

The negligence of the owner or possessor must, of course, be a proximate cause of the injuries sustained, see PJI 2:70; see also *Olsen v Richfield*, 81 NY2d 1024, 599 NYS2d 912, 616 NE2d 498 (1993); *Lionarons v General Elec. Co.*, 215 AD2d 851, 626 NYS2d 321 (3d Dept 1995), *aff'd*, 86 NY2d 832, 634 NYS2d 436, 658 NE2d 214 (1995); *Butler v Marshall*, 243 AD2d 971, 663 NYS2d 381 (3d Dept 1997); *Rowell v Hempstead*, 186 AD2d 553, 588 NYS2d 405 (2d Dept 1992). The issue of proximate cause is for the finder of fact to determine once a *prima facie* case has been established. As to an intervening cause, which may serve to relieve a defendant of liability, see PJI 2:72.

III. General Obligations Law § 5-301 et seq.

A. Lessors and Contractors

Agreements exempting lessors and building service or maintenance contractors from liability for negligence are void, see GOL § 5-321. For a discussion of GOL § 5-321, see Comment to PJI 2:275.

B. Owners and Operators of Applicable Establishments

Also void are agreements exempting owners or operators of pools, gymnasiums, and places of public amusement or recreation from liability, GOL § 5-326. For a discussion of GOL § 5-326, see Comment to PJI 2:10A.

IV. General Obligations Law § 9-103

GOL § 9-103 limits the duty of reasonable care owed by an uncompensated “owner, lessee or occupant” of undeveloped lands (including the State, *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); as to municipalities, see PJI 2:225, 2:228) to hunters, trappers, fishermen, hikers, horseback riders, bicyclists, snowmobile operators, dog trainers, canoeists, hang gliders, cross country skiers, tobogganers, sledders, spelunkers and operators of motorized vehicles for recreational purposes, *Farnham v Kittinger*, 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162 (1994). The limitations on liability conferred by the statute do not apply where permission was granted to use the property for an enumerated activity in exchange for consideration, GOL § 103(2)(b); *Schoonmaker v Ridge Runners Club 99, Inc.*, 119 AD2d 858, 500 NYS2d 562 (3d Dept 1986); see *Ferland v GMO Renewable Resources LLC*, 105 AD3d 1158, 963 NYS2d 428 (3d Dept 2013) (naming of landowner as additional insured on liability insurance policy of group using property not consideration); *Seminara v Highland Lake Bible Conference, Inc.*, 112 AD2d 630, 492 NYS2d 146 (3d Dept 1985).

However, the statutory limitations were held to apply where a municipality charged for use of the property for a particular purpose in one season but allowed the injured party to use the property without a fee for a different activity in a different season, *Bowles v Kawasaki Motor Corp. USA*, 179 AD2d 299, 582 NYS2d 881 (4th Dept 1992); see *Ferland v GMO Renewable Resources LLC*, *supra*. Where the statute is applicable, the landowner is immune from liability for ordinary negligence and may only be held liable for injuries resulting from a wilful or malicious failure to guard against or warn of a dangerous condition, GOL § 9-103. For a charge and further discussion on a landowner's liability for wilful or malicious failure to guard against or warn of a dangerous condition, see PJI 2:90A.

GOL § 9-103 was enacted to limit the application of the rule in *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976), with respect to the enumerated activities conducted on undeveloped lands, *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); *Jacobs v Northeastern Indus. Park, Inc.*, 181 AD2d 720, 581 NYS2d 366 (2d Dept 1992); *Clark v State*, 178 AD2d 907 577 NYS2d 946; *Wilkins v State*, 165 AD2d 514, 568 NYS2d 236 (3d Dept 1991). However, the application of the statute is not restricted to undeveloped lands and may extend to commercial property, *Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 544 NYS2d 308, 542 NE2d 621 (1989); *Jefferson v North Rockland Cent. School Dist.*, 220 AD2d 642, 633 NYS2d 51 (2d Dept 1995) (mere fact that land in question was not located in area that could be characterized as wilderness, remote, or undeveloped, did not deprive land owner of limited liability of General Obligations Law § 9-103). Similarly, the statute may be applicable to State-owned property as long as the property is not a park or other recreational facility that, by nature and definition, invites public recreation, *Sena v Greenfield*, 91 NY2d 611, 673 NYS2d 984, 696 NE2d 996 (1998); *Ferres v New Rochelle*, 68 NY2d 446, 510 NYS2d 57, 502 NE2d 972 (1986). The statutory limitation on liability applies to owners who have refused permission for the use of their lands as well as to those who have granted permission, *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994); *Coogan v D'Angelo*, 66 AD3d 1465, 886 NYS2d 306 (4th Dept 2009); *Bloom by Lins v Brady*, 171 AD2d 910, 566 NYS2d 783 (3d Dept 1991); *Hardy v Gullo*, 118 AD2d 541, 499 NYS2d 159 (2d Dept 1986); see *Guereschi v Erie Blvd. Hydropower, L.P.*, 19 AD3d 1022, 797 NYS2d 679 (4th Dept 2005).

A. General Principles

The Court of Appeals has ruled that the statute is properly applied when (1) the plaintiff is engaged in one of the activities identified in § 9-103, and (2) the plaintiff is recreating on land suitable for that activity, *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994); see PJI 2:90A, for further discussion; see also *Albright v Metz*, 88 NY2d 656, 649 NYS2d 359, 672 NE2d 584 (1996); *Ferres v New Rochelle*, 68 NY2d 446, 510 NYS2d 57, 502 NE2d 972 (1986); *Reid by Reid v Kawasaki Motors Corp., U.S.A.*, 189 AD2d 954, 592 NYS2d

496 (3d Dept 1993); *Jacobs v Northeastern Indus. Park, Inc.*, 181 AD2d 720, 581 NYS2d 366 (2d Dept 1992); *Bowles v Kawasaki Motor Corp. USA*, 179 AD2d 299, 582 NYS2d 881 (4th Dept 1992); *Wilkins v State*, 165 AD2d 514, 568 NYS2d 236 (3d Dept 1991); *Hirschler v Anco Builders, Inc.*, 126 AD2d 971, 511 NYS2d 746 (4th Dept 1987); *O’Keefe v State*, 104 AD2d 43, 481 NYS2d 920 (4th Dept 1984); see also *Walters v Rensselaer*, 282 AD2d 944, 724 NYS2d 97 (3d Dept 2001) (GOL § 9-103 inapplicable where injured plaintiff, who was engaged in enumerated activity, fell within right-of-way of public highway maintained by defendant, since highway already open to public use). Whether a parcel of land is suitable and the immunity of § 9-103 available is generally a question of statutory interpretation, and it is, therefore, a question of law for the court, *Bragg v Genesee County Agr. Soc.*, *supra*; *Hulett ex rel. Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 768 NYS2d 535 (4th Dept 2003); *Moscato v Frontier Distributing, Inc.*, 254 AD2d 802, 677 NYS2d 853 (4th Dept 1998); see *King v Cornell University*, 119 AD3d 1195, 990 NYS2d 329 (3d Dept 2014). A defendant seeking summary judgment on the basis of the statute has the burden of establishing its applicability *prima facie* by showing (a) its ownership of the property in question, (b) plaintiff’s engagement in an enumerated recreational activity and (c) the suitability of the property for recreational use, *Morales v Coram Materials Corp.*, 51 AD3d 86, 853 NYS2d 611 (2d Dept 2008); but see *Ferland v GMO Renewable Resources LLC*, 105 AD3d 1158, 963 NYS2d 428 (3d Dept 2013).

B. Suitability

GOL § 9-103 makes no reference to the “suitability” of the land for recreational use. The “suitability” requirement is actually the product of case law aimed at limiting the statute’s reach to situations in which its public purpose would be served, *Cummings v Manville*, 153 AD3d 58, 58 NYS3d 823 (4th Dept 2017); *Morales v Coram Materials Corp.*, 51 AD3d 86, 853 NYS2d 611 (2d Dept 2008); see *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994).

Suitability must be judged by viewing the property as it generally exists, not portions of it at some given time, *Morales v Coram Materials Corp.*, 51 AD3d 86, 853 NYS2d 611 (2d Dept 2008). To determine the suitability of property, the court must ascertain whether the premises are the type of property that is (1) physically conducive to the particular activity or sport, and (2) appropriate for public use in pursuing the activity as recreation, *Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 544 NYS2d 308, 542 NE2d 621 (1989); see *Albright v Metz*, 88 NY2d 656, 649 NYS2d 359, 672 NE2d 584 (1996). A substantial factor to consider in determining whether property is physically conducive to the particular activity is whether recreationists have used the property for that activity in the past; such past use by participants in the particular activity demonstrates that the property is physically conducive to it, *Albright v Metz*, *supra*; *Morales v Coram Materials Corp.*, 51 AD3d 86, 853 NYS2d 611 (2d Dept 2008); *Blair v Newstead Snowseekers, Inc.*, 2 AD3d 1286, 769 NYS2d 807 (4th Dept 2003); *Moscato v Frontier*

Distributing, Inc., 254 AD2d 802, 677 NYS2d 853 (4th Dept 1998). The presence or absence of a dangerous condition is not the benchmark for determining suitability or appropriateness of the land for the particular activity, *Rivera v Glen Oaks Village Owners, Inc.*, 41 AD3d 817, 839 NYS2d 183 (2d Dept 2007); *McGregor v Middletown School Dist. No. 1*, 190 AD2d 923, 593 NYS2d 609 (3d Dept 1993); *Wiggs by Wiggs v Panzer*, 187 AD2d 504, 589 NYS2d 591 (2d Dept 1992).

The suitability of property for recreational use is determined by reference to the general use of the property rather than to the circumstances existing on a particular date, *Morales v Coram Materials Corp.*, 51 AD3d 86, 853 NYS2d 611 (2d Dept 2008) (citing *Albright v Metz*, 88 NY2d 656, 649 NYS2d 359, 672 NE2d 584 (1996); *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994)). Thus, the temporary unsuitability of the land on the date of the accident is not a bar to the application of § 9-103, *Morales v Coram Materials Corp.*, supra. Likewise, the court held in *Morales v Coram Materials Corp.*, supra, that where an accident occurs on property containing some portions that are suitable for recreational use and other portions that are not suitable, the general character of the overall property used at the time of the occurrence controls (citing *Albright v Metz*, supra; *Rzeczkowski v Kowalczyk*, 237 AD2d 342, 654 NYS2d 816 (2d Dept 1997); *Hoffman by Hoffman v Joseph R. Wunderlich, Inc.*, 147 AD2d 807, 539 NYS2d 107 (3d Dept 1989)). Each property must be considered on its individual characteristics rather than on the basis of its generic category, *Morales v Coram Materials Corp.*, supra. Thus, although in some cases gravel pits and landfills may be deemed suitable for ATV and dirtbike riding, see *Albright v Metz*, supra, such facilities are not per se eligible for the limitations on liability set forth in GOL § 9-103, *Morales v Coram Materials Corp.*, supra.

C. Enumerated Recreational Activities

Only those activities specifically enumerated are governed by the limitations of liability in GOL § 9-103, see *King v Cornell University*, 119 AD3d 1195, 990 NYS2d 329 (3d Dept 2014) (reviewing “hiking” activity); *Drake v Sagbolt, LLC*, 112 AD3d 1132, 977 NYS2d 131 (3d Dept 2013) (“hiking” requires more than walking with dogs on paved walkway); *McCarthy v New York State Canal Corp.*, 244 AD2d 57, 675 NYS2d 254 (3d Dept 1998) (defining “fishing” broadly); *Cramer v Henderson*, 120 AD2d 925, 503 NYS2d 207 (4th Dept 1986) (walking away from “swimming hole” is related to the non-enumerated activity of swimming and is not “hiking”); *Rochette v Newburgh*, 88 AD2d 614, 449 NYS2d 1013 (2d Dept 1982) (ice boating not covered by statute); see *Seideman by Seideman v Monroe*, 185 AD2d 640, 585 NYS2d 909 (4th Dept 1992) (1984 amendment to include sledding and tobogganing does not apply retroactively); see also *Hulett ex rel. Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 768 NYS2d 535 (4th Dept 2003) (walking bicycle across railroad track sufficiently related to bicycle riding to justify application of statute). In defining an activity enumerated in the statute and determining whether a plaintiff was engaged in a

particular enumerated activity, consideration should be given to the Legislature's intent in enacting the statute: to allow or encourage more people to use more accessible land for recreational enjoyment, see *King v Cornell University*, *supra*. An individual engaged in any of the enumerated activities, with the exception of the use of a "motorized vehicle," is presumed to be doing so for recreational purposes; the individual's subjective purpose is irrelevant, *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994); *King v Cornell University*, *supra*; *Cometti v Hunter Mountain Festivals Ltd.*, 241 AD2d 896, 660 NYS2d 511 (3d Dept 1997).

The operator of a four wheel drive, multi-purpose operational vehicle, which is not an inherently recreational vehicle, does not fall under the terms "use for motorized . . . vehicle operation for recreational purposes," unless the operator uses the vehicle with a recreational intent, *Farnham v Kittinger*, 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162 (1994); see *Bragg v Genesee County Agr. Soc.*, 84 NY2d 544, 620 NYS2d 322, 644 NE2d 1013 (1994). When addressing the use of a motorcycle, minibike, or all-terrain vehicle, the subjective intent of the party remains irrelevant, since those motor vehicles by their nature are designed predominantly for recreational purposes, *Farnham v Kittinger*, *supra*; see *Morales v Coram Materials Corp.*, 51 AD3d 86, 853 NYS2d 611 (2d Dept 2008) (ATV riding constitutes motorized vehicle operation for recreational purposes").

D. Owners, Lessees and Occupants

An owner's agent may be protected by GOL § 9-103, *Gibbs v D'Angelo*, 265 AD2d 833, 695 NYS2d 833 (4th Dept 1999). However, a defendant who had the right to construct, maintain and use a high-voltage transmission line along the right-of-way where an accident occurred does not qualify as an "owner, lessee or occupant of premises" entitled to the protections of the statute, *Adams v Rochester Gas and Elec. Corp.*, 191 AD2d 960, 594 NYS2d 501 (4th Dept 1993). The term "occupant" includes a corporation authorized to operate a land fill on the premises, *Albright v Metz*, 88 NY2d 656, 649 NYS2d 359, 672 NE2d 584 (1996). The term also includes a municipality that was granted the right to use the premises pursuant to a license agreement with the landowners, *Bowles v Kawasaki Motor Corp. USA*, 179 AD2d 299, 582 NYS2d 881 (4th Dept 1992).

E. State and Municipal Land

The statute does not limit the duty of the State or a municipality with respect to activity taking place in a supervised public park and recreational facility, *Sena v Greenfield*, 91 NY2d 611, 673 NYS2d 984, 696 NE2d 996 (1998); *Ferres v New Rochelle*, 68 NY2d 446, 510 NYS2d 57, 502 NE2d 972 (1986); *Schiff v State*, 31 AD3d 526, 818 NYS2d 597 (2d Dept 2006) (canoe launching site maintained and supervised by state); *Rashford v Utica*, 23 AD3d 1000, 803 NYS2d 453 (4th Dept 2005) (tobogganing in park maintained by city for winter recreational activi-

ties); *English v Albany*, 235 AD2d 977, 652 NYS2d 873 (3d Dept 1997) (tobogganing on city's golf course held open to public for winter activities with supervising staff); *Meyer v Orange*, 129 AD2d 688, 514 NYS2d 450 (2d Dept 1987); *Leonakis v State*, 126 AD2d 706, 511 NYS2d 119 (2d Dept 1987); *Bush v Saugerties*, 114 AD2d 176, 498 NYS2d 563 (3d Dept 1986) (citing PJI); *O'Keefe v State*, 104 AD2d 43, 481 NYS2d 920 (4th Dept 1984). In cases involving government landowners, the determinative inquiry as to whether the statute applies is the role of the landowner in relation to the public's use of the property, *Rashford v Utica*, supra; *Myers v State*, 11 AD3d 1020, 782 NYS2d 326 (4th Dept 2004); *Blair v Newstead Snowseekers, Inc.*, 2 AD3d 1286, 769 NYS2d 807 (4th Dept 2003); *Stento v State*, 245 AD2d 771, 665 NYS2d 471 (3d Dept 1997). Where there is insufficient proof of supervision on a par with that provided by municipal parks, the statute will apply, *McCarthy v New York State Canal Corp.*, 244 AD2d 57, 675 NYS2d 254 (3d Dept 1998). For example, the statute limits the liability of the State with respect to cross-country skiing on a golf course, where the park's multipurpose trails are not maintained in the winter and are neither groomed nor routinely inspected for skiing, *Stento v State*, supra; see *Myers v State*, supra; *Blair v Newstead Snowseekers, Inc.*, supra (statute applicable to case involving snowmobile accident on bike path where defendant Village neither supervised nor maintained path during winter months and snowmobiling was not a stated use of path, although it had been used for that purpose for years). In such circumstances, the State's role as a landowner changes so dramatically in the winter that it cannot reasonably be said to operate, maintain or supervise public recreational facilities at that time of year, *Stento v State*, supra. The statute also limits the liability of the State with respect to fishing from a terminal wall adjacent to a portion of a State canal where recreational boating is permitted, *McCarthy v New York State Canal Corp.*, supra. Similarly, the statute limits the liability of a municipality for injuries sustained on privately owned land which was used for recreational purposes pursuant to a license agreement between the municipality and the landowners; the land was not a public park and was only minimally maintained and supervised by the municipality, *Bowles v Kawasaki Motor Corp. USA*, 179 AD2d 299, 582 NYS2d 881 (4th Dept 1992). The municipality's right to control access to or exclude people from the land is not determinative of the statute's applicability, *Blair v Newstead Snowseekers, Inc.*, supra.

Sega v State, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983), suggests that the statute applies to undeveloped municipal or public land. In *Wilkins v State*, 165 AD2d 514, 568 NYS2d 236 (3d Dept 1991), the court, relying on *Sega*, held the statute applicable to state land which was primarily a wilderness area open for recreational purposes and which contained only limited improvements, such as an access road, parking lot and natural trails, see *Myers v State*, 11 AD3d 1020, 782 NYS2d 326 (4th Dept 2004). In *Clark v State*, 178 AD2d 908, 577 NYS2d 946 (3d Dept 1991), the statute was held applicable to a sledging accident sustained on the grounds of an historic site, consisting of a restored mansion, a parking lot and a visitor center. Similarly, in *McGregor v Middletown School Dist. No. 1*, 190 AD2d 923, 593 NYS2d

609 (3d Dept 1993), the statute was held applicable to a sledding accident on school grounds.

F. Other Considerations

College students engaging in various activities at their campus have also been subject to the limitations of liability in General Obligations Law § 9-103, see *Weller v Colleges of the Senecas*, 217 AD2d 280, 635 NYS2d 990 (4th Dept 1995); *Martins v Syracuse University*, 214 AD2d 967, 627 NYS2d 191 (4th Dept 1995). The courts have held that a plaintiff's status as a student does not preclude application of the statute because landowners owe no duty to both those who either "enter or use" their lands for an enumerated recreational activity, *id.* The courts have also held that tuition and student activities fees have no nexus to a student's use of the campus for bike riding or sledding, *id.* The courts have noted that GOL § 9-103 is properly applied to a private college because the statute encourages the college to permit individuals to pursue recreational activities on campus, *Weller v Colleges of the Senecas*, *supra*.

As to farms, GOL § 9-103(c) provides that whether or not the land is posted, the owner, lessee or occupant owes no duty to keep the farm safe for entry or use by one entering or remaining on the land without consent or privilege, or to give warning of a hazardous condition, use or activity to such persons. The statute does not exempt from liability gross negligence, or wilful or malicious failure to warn of the condition, see *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983).

Where a defendant's alleged liability is not premised upon any condition on the land or upon the defendant's status as an owner or occupant of the land but rather is based upon defendant's allegedly improper conduct, GOL § 9-103 does not apply, *Hulett ex rel. Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 768 NYS2d 535 (4th Dept 2003) (negligence in operating train); *Del Costello v Hudson Railway Co. Inc.*, 274 AD2d 19, 711 NYS2d 77 (3d Dept 2000) (negligence of defendant's engineer in operating train); *Sauberan v Ohl*, 239 AD2d 891, 659 NYS2d 658 (4th Dept 1997) (defendant advising codefendant to shoot at target defendant could not see); *Lee v Long Island R.R.*, 204 AD2d 280, 611 NYS2d 296 (2d Dept 1994) (negligence of defendant's engineer in operating train).

(1) POSSESSOR'S LIABILITY

PJI 2:90. Possessor's Liability for Condition or Use of Premises—Standard of Care

As you have heard, the plaintiff AB brings this action against the defendant CD based on the claim that CD negligently maintained the property at [*state location of property*]. The (owner, possessor) of (land, a building) has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable.

In order to recover, the plaintiff, AB, must prove: (1) that the premises were not reasonably safe; (2) that the defendant, CD, was negligent in not keeping the premises in a reasonably safe condition; and (3) that CD's negligence in allowing the unsafe condition to exist was a substantial factor in causing AB's injury.

You must first consider whether the premises were reasonably safe. AB claims that the premises were not in a reasonably safe condition because [*state plaintiff's contentions*]. CD contends [*state defendant's contentions*]. If you decide that the premises were reasonably safe, you will find for CD and proceed no further. If you decide that the premises were not reasonably safe, you will proceed to consider whether CD was negligent in permitting the unsafe condition to exist.

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent (owner, possessor) of (land, a building) would use under the same circumstances, taking into account the foreseeable risk of injury. In deciding whether CD was negligent, you must decide whether CD created the [*state claimed condition*] or either knew or, in the use of reasonable care, should have known, that the [*state claimed condition*] existed. If CD did not create the [*state claimed condition*] but knew or

should have known about the [*state claimed condition*], you must decide whether CD had sufficient time before the accident to correct the [*state claimed condition*], provide reasonable safeguards or provide reasonable warning.

In order to find that CD's conduct was negligent, you must find (*add where appropriate:*) that AB's presence was foreseeable and) that (a) CD created the [*state claimed condition*] or, (b) if CD did not create the [*state claimed condition*], CD either knew of the unsafe condition long enough before AB's injury to have permitted CD in the use of reasonable care to have it corrected or to take other suitable precautions and did not do so; or CD did not know of the condition but in the use of reasonable care should have known of it and corrected it (or taken other suitable precautions).

(*If plaintiff's contentions include failure to warn and defendant contends that there was no duty to warn because the condition, if unsafe, was open and obvious, the following should be given:*) On the question of the failure to warn, there is no duty to warn of unsafe conditions that are open and obvious. A condition is open and obvious if it could have readily been observed by any person reasonably using his or her senses.

If you decide that the [*state claimed condition*] was open and obvious, you will find for CD on AB's claim that there was a failure to provide a warning (*add where appropriate:*) and you will proceed to consider AB's other claims concerning the [*state claimed condition*]. If you decide that [*state claimed condition*] was not open and obvious, you will proceed to consider whether CD gave an adequate warning. The adequacy of a warning depends on both the information it provides and the way the information is given.)

You will find that CD was negligent if you decide that (*add where appropriate:*) AB's presence was foreseeable and that) CD created the [*state*

claimed condition] or either knew, or in the use of reasonable care should have known, about the *[state claimed condition]* long enough before the accident to have allowed (him, her, it), in the use of reasonable care to correct it or to take other suitable precautions and if you further find that (he, she, it) failed to do so. On the other hand, if you find that (*[add where appropriate:]* AB's presence was not foreseeable or that) CD did not create the *[state claimed condition]* and, further, that CD did not know about or, in the use of reasonable care, would not have been able to discover and correct the *[state claimed condition]* before the accident occurred, or if you find that CD corrected the *[state claimed condition]* or took other suitable precautions, then you will find that CD was not negligent.

If you find that CD was negligent you must next consider whether that negligence was a substantial factor in causing AB's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that CD's negligence was not a substantial factor in causing the injury, then AB may not recover. If you find that CD's negligence was a substantial factor in causing AB's injury, you will proceed to consider *[state next appropriate step, e.g. comparative fault, damages, verdict]*.

(*[Where there is an issue as to the plaintiff's comparative fault in light of the open and obvious nature of the condition or the adequacy of the warning, add:]* If you find that the *[state claimed condition]* was open and obvious (*state where appropriate:* or that a warning was provided), you should consider (that, those) fact(s) in deciding whether AB was also at fault for causing (his, her) injuries. The burden is on CD to prove that AB was at fault and that AB's conduct contributed to causing (his, her) injuries. If you find that AB was not at fault or, if at fault, that (his, her) conduct did not contribute to causing (his, her) injuries, you must find that plaintiff was not at fault and you must go on to consider AB's

damages, if any [*in a bifurcated trial, substitute the following for the direction to go on to consider damages: in that event you should go no further and report your findings to the court*].

If, however, you find that AB was at fault and that (his, her) conduct contributed to causing (his, her) injuries, you must then apportion the fault between AB and CD [*add where appropriate: and EF*].

Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both AB and CD [*add where appropriate: and EF*] **and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.**

See PJI 2:36.1 for an example that may be given to the jury to assist it to understand the process of arriving at percentages of fault. See PJI 2:36.2 for a charge to be given in the damages phase of a bifurcated trial before the same jury that decided liability.

Comment

Caveat 1: Where the evidence raises questions of fact both as to whether a particular condition was open and obvious and as to whether the condition rendered the premises not reasonably safe, it is error to give the “failure to warn” portion of PJI 2:90 without telling the jury that, even if it finds no duty to warn, it should proceed to consider plaintiff’s other claims with regard to the unsafe condition, *Gaudiello v New York*, 80 AD3d 726, 916 NYS2d 606 (2d Dept 2011) (citing PJI); *Slatsky v Great Neck Plumbing Supply, Inc.*, 29 AD3d 776, 815 NYS2d 201 (2d Dept 2006).

Caveat 2: The court’s charge must make clear that, in order to find constructive notice of an unsafe condition, the jury must conclude that the condition was visible and apparent and had existed for a sufficient length of time for defendant to have discovered it and taken curative steps, *Harrison v New York City Transit Authority*, 113 AD3d 472, 978 NYS2d 194 (1st Dept 2014) (citing PJI) (reversing where court instructed that, to find constructive notice, the jury must find that “a reasonable person would conclude that [a dangerous] condition existed”; error not cured by subsequent instruction that jury “also needed to find that defendant failed to use reasonable care ‘or had a reasonable time to remove the snow or ice but failed to do so’” as this instruction not related to notice).

Based on *Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331, 763 NE2d 107 (2001); *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); *Barker v Parnossa, Inc.*, 39 NY2d 926, 386 NYS2d 576, 352 NE2d 880 (1976); *Parish v Henneberry Road Farms, Inc.*, 39 NY2d 932, 386 NYS2d 580, 352 NE2d 884 (1976); *MacDonald v Schenectady*, 308 AD2d 125, 761 NYS2d 752 (3d Dept 2003); see *Herman v State*, 63 NY2d 822, 482 NYS2d 248, 472 NE2d 24 (1984); *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983); *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); *Farkas v Cedarhurst Natural Food Shoppe, Inc.*, 41 NY2d 1041, 396 NYS2d 165, 364 NE2d 829 (1977); *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *DiSalvo v Armae, Inc.*, 41 NY2d 80, 390 NYS2d 882, 359 NE2d 391 (1976); see PJI 2:12 as to foreseeability generally.

If causation is undisputed, the second and penultimate paragraphs of the charge should be modified to delete that issue. If there is a claim as to intervening or concurrent causation, further charges on those issues are required, see PJI 2:71, 2:72. As to comparative fault, see PJI 2:36; as to assumption of risk, see PJI 2:55, 2:55A.

GOL § 9-103 limits the duty owed by an owner or possessor of undeveloped land who, without compensation, permits the property to be used for certain recreational purposes. For text discussion and a pattern charge for a case in which GOL § 9-103 applies, see *infra* this Comment at PJI 2:90A.

The duty owed by the owner or possessor does not depend upon whether plaintiff is an invitee, licensee or trespasser, and landowners have a duty to maintain their property in a reasonably safe condition whether the property is open to the public or not, *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003). The duty owed is that of reasonable care for the safety of all persons reasonably expected to be on the premises. However, plaintiff's status remains relevant on the reasonableness of defendant's conduct. Whether the plaintiff's presence and actions were reasonably to be foreseen are factors for the jury to consider in evaluating the defendant's conduct, *Peralta v Henriquez*, *supra*; *Farkas v Cedarhurst Natural Food Shoppe, Inc.*, 41 NY2d 1041, 396 NYS2d 165, 364 NE2d 829 (1977); *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); *Persons v Cross*, 146 AD2d 892, 536 NYS2d 597 (3d Dept 1989); see *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983); *DiSalvo v Armae, Inc.*, 41 NY2d 80, 390 NYS2d 882, 359 NE2d 391 (1976); *Ouimet v Humble Oil & Refining Company*, 55 AD2d 855, 390 NYS2d 497 (4th Dept 1976).

Whether defendant should have reasonably foreseen plaintiff's pres-

ence on the premises depends on the assessment of a number of factors, including whether plaintiff entered the premises with or without permission, express or implied, of the owner or possessor; the purpose for which plaintiff entered the premises; and defendant's knowledge that plaintiff (or others like plaintiff) had entered before, *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); see *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003). Where there is an issue regarding plaintiff's status as a person on the premises, the following charge should be given after the fourth paragraph of 2:90. Where there is a claim that plaintiff was a trespasser, PJI 2:90.2 (involving adult trespassers) or PJI 2:90.3 (child trespassers) should be given after the fourth paragraph.

PJI 2:90.1

The reasonableness of CD's conduct also depends upon whether CD should reasonably have foreseen the presence of AB or someone like AB on the premises. In deciding whether AB's presence should have been reasonably foreseen by CD, you must consider the time, place, and circumstances of AB's presence (on CD's property, in CD's building). In deciding that question, you should consider ([add or delete any items as appropriate to the evidence:] the nature and location of the premises; how often that part of the (land, building) was used and whether AB entered the premises for a purpose for which the premises were open to the public; AB entered the premises for a purpose that was related to CD's business; AB had CD's consent to (enter, remain on) the premises; AB was invited in as CD's guest; AB regularly used the premises or was there for a significant period of time.)

([State plaintiff's contentions; state defendant's contentions]).

There are cases where, although plaintiff had a right to be present on the premises, plaintiff's injuries are claimed to have resulted from the misuse of instruments or structures on defendant's property. The duty of the owner or possessor includes a duty to use reasonable care to prevent foreseeable risk of harm that arises out of activities or conditions on the premises, *Holtzlander v C.W. Whalen and Sons*, 70 NY2d 962, 525 NYS2d 793, 520 NE2d 512 (1988); *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988). Once

it is known that children commonly play around an artificial structure, their well-known propensities to climb about and play create a duty of care on the part of the landowner to prevent foreseeable risks of harm that might arise out of those activities, *Charles ex rel. Charles v Mohawk*, 128 AD3d 1477, 8 NYS3d 537 (4th Dept 2015) (rolling gate).

Firefighters, Police Officers and Others Entering at Unusual Times or Remote Locations

As to firefighters, police officers and others who may enter property at unusual times or who may need to enter remote parts of the premises, *Fiederlein v Hochberg Bros.*, 83 AD2d 472, 445 NYS2d 183 (2d Dept 1981), and *Starkey v Trancamp Contracting Corp.*, 152 AD2d 358, 548 NYS2d 722 (2d Dept 1989) (abrogated on other grounds by, *Maisch v New York*, 181 AD2d 467, 581 NYS2d 181 (1st Dept 1992)) and (abrogated on other grounds by, *Cooper v New York*, 81 NY2d 584, 601 NYS2d 432, 619 NE2d 369 (1993)), hold that the advent of the universal standard of reasonable care supplants the authority of older cases as to status exemplified by the once leading decision in *Beedenbender v Midtown Properties, Inc.*, 4 AD2d 276, 164 NYS2d 276 (1st Dept 1957). Liability for injuries that occur on remote or rarely frequented parts of the premises depends upon whether plaintiff's presence was foreseeable in light of the frequency of the use of the area where the injuries were sustained and is generally a question for the jury, *Vargas v Lamberti*, 186 AD3d 1572, 131 NYS3d 66 (2d Dept 2020) (citing PJI); *Starkey v Trancamp Contracting Corp.*, supra; see *Fiederlein v Hochberg Bros.*, supra. The resolution of this question involves a specific application of the general rule that the time, place and circumstances of the plaintiff's presence are to be considered in assessing the reasonableness of the conduct of the owner or possessor, see *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); see also *Ouimet v Humble Oil & Refining Company*, 55 AD2d 855, 390 NYS2d 497 (4th Dept 1976). There are, however, instances where plaintiff's presence may be unforeseeable as a matter of law, see *Baczkowski v Zurn*, 235 AD2d 894, 652 NYS2d 850 (3d Dept 1997) (snowmobiler using area under homeowner's deck to urinate); *Mulholland v Willis*, 177 AD2d 482, 575 NYS2d 696 (2d Dept 1991) (police officer using a snow covered walk located in backyard before dawn); *Rubsam v Alexander*, 177 AD2d 484, 575 NYS2d 698 (2d Dept 1991) (police officer, walking to a stake-out position, not using available gate but scaling five foot high wall and landing on debris). A premises owner may be held liable for failure to warn a firefighter of a dangerous condition where the owner has reason to believe that the firefighter is unaware of the condition, see *Benjamin v Sodus Cold Storage Co.*, 149 AD2d 937, 540 NYS2d 70 (4th Dept 1989).

In actions where firefighters and police officers seek to recover damages for injuries sustained in the course of performance of their duties, see PJI 2:225.

Trespassers

The jury should be instructed that the duty owed to a trespasser is

the duty of reasonable care under the circumstances, *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); *Watson v Niagara Mohawk Power Corp.*, 66 AD2d 996, 411 NYS2d 769 (4th Dept 1978); *Lukasiewicz v Buffalo*, 55 AD2d 848, 390 NYS2d 341 (4th Dept 1976). As to that duty, the jury must evaluate the reasonableness of defendant's conduct in light of whether plaintiff's presence or actions were reasonably to be foreseen, see *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003); *Farkas v Cedarhurst Natural Food Shoppe, Inc.*, 41 NY2d 1041, 396 NYS2d 165, 364 NE2d 829 (1977); *Basso v Miller*, *supra*; *Scurti v New York*, *supra*.

Foreseeability of harm to trespassers requires consideration of several factors. Relevant considerations include whether the trespasser was a child and "the location of the property in relation to populated areas, its accessibility and whether there have been any prior incidents of trespassing in the area where the injury occurred," *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); see *Barker v Parnossa, Inc.*, 39 NY2d 926, 386 NYS2d 576, 352 NE2d 880 (1976) (trespassing children were known to frequent area where defendant maintained a useless silo without any safeguards); see also Restatement, Second, Torts, § 368. Absent evidence of earlier incidents or complaints involving a potentially dangerous instrumentality on defendant's property, the possibility that a child might play on the instrumentality does not render the presence of the instrumentality on the property foreseeably dangerous, *S.-B.*, on behalf of *Deandre S.-B. v Radincic*, 173 AD3d 407, 103 NYS3d 375 (1st Dept 2019) (stacked logs present for several years); see *Osorio v Thomas Balsley Associates*, 69 AD3d 402, 892 NYS2d 92 (1st Dept 2010) (stretching bar in municipal park). In a case where an intoxicated plaintiff trespassed into house under construction and fell through an uncovered opening, there was a triable issue of fact as to whether the plaintiff's presence on the property was foreseeable, *Desroches v Heritage Builders Group, LLC*, 187 AD3d 1369, 133 NYS3d 311 (3d Dept 2020). However, the owner of vacant land has no duty to remove natural accumulations of snow and ice for the protection of patrons of a nearby business who might choose to trespass on the property by using it as an unauthorized parking lot, *Palmer v Prescott*, 208 AD2d 1065, 617 NYS2d 411 (3d Dept 1994).

Where there is an issue regarding plaintiff's status as a trespasser, the following charge should be given after the fourth paragraph of PJI 2:90.

PJI 2:90.2

CD claims that AB was a trespasser. If AB was a trespasser, that is, (he, she) was on the premises without the owner's consent, that fact may be considered only in deciding whether (his, her) presence on the property was reasonably

foreseeable. Even if AB was a trespasser, if (his, her) presence was reasonably foreseeable, CD still had a duty to use reasonable care under the circumstances. In deciding the foreseeability of AB's presence or the presence of someone like (him, her) you should consider the circumstances, including ([refer to any appropriate items:] whether the property was located near populated areas, the ease or difficulty with which people could enter the property, the frequency and duration or prior trespasses by AB or others, and whether CD was aware of any prior trespasses).

With respect to trespassing children, the child's age and the well known propensities of children to climb about and play are circumstances for the jury to consider in determining whether the owner or possessor has exercised reasonable care, *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); *Barker v Parnossa, Inc.*, 39 NY2d 926, 386 NYS2d 576, 352 NE2d 880 (1976). Defendant's knowledge of prior incidents of trespassing should be considered by the jury in assessing the foreseeability of plaintiff's presence and the reasonableness of defendant's conduct, see *Scurti v New York*, *supra*; *Prosser & Keeton, Torts* (5th Ed.) § 59, pp 404–405. However, defendant's awareness that trespasses were occurring does not give rise to liability where the injury was caused by a superseding event, *Boltax v Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660, 490 NE2d 527 (1986); *Garcia v New York*, 205 AD2d 49, 617 NYS2d 462 (1st Dept 1994); *O'Britis v Peninsula Gulf Course*, 143 AD2d 123, 531 NYS2d 364 (2d Dept 1988).

Where there is an issue regarding the injured person's status as a trespasser and the injured person is a child, the following charge should be added to PJI 2:90.2.

PJI 2:90.3

[Identify injured child] was — years old at the time (he, she) was injured. In considering the reasonableness of CD's conduct, you must also consider whether CD should have foreseen the presence of [identify injured child] or someone like (him, her) and the ability of [identify injured child] or someone like (him, her) to protect (himself, herself) from harm. ([Add where appropriate:] You must also consider the fact that children are known to climb and play.)

The circumstances of a particular case may dictate that the owner

or possessor investigate or inquire to ascertain whether persons are trespassing or likely to trespass. Restatement, Torts, § 339, Comment g asserts that there is no duty of inquiry. However, in *Clifton v Patroon Operating Corp.*, 271 App Div 122, 63 NYS2d 597 (3d Dept 1946), the court, relying on an earlier version of the Restatement, held that the owner's or possessor's liability could be based, in part, on a finding that defendant "should have known" that children were trespassing on the premises, see *Ouimet v Humble Oil & Refining Company*, 55 AD2d 855, 390 NYS2d 497(4th Dept 1976); *Prosser & Keeton, Torts*, 5th Ed., § 59, pp 395–396.

Different considerations arise where the defendant has actual knowledge of trespassing in a place of danger. In such circumstances, the owner or possessor has the duty to take reasonable action to correct the condition or give adequate warning, *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976); *Ouimet v Humble Oil & Refining Company*, 55 AD2d 855, 390 NYS2d 497(4th Dept 1976). However, where a municipality took all reasonably necessary steps to secure its swimming pool from after-hours intruders and those measures were thwarted by persistent trespassers, the municipality could not be held liable for failure to provide life-saving equipment, a life guard, and lights for the protection of trespassing swimmers, *Garcia v New York*, 205 AD2d 49, 617 NYS2d 462 (1st Dept 1994). Absent a special duty, a municipality is not liable to plaintiffs' decedents, who drowned in a lake owned by the municipality, for its alleged negligence in failing to enforce its regulations which prohibited swimming when the beach was closed, *DeWick v Penn Yan*, 275 AD2d 1011, 713 NYS2d 592 (4th Dept 2000).

Defective Conditions

Liability may attach to the owner or possessor of property as a result of a defect in design or construction, *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977) ("architecturally unsound" design of entranceway); *Stevens v Central School Dist. No. 1 of Town of Ramapo*, 25 AD2d 871, 270 NYS2d 23 (2d Dept 1966), *aff'd*, 21 NY2d 780, 288 NYS2d 475, 235 NE2d 448 (1968) (failure to install shatterproof glass in basketball arena); *Cole v New York Racing Ass'n*, 24 AD2d 993, 266 NYS2d 267 (2d Dept 1965), *aff'd*, 17 NY2d 761, 270 NYS2d 421, 217 NE2d 144 (1966) (elevated fence post footings); *Viscusi v Fenner*, 10 AD3d 361, 781 NYS2d 121 (2d Dept 2004); *Hotzoglou v Hotzoglou*, 221 AD2d 594, 634 NYS2d 501 (2d Dept 1995) (failure to install handrail); *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988) (allegedly defectively designed railing on stairway in elevated subway station); *Galieta v Young Men's Christian Ass'n of City of Schenectady*, 32 AD2d 711, 300 NYS2d 170 (3d Dept 1969) (steam pipe one foot from floor); *Blaustein v Levitt*, 24 AD2d 862, 264 NYS2d 318 (2d Dept 1965) (location of guy wire); *Ranftle v City Athletic Club*, 20 AD2d 716, 247 NYS2d 355 (2d Dept 1964) (radial stairwell); see *Hyman v Queens County Bancorp, Inc.*, 307 AD2d 984, 763 NYS2d 669 (2d Dept 2003), *aff'd*, 3 NY3d 743, 787 NYS2d 215, 820 NE2d 859 (2004) and *Penge v Board of Educ. of City of New York*,

10 AD3d 251, 781 NYS2d 68 (1st Dept 2004) (addressing issue of causation where absence of handrail is alleged defect). To establish a defect in design or construction, the plaintiff must adduce evidence that a relevant building code provision or specific, accepted industry standard was violated, see *McKee v State*, 75 AD3d 893, 906 NYS2d 632 (3d Dept 2010). However, if a building was constructed in compliance with code requirements and industry standards applicable at the time of construction, an owner is under no duty to modify the building in light of more recent safety standards, *Hotaling v New York*, 55 AD3d 396, 866 NYS2d 117 (1st Dept 2008), *aff'd*, 12 NY3d 862, 881 NYS2d 655, 909 NE2d 577 (2009). A certificate of occupancy is not proof that the premises in question were built in compliance with all applicable code provisions and, therefore, a defendant accused of violating a code provision will not be entitled to summary judgment merely because a certificate of occupancy has been issued for the premises, *Viselli v Riverbay Corporation*, 32 NY3d 980, 84 NYS3d 853, 109 NE3d 1153 (2018); see *Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84, 996 NYS2d 210, 20 NE3d 990 (2014).

A private university that sponsored the creation of a pedestrian mall on city-owned streets has been held to owe a duty to design and create a mall that is safe, *Ramsammy v New York*, 216 AD2d 234, 628 NYS2d 693 (1st Dept 1995). The owner of a retail store or other place of public assembly has a non-delegable duty to provide members of the public with reasonably safe premises and can be held responsible for a dangerous condition created by a third party's negligent performance of a maintenance contract, *Atkinson v Golub Corp. Co.*, 278 AD2d 905, 718 NYS2d 546 (4th Dept 2000); see *Correa v New York*, 66 AD3d 573, 890 NYS2d 461 (1st Dept 2009). However, the use of asphalt or blacktop as a playground surface for touch football is not inherently dangerous, despite the existence of a non-mandatory, governmentally-promulgated guideline or industry recommendation that was not shown to have been adopted in actual practice, *Capotosto v Roman Catholic Diocese of Rockville Centre*, 2 AD3d 384, 767 NYS2d 857 (2d Dept 2003); see *Swan v Brookhaven*, 32 AD3d 1012, 821 NYS2d 265 (2d Dept 2006) (nonmandatory Consumer Product Safety Commission Guidelines insufficient to show that ground cover on playground caused plaintiff's injury); *DeJesus v New York*, 29 AD3d 401, 815 NYS2d 502 (1st Dept 2006) (owner of housing development under no duty to maintain continuous curbs or even to maintain curbs along pedestrian pathways). Even where the Fair Housing Act may impose a duty on a landlord to provide ramps, railings or other devices, the statutory standard does not create a standard of care for negligence litigation premised upon alleged discrimination against a handicapped person and the failure to comply does not constitute negligence, *Hand v Gilbank*, 300 AD2d 1067, 752 NYS2d 501 (4th Dept 2002).

A design or construction defect created during construction in places of public accommodation continues to be the owner's responsibility, even after completion of the work, *Reynolds v Sead Development Group*, 257 AD2d 940, 684 NYS2d 361 (3d Dept 1999), and notice is not required

since the condition was created by the owner or its contractor, *Richardson v David Schwager Associates, Inc.*, 249 AD2d 531, 672 NYS2d 114 (2d Dept 1998); *Thomassen v J & K Diner, Inc.*, 152 AD2d 421, 549 NYS2d 416 (2d Dept 1989).

Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury, *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802, 41 NE3d 766 (2015); *Trincere v Suffolk*, 90 NY2d 976, 665 NYS2d 615, 688 NE2d 489 (1997); *Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 41 NYS3d 559 (3d Dept 2016). Physically small defects may be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for pedestrians and persons traversing buildings to see or identify as hazardous or difficult to traverse safely on foot, *Hutchinson v Sheridan Hill House Corp.*, *supra*; *Pitt v New York City Transit Authority*, 146 AD3d 826, 44 NYS3d 525 (2d Dept 2017).

However, a property owner may not be held liable for a trivial defect over which a person might merely stumble, stub his or her toes, or trip, *Fasone v Northside Properties Management Corp.*, 149 AD3d 905, 52 NYS3d 428 (2d Dept 2017); *Gillis v Herzog Supply Co., Inc.*, 121 AD3d 1334, 995 NYS2d 314 (3d Dept 2014); *Schiller v St. Francis Hosp.*, 108 AD3d 758, 970 NYS2d 241 (2d Dept 2013); *Hardsog v Price Chopper Operating Co., Inc.*, 99 AD3d 1130, 952 NYS2d 802 (3d Dept 2012); see *Langgood v Carrols, LLC*, 148 AD3d 1734, 50 NYS3d 733 (4th Dept 2017). In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury, *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802, 41 NE3d 766 (2015); *Trincere v Suffolk*, 90 NY2d 976, 665 NYS2d 615, 688 NE2d 489 (1997); *Pitt v New York City Transit Authority*, 146 AD3d 826, 44 NYS3d 525 (2d Dept 2017); *Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 41 NYS3d 559 (3d Dept 2016); *Gillis v Herzog Supply Co., Inc.*, *supra*; *Lupa v Oswego*, 117 AD3d 1418, 985 NYS2d 361 (4th Dept 2014); *Cardona-Torres v New York*, 109 AD3d 862, 972 NYS2d 582 (2d Dept 2013); *Hardsog v Price Chopper Operating Co., Inc.*, *supra*; *Werner v Health*, 96 AD3d 1569, 947 NYS2d 264 (4th Dept 2012); see *Thomas v Dever Properties LLC*, 115 AD3d 459, 981 NYS2d 529 (1st Dept 2014); *Schiller v St. Francis Hosp.*, *supra*; *Fayolle v East West Manhattan Portfolio L.P.*, 108 AD3d 476, 970 NYS2d 186 (1st Dept 2013); *Nigro v Cervinara, LLC*, 106 AD3d 428, 963 NYS2d 871 (1st Dept 2013). Factors that may render a physically small defect actionable include a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; poor lighting; or a location where pedestrians are naturally distracted from looking down at their feet, *Hutchinson v Sheridan Hill House Corp.*, *supra*. There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable, *id*; *Trincere v Suffolk*, *supra*; *Tesoriero v Brinckerhoff*

Park, LLC, 126 AD3d 782, 5 NYS3d 261 (2d Dept 2015). A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted, *Tesoriero v Brinckerhoff Park, LLC*, supra. The trivial defect doctrine is equally applicable to private defendants and municipalities, *Hutchinson v Sheridan Hill House Corp.*, supra. A defendant cannot obtain summary judgment under the trivial defect doctrine solely on the basis of the dimensions of the alleged defect, and the court is obligated to consider all of the facts and circumstances presented when deciding such a motion, *id.*

Prior to the Court of Appeals' decision in *Hutchinson*, the Appellate Division in numerous cases analyzed whether a defect alleged to be trivial as a matter of law was a trap or snare. In *Hutchinson*, the Court of Appeals stated that the focus should not be on whether the alleged defect is a trap or snare but whether, under all of the facts and surrounding circumstances, the alleged defect was difficult for a pedestrian to see or to identify as hazardous or difficult to traverse safely on foot, *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802, 41 NE3d 766 (2015). In *Fasone v Northside Properties Management Corp.*, 149 AD3d 905, 52 NYS3d 428 (2d Dept 2017), the Second Department referenced the trap or snare formulation but followed *Hutchinson*, see *Forrester v Riverbay Corp.*, 135 AD3d 448, 21 NYS3d 890 (1st Dept 2016) (same).

The absence of a handrail may furnish a basis of liability if it was a proximate cause of an accident and if either there was a defective condition which could cause a person to fall or there was a code provision requiring that handrails be provided, *Jung v Kum Gang, Inc.*, 22 AD3d 441, 806 NYS2d 62 (2d Dept 2005); *Viscusi v Fenner*, 10 AD3d 361, 781 NYS2d 121 (2d Dept 2004); see *Portilla v Rodriguez*, 179 AD2d 631, 578 NYS2d 241 (2d Dept 1992); *Thomassen v J & K Diner, Inc.*, 152 AD2d 421, 549 NYS2d 416 (2d Dept 1989); but see *Eidlitz v Dobbs Ferry*, 97 AD2d 747, 468 NYS2d 585 (2d Dept 1983). Even if the plaintiff's fall was precipitated by a misstep, the absence of a handrail within reach which could have prevented the fall might be the basis of liability, *Viscusi v Fenner*, supra; *Hotzoglou v Hotzoglou*, 221 AD2d 594, 634 NYS2d 501 (2d Dept 1995); *Matter of Lattimore's Estate*, 35 AD2d 1069, 316 NYS2d 363 (4th Dept 1970). A failure to provide a handrail of sufficient height pursuant to Multiple Dwelling Law § 52 is negligence per se, *Martinez v Melendez*, 32 AD3d 999, 821 NYS2d 270 (2d Dept 2006). Whether a properly placed handrail would have prevented the fall is usually a question of fact, *Martinez v Melendez*, supra; *Penge v Board of Educ. of City of New York*, 10 AD3d 251, 781 NYS2d 68 (1st Dept 2004); see *Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 19 NYS3d 580 (2d Dept 2015); *Finnigan v Lasher*, 90 AD3d 1286, 935 NYS2d 669 (3d Dept 2011).

A step may be dangerous where the conditions create "optical confusion"—the illusion of a flat surface, visually obscuring the step, *Saretsky*

v 85 Kenmare Realty Corp., 85 AD3d 89, 924 NYS2d 32 (1st Dept 2011); see *Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 64 NYS3d 22 (1st Dept 2017); *Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 939 NYS2d 370 (1st Dept 2012); see also *Brooks v Bergdorf-Goodman Co.*, 5 AD2d 162, 170 NYS2d 687 (1st Dept 1958). Findings of liability in “optical confusion” cases have typically turned on factors such as inadequate warning of the drop (coupled with poor lighting), inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition, see *Langer v 116 Lexington Ave., Inc.*, *supra*; *Saretsky v 85 Kenmare Realty Corp.*, *supra*. Plaintiff cannot rely on the “optical confusion” theory where he or she perceived the step at issue before descending from or ascending to it, see *Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 19 NYS3d 580 (2d Dept 2015).

In New York City, the requirements for interior stairway risers, treads, guards and handrails are governed by Administrative Code § 27-375(e) and (f). Inasmuch as the New York City Building Code of 1916 did not contain a definition of “interior stairs,” the definition of that phrase in the current Administrative Code § 27-232, i.e., “a stair within a building, that serves as a required exit” or “means of egress from the interior of the building to an open exterior space,” applies to cases involving buildings governed by the Code of 1916, *Maksuti v Best Italian Pizza*, 27 AD3d 300, 811 NYS2d 375 (1st Dept 2006); see also *DeRosa v New York*, 30 AD3d 323, 817 NYS2d 282 (1st Dept 2006) (discussing and applying Administrative Code’s definitions of “interior stairs” and “exterior stairs”). A stairway that does not serve as a means of egress to an open exterior space on one end is not an “interior stair” under the Administrative Code, *Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 939 NYS2d 370 (1st Dept 2012); *Mansfield v Dolcemasclo*, 34 AD3d 763, 826 NYS2d 115 (2d Dept 2006); see *Cusumano v New York*, 15 NY3d 319, 910 NYS2d 410, 937 NE2d 74 (2010). Likewise, the requirement for “interior stairs” did not apply to a stairway connecting the sidewalk with a grocery store’s cellar storage area that was self-contained, inaccessible from the grocery store and contained no service equipment connected with the store, *Lopez v Chan*, 102 AD3d 625, 959 NYS2d 67 (1st Dept 2013).

A plaintiff’s inability to identify the defective condition that caused plaintiff’s fall is fatal to the action because a finding that the defendant’s negligence, if any, proximately caused plaintiff’s injuries would be based on speculation, *O’Connor v Metro Management Development, Inc.*, 130 AD3d 698, 15 NYS3d 59 (2d Dept 2015); *Smith v Maloney*, 91 AD3d 1259, 936 NYS2d 791 (3d Dept 2012); *Califano v Maple Lanes*, 91 AD3d 896, 938 NYS2d 140 (2d Dept 2012); *Siegel v New York*, 86 AD3d 452, 928 NYS2d 1 (1st Dept 2011); see *Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189, 772 NYS2d 59 (1st Dept 2004). The rationale for this rule is that if a plaintiff cannot identify the defective condition, it is just as likely that the fall could have been caused by some factor for which the defendant is not responsible, e.g., misstep by plaintiff or loss of balance, *Califano v Lanes*, *supra*; *Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 790 NYS2d 693 (2d Dept 2005). To satisfy the requirement that he

or she identify the defective condition, the plaintiff must identify the defect itself; mere identification of the approximate location of the accident is insufficient, see *Siegel v New York*, supra. Plaintiff need not identify the defect at the time of the accident, see *Tomaino v 209 East 84th Street Corp.*, 72 AD3d 460, 900 NYS2d 245 (1st Dept 2010); see also *Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495, 23 NYS3d 162 (1st Dept 2015), aff'd, 28 NY3d 958, 38 NYS3d 516, 60 NE3d 411 (2016). Rather, plaintiff can identify the defect after the accident occurs, provided there is evidence that, at the time plaintiff identified the defect, the defect was in the same condition as it was at the time of the accident, see *Tomaino v 209 East 84th Street Corp.*, supra; see also *Brumm v St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 41 NYS3d 559 (3d Dept 2016).

Natural Geographic Features

A property owner is not required to enclose natural geographic features which present open and obvious, rather than latent, dangers, *Melendez v New York*, 76 AD3d 442, 906 NYS2d 263 (1st Dept 2010); *Cohen v State*, 50 AD3d 1234, 854 NYS2d 253 (3d Dept 2008); *Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611, 852 NYS2d 370 (2d Dept 2008); *Cramer v Erie*, 23 AD3d 1145, 804 NYS2d 201 (4th Dept 2005); *Moriello v Stormville Airport Antique Show & Flea Market, Inc.*, 271 AD2d 664, 706 NYS2d 463 (2d Dept 2000); *Dart v Solomon*, 210 AD2d 581, 619 NYS2d 817 (3d Dept 1994); *Tarricone v State*, 175 AD2d 308, 571 NYS2d 845 (3d Dept 1991); *Casela v Troy*, 161 AD2d 991, 557 NYS2d 562 (3d Dept 1990); *Diven by Diven v Hastings-on-Hudson*, 156 AD2d 538, 548 NYS2d 807 (2d Dept 1989); see *Leckanby v Cohoes Community Center, Inc.*, 299 AD2d 625, 749 NYS2d 336 (3d Dept 2002) (extending principle to building located at base of hill); see also *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012) (discussing duty of landowner to take reasonable precautions, including providing warnings, regarding dangerous terrain on its property); but see *Stempien v Walls*, 193 AD3d 1383, 147 NYS3d 782 (4th Dept 2021) (issue of fact as to whether unguarded and unlit cliff in defendant's backyard was visible and obvious or presented latent, dangerous condition); *Walter v State*, 185 AD2d 536, 586 NYS2d 391 (3d Dept 1992) (difficulty in seeing edge of cliff created by trees and underbrush and dirt path running in direction of cliff gave rise to hidden danger). However, at a camp for developmentally disabled individuals, a steep embankment filled with rocks and boulders was not a natural geographic phenomenon and there was an issue of fact as to whether the defendant breached a duty by failing to erect a railing or barricade that would have prevented the plaintiff's fall, *Aberger v Camp Loyaltown, Inc.*, 193 AD3d 195, 142 NYS3d 528 (1st Dept 2021).

However, this principle may be affected by a line of recent decisions holding that liability for a defect in a fixture or other condition on the premises is not negated merely because the condition may have been open and obvious, see *Sweeney v Riverbay Corp.*, 76 AD3d 847, 907 NYS2d 214 (1st Dept 2010); *Juoniene v H.R.H. Const. Corp.*, 6 AD3d

199, 774 NYS2d 525 (1st Dept 2004); *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 773 NYS2d 38 (1st Dept 2004); *Luksch v Blum-Rohl Fishing Corp.*, 3 AD3d 475, 771 NYS2d 136 (2d Dept 2004); *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 (2d Dept 2003); *Cohen v Shopwell, Inc.*, 309 AD2d 560, 765 NYS2d 40 (1st Dept 2003); *MacDonald v Schenectady*, 308 AD2d 125, 761 NYS2d 752 (3d Dept 2003); *Soich v Farone*, 307 AD2d 658, 763 NYS2d 168 (3d Dept 2003). Under these cases, the open and obvious character of the defect does not absolve the landowner of the duty to maintain the premises in safe condition, but rather is relevant to comparative negligence, *Sportiello v New York*, 6 AD3d 421, 774 NYS2d 353 (2d Dept 2004); *Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 773 NYS2d 62 (1st Dept 2004); *DiVietro v Gould Palisades Corp.*, 4 AD3d 324, 771 NYS2d 527 (2d Dept 2004); *Moloney v Wal-Mart Stores, Inc.*, 2 AD3d 508, 767 NYS2d 897 (2d Dept 2003); *MacDonald v Schenectady*, supra; *Pelow v Tri-Main Development*, 303 AD2d 940, 757 NYS2d 653 (4th Dept 2003); *Williams v Chenango County Agr. Soc., Inc.*, 272 AD2d 906, 707 NYS2d 578 (4th Dept 2000). It should be noted, however, that notwithstanding this line of cases, the Second Department has held that landowners are not liable "for injuries arising from a condition on the property that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it," *Stanton v Oyster Bay*, 2 AD3d 835, 769 NYS2d 383 (2d Dept 2003); see also *Tulovic v Chase Manhattan Bank, N.A.*, 309 AD2d 923, 767 NYS2d 44 (2d Dept 2003) (plaintiff tripped over structural steel rebar that had been exposed during renovation of building). Moreover, the court held in *Cohen v State*, supra, that an owner of land with a whirlpool that posed an open and obvious danger and comprised part of the natural environment did not owe a duty to neutralize the hazard for passersby, particularly since the whirlpool was not easily accessible from the more commonly used swimming area on the property.

The duty to warn, see this Comment, *infra*, does not extend to the open and obvious dangers of natural geographic phenomena that could not be overlooked, *King v Cornell University*, 119 AD3d 1195, 990 NYS2d 329 (3d Dept 2014); *Freese v Bedford*, 112 AD3d 1280, 977 NYS2d 814 (3d Dept 2013); *Torres v New York*, 104 AD3d 593, 961 NYS2d 439 (1st Dept 2013); *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012); *Melendez v New York*, 76 AD3d 442, 906 NYS2d 263 (1st Dept 2010); see *Cohen v State*, 50 AD3d 1234, 854 NYS2d 253 (3d Dept 2008); *Plate v Rochester*, 217 AD2d 984, 629 NYS2d 600 (4th Dept 1995).

Where the State, acting in its capacity as landowner, reserves an area for public swimming and provides beach facilities such as picnic tables, barbecue pits, trash cans and outhouses, it has a duty either to inspect or remove hazards from the water or to warn that the waters are to be used at the swimmer's own risk, *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983). No such duty exists, however, when the water in which the accident occurred was not designated as an area in which the public was invited to swim, *Jarmolowski v State*, 23 AD3d 786, 803 NYS2d 761 (3d Dept 2005).

Moreover, the duty to inspect and/or warn does not apply to a portion of a riverbed held out to the public for use as a canoe launching site, since a landowner “is not required to scrutinize every square foot of riverbed and lakebottom that it owns,” *Schiff v State*, 31 AD3d 526, 818 NYS2d 597 (2d Dept 2006); see *Carol S. v State*, 185 AD3d 1385, 128 NYS3d 376 (4th Dept 2020) (where claimant was struck by falling tree after entering closed section of park, the duty of reasonable care did not require the state to have “sanitized” more “primitive” or undeveloped areas of approximately 14,350-acre park).

Unsafe Conditions on Adjoining Property

The owner or possessor of realty may be held liable for injuries sustained on adjoining lands where such owner or possessor failed to erect a barrier between his or her property and a dangerous condition which existed on the adjoining property, see *McKeever v New York Tel. Co.*, 254 App Div 872, 5 NYS2d 6 (2d Dept 1938), *aff'd*, 279 NY 651, 18 NE2d 44 (1938); *Gayden v Rochester*, 148 AD2d 975, 539 NYS2d 211 (4th Dept 1989); *Licato v Eastgate*, 118 AD2d 904, 499 NYS2d 472 (3d Dept 1986); see also *Drake v State*, 97 Misc2d 1015, 416 NYS2d 734 (Ct Cl 1979), *aff'd*, 73 AD2d 1031, 425 NYS2d 532 (4th Dept 1980) and *aff'd*, 75 AD2d 1017, 432 NYS2d 676 (4th Dept 1980) and *aff'd*, 75 AD2d 1016, 432 NYS2d 676 (4th Dept 1980) (state held liable for failure to abate danger to travelers from armed persons present on state land adjoining public highway). More recent case law has held that an owner or occupier of abutting property owes no duty to warn or protect others from a defective or dangerous condition on neighboring property, *Galindo v Clarkstown*, 2 NY3d 633, 781 NYS2d 249, 814 NE2d 419 (2004), unless the owner of the abutting property caused or contributed to that condition, *Bhandari v Isis*, 45 AD3d 619, 846 NYS2d 266 (2d Dept 2007) (owner of two-family house in which injured infant resided had no duty to infant to protect against unsafe condition of adjacent property, which contained unenclosed swimming pool); *Galperina v Mandelbaum*, 27 AD3d 520, 813 NYS2d 122 (2d Dept 2006); *Badou v New Jersey Transit Rail Operations*, 221 AD2d 303, 633 NYS2d 530 (2d Dept 1995); see *St. Andrew v O'Brien*, 45 AD3d 1024, 845 NYS2d 184 (3d Dept 2007) (property owner that operated festival in parking lot had no duty to protect festival attendees from risks associated with running into vehicular traffic on abutting street); *Gehler v New York*, 261 AD2d 506, 692 NYS2d 397 (2d Dept 1999) (defendant had no duty to warn of defective condition of wall on neighboring premises); *Palmer v Prescott*, 208 AD2d 1065, 617 NYS2d 411 (3d Dept 1994) (restaurant owner not liable to patron who fell on snow and ice on adjoining vacant property used as unauthorized parking lot); *Pensabene v Valley Stream*, 202 AD2d 486, 609 NYS2d 75 (2d Dept 1994); *Bianchini by Bianchini v Northport*, 140 AD2d 574, 528 NYS2d 640 (2d Dept 1988) (movie theater not liable for injuries sustained by patron struck by vehicle in street after theater was evacuated in response to bomb threat); *Abdur-Rashid by Abdur-Rashid v Consolidated Rail Corp.*, 135 AD2d 208, 524 NYS2d 716 (1st Dept 1988) (no contribution allowed railroad from municipal landlord for injuries sustained by child who left playground area and was struck by train while attempting to retrieve ball hit over playground fence).

A landowner is not under a duty to remove or warn of a tree located on adjoining property, even if on notice that the tree presented a danger and might fall on its own property, *Galindo v Clarkstown*, 2 NY3d 633, 781 NYS2d 249, 814 NE2d 419 (2004); *Christopher v Traditi*, 178 AD2d 807, 577 NYS2d 705 (3d Dept 1991). Similarly, in *Clementoni v Consolidated Rail Corp.*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 (2007), the Court of Appeals held that a landowner whose private road was traversed by railroad tracks had no duty to warn of the dangers of oncoming trains where the injured driver “assumed” that the tracks were actively used, had driven across the tracks on other occasions and had proceeded with caution each time. However, the Court of Appeals has left open the “possibility that some dangers from neighboring property might be so clearly known to the landowner, though not open or obvious to others, that a duty to warn would arise,” *Galindo v Clarkstown*, *supra*; see *Clementoni v Consolidated Rail Corp.*, *supra*.

Duty to Control Vegetation

An owner of property has no common law duty to control vegetation on its property for the benefit of users of the public highway, *Lubitz v Scarsdale*, 31 AD3d 618, 819 NYS2d 92 (2d Dept 2006); *Cain v Pappalardo*, 225 AD2d 1005, 639 NYS2d 570 (3d Dept 1996); *McSweeney v Rogan*, 209 AD2d 386, 618 NYS2d 430 (2d Dept 1994); see *Echorst ex rel. Echorst v Kaim*, 288 AD2d 595, 732 NYS2d 285 (3d Dept 2001). Likewise, an owner of property abutting a private road that intersects with a railroad crossing has no duty to control vegetation to prevent the obstruction of a road user’s view of oncoming trains, *Clementoni v Consolidated Rail Corp.*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 (2007). Additionally, an owner of property has no duty to control the vegetation of adjoining landowners which allegedly creates a dangerous condition, *Ingenito v Robert M. Rosen, P.C.*, 187 AD2d 487, 589 NYS2d 574 (2d Dept 1992). However, an ordinance that prohibits vegetation that may cause danger to traffic may give rise to tort liability, even if the ordinance does not expressly provide for such liability, *Lubitz v Scarsdale*, *supra*; *McSweeney v Rogan*, *supra*. As to the duty generally of an owner or lessee of property to one injured on adjoining lands, sidewalks and streets, see Comments to PJI 2:110-2:116.

Innkeepers’ Duties

New York courts have recognized negligence causes of action against innkeepers in a variety of contexts, see *Morell v Peekskill Ranch, Inc.*, 64 NY2d 859, 487 NYS2d 319, 476 NE2d 645 (1985) (failure to warn of dangerous condition on resort walking path); *DiSalvo v Armae, Inc.*, 41 NY2d 80, 390 NYS2d 882, 359 NE2d 391 (1976) (failure to protect children at play on resort grounds from traffic on private resort road); *Orlick v Granit Hotel and Country Club*, 30 NY2d 246, 331 NYS2d 651, 282 NE2d 610 (1972) (failure to properly construct and light stairways in hotel); *Buchaca v Colgate Inn*, 296 NY 790, 71 NE2d 471 (1947) (failure to keep inn sidewalk free of ice); *Maloney v Hearst Hotels Corporation*, 274 NY 106, 8 NE2d 296 (1937) (failure to safeguard

against fire inside hotel); *Allon v Park Central Hotel Co.*, 272 NY 631, 5 NE2d 366 (1936) (failure to supervise hotel swimming pool); *Clark v New York Hotel Statler Co.*, 253 NY 583, 171 NE 792 (1930) (failure to maintain hotel's revolving door entrance).

The Court of Appeals has refused to impose a duty on innkeepers to warn of dangerous surf conditions at off-premises beaches they do not own or control, *Darby v Compagnie National Air France*, 96 NY2d 343, 728 NYS2d 731, 753 NE2d 160 (2001). In *Butts v Kouwenhoven*, 272 App Div 1019, 73 NYS2d 498 (2d Dept 1947), the Court held that an innkeeper was under a duty to take reasonable care to discover the actual condition of the land under water in the area wherein its guests were invited and permitted to bathe, and either to make the area safe or warn them of its dangerous condition. *Darby v Compagnie National Air France*, *supra*, distinguished *Butts* because the defendant hotel sued in *Butts* was located directly on 100 feet of waterfront and maintained a retaining wall along the shoreline with a stairway leading into the water to provide access for its customers. *Darby*, however, involved an off-premises beach over which the hotel exercised no management, supervision or oversight. In *Darby v Compagnie National Air France*, *supra*, the Court also concluded that a innkeeper owes no duty to discover the actual condition of land under water at a beach it does not own or control, even though it encourages and facilitates the use of the beach. The Court noted that to the extent *Butts v Kouwenhoven*, *supra*, could be read to the contrary of its holding, it should not be followed, *Darby v Compagnie National Air France*, *supra*.

A hotel keeper owes a duty to use reasonable care to protect the safety of guests, which includes the duty to guard against known dangers which may arise through no fault of the hotel keeper, *Wolf v Paxton-Farmer*, 23 AD3d 1046, 803 NYS2d 468 (4th Dept 2005); *Kahane v Marriott Hotel Corp.*, 249 AD2d 164, 672 NYS2d 55 (1st Dept 1998); *Cittadino v DeGironimo*, 198 AD2d 801, 604 NYS2d 387 (4th Dept 1993); *Taieb v Hilton Hotels Corp.*, 131 AD2d 257, 520 NYS2d 776 (1st Dept 1987) (evacuation of guests during fire); see *Pantages v L.G. Airport Hotel Associates, Inc.*, 187 AD2d 273, 589 NYS2d 426 (1st Dept 1992) (person subsequently raped, carried into motel in view of hotel desk clerk). However, a hotel keeper is not an insurer and is not responsible for the conduct of third parties which takes place outside of the hotel, *McAndrew v Pierre Hotel*, 262 AD2d 193, 693 NYS2d 20 (1st Dept 1999); *Barber v Princess Hotels Intern., Inc.*, 134 AD2d 312, 520 NYS2d 789 (2d Dept 1987); see *Bennett v Saeger Hotels, Inc.*, 229 AD2d 909, 645 NYS2d 678 (4th Dept 1996) (summary judgment granted to hotel owner where the incident was not foreseeable, the owner lacked notice of alleged criminal propensities of its guests, had no duty to investigate the backgrounds of its guests and had no duty or opportunity to control the conduct of its guests). Likewise, the owner of a campground is not an insurer of the safety of campers and is responsible only to exercise reasonable care in maintaining the grounds in a reasonably safe condition so as to prevent foreseeable injury, *Csukardi v Bishop McDonnell Camp*, 148 AD2d 657, 539 NYS2d 408 (2d Dept 1989).

A travel agent ordinarily is not an insurer or guarantor of its customers' safety and, without a specific request, is not obligated to investigate safety features of lodging accommodations, *Creteau v Liberty Travel, Inc.*, 195 AD2d 1012, 600 NYS2d 576 (4th Dept 1993). Where, however, the agent has knowledge of safety factors or where such information is readily available, the travel agent has the duty to inform the customer of those factors, *id.*

Fire Prevention and Detection

The common law duty of a landlord does not include a duty to provide fire prevention equipment, *Dufur v Lavin*, 101 AD2d 319, 476 NYS2d 389 (3d Dept 1984), *aff'd*, 65 NY2d 830, 493 NYS2d 123, 482 NE2d 919 (1985), or to provide smoke detectors, *McIntosh v Moscrip*, 138 AD2d 781, 525 NYS2d 420 (3d Dept 1988). However, a duty to provide smoke detectors has been imposed by statute, Multiple Dwelling Law § 68; Multiple Residence Law § 15, and a similar duty is imposed on property owners in the City of New York, Administrative Code of the City of New York § 27-2045(a)(1); see *Acevedo v Audubon Management, Inc.*, 280 AD2d 91, 721 NYS2d 332 (1st Dept 2001). A landlord's statutory duty to provide smoke detectors is satisfied once such devices are installed. Thereafter, the premises occupant is responsible for maintaining and repairing the smoke detector and for replacing it in the event of its removal, *Tucker v 64 West 108th St. Corp.*, 2 AD3d 193, 768 NYS2d 460 (1st Dept 2003); *Fairclough v 679 Magenta LLC*, 309 AD2d 619, 765 NYS2d 623 (1st Dept 2003). Although landlords are statutorily required to install fireproof doors in the stairs and public halls of certain tenements, Multiple Dwelling Law § 234(2), the statute does not require that every individual apartment door be impervious to the passage of smoke, *Chung v Ma*, 235 AD2d 464, 652 NYS2d 744 (2d Dept 1997).

Lead Paint

The City of New York and other municipalities have enacted legislation that requires landlords to remove lead paint hazards from their premises, *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996); see *Yaniveth R. ex rel. Ramona S. v LTD Realty Co.*, 27 NY3d 186, 32 NYS3d 10, 51 NE3d 521 (2016); *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001). The absence of a statutory scheme is not fatal to an action by a plaintiff-tenant in a lead paint poisoning case against a landlord. To impose liability upon a landlord for a lead paint condition, a plaintiff must establish that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition, *Chapman v Silber*, *supra*; see *Cunningham v Anderson*, 85 AD3d 1370, 925 NYS2d 693 (3d Dept 2011). A plaintiff may raise a triable issue of fact in opposition to a defendant landlord's motion for summary judgment by demonstrating that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead based interior paint was

banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead based paint to young children and (5) knew that a young child lived in the apartment, *Chapman v Silber*, supra; *Rivera v Neighborhood Partnership Housing Development Fund Co. Inc.*, 116 AD3d 633, 985 NYS2d 485 (1st Dept 2014); *Cunningham v Anderson*, supra; *Parra v Lopez*, 293 AD2d 458, 739 NYS2d 450 (2d Dept 2002) (finding triable issue of fact); *Patterson v Brennan*, 292 AD2d 582, 740 NYS2d 96 (2d Dept 2002); see *Haggray v Malek*, 21 AD3d 683, 799 NYS2d 689 (3d Dept 2005). An owner of rental property is presumed to know the age of the property and, accordingly, cannot avoid liability by a conclusory denial of knowledge that the building was erected before lead-based interior paint was outlawed, *Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 (1st Dept 2008). An elevated lead level, which may be evidence of lead poisoning, is one greater than or equal to 10 micrograms per deciliter (mcg/dcl) of whole blood, see Public Health Law § 1370(6); 10 NYCRR 67-1.1(e); *Derr v Fleming*, 106 AD3d 1240, 965 NYS2d 209 (3d Dept 2013); *Robinson ex rel. Chapman v Bartlett*, 95 AD3d 1531, 944 NYS2d 777 (3d Dept 2012).

A landlord sued for an infant's lead paint injuries may not invoke the parent's negligence (including negligent supervision) or failure to mitigate damages as affirmative defenses, nor may the parent's negligence be imputed to the infant to reduce the infant's recovery, *M.F. ex rel. Flowers v Delaney*, 37 AD3d 1103, 830 NYS2d 412 (4th Dept 2007); see *Cunningham v Anderson*, 85 AD3d 1370, 925 NYS2d 693 (3d Dept 2011). The landlord may, however, assert as an affirmative defense that the injured infant's parent created or exacerbated the unsafe lead condition by changing or otherwise damaging the paint condition or by negligently attempting to remediate it, *id.* While the law may absolve very young children of all liability for their actions as a matter of law, individuals less than 18 years of age can, under some circumstances, be held legally responsible for their actions through defenses such as comparative negligence or failure to mitigate damages, *Cunningham v Anderson*, supra; see *Robinson ex rel. Chapman v Bartlett*, 95 AD3d 1531, 944 NYS2d 777 (3d Dept 2012). In *Cunningham*, the court determined that plaintiff's conduct when he was a preteen and teenager, including discontinuing prescribed medication and failing to attend school, may have constituted a failure to mitigate damages at a time when plaintiff could be held legally responsible for his actions.

A public housing administrator under the Federal section 8 housing assistance payment program is not liable in failing to conduct inspections pursuant to the Federal Lead Based Poisoning Prevention Act (42 USC 4822 et seq.) on a common law negligence theory absent a special relationship between the administrator and the plaintiff since these inspections constitute a governmental function, *Messam v Williams*, 284 AD2d 437, 727 NYS2d 450 (2d Dept 2001). Similarly, no liability may be imposed on the City of New York for its purported failure to properly enforce its lead paint abatement regulations in the absence of a special relationship between the parties, *Gibbs ex rel. Gibbs v Paine*, 280 AD2d 517, 720 NYS2d 184 (2d Dept 2001). Likewise, the Residen-

tial Lead-Based Paint Hazard Reduction Act of 1992, 42 USC § 4852d, which requires sellers and lessors of residential housing to provide purchasers and lessees with a lead-hazard information pamphlet and to disclose the presence of any known lead-based paint or lead-based paint hazards, is intended only to protect the actual purchasers and lessees of premises. Thus, the statute does not protect the child of a purchaser or lessee or give rise to a private right of action in favor of such a child even if the child was allegedly injured as a result of undisclosed lead paint hazards on the purchased or leased premises, *Skerritt v Bach*, 23 AD3d 1080, 805 NYS2d 213 (4th Dept 2005); see *Brown v Maple3, LLC*, 88 AD3d 224, 928 NYS2d 740 (2d Dept 2011) (neither lessee's daughter nor her granddaughter has standing to maintain cause of action under Residential Lead-Based Paint Hazard Reduction Act). However, Congress intended the Residential Lead-Based Paint Hazard Reduction Act to be implemented in conjunction with state and local laws that require abatement of lead-based paint, *Brown v Maple3, LLC*, *supra*. Thus, a plaintiff unable to assert a private cause of action under the Act may still pursue causes of action cognizable under New York law, e.g., common law negligence, *id*. Moreover, liability may be imposed on an independent contractor retained by the City of New York to perform a lead abatement project where the contractor, by failing to exercise reasonable care in the performance of the project, exposed the plaintiff-tenant to a dangerous, toxic environment, *Vega v S.S.A. Properties, Inc.*, 13 AD3d 298, 788 NYS2d 28 (1st Dept 2004).

Improper Maintenance

Liability may also arise as the result of failure to properly maintain the premises, *Schmerz v Salon*, 26 AD2d 691, 272 NYS2d 404 (2d Dept 1966), *aff'd*, 19 NY2d 846, 280 NYS2d 409, 227 NE2d 322 (1967); from failure to comply with nondelegable statutory duties, Multiple Dwelling Law § 78; see *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990); or from the failure to comply with an applicable statute, ordinance or regulation, *Ragona v Hamilton Hall Realty*, 251 AD2d 391, 674 NYS2d 113 (2d Dept 1998) (citing PJI) (alleged breach of legislatively mandated obligation to provide and maintain properly-locked inner lobby door); *Griffin v State*, 83 AD3d 1357, 921 NYS2d 703 (3d Dept 2011) (failure to mark sidelights to glass doors); *Feisthamel v State*, 89 AD2d 756, 453 NYS2d 904 (3d Dept 1982) (failure to mark glass door as required by Labor Law § 241-b and the Industrial Code); *Abrash v Long Island University*, 22 AD2d 940, 255 NYS2d 930 (2d Dept 1964) (failure to light stairway as required by New York City Administrative Code); see *Rivera v Nelson Realty, LLC*, 7 NY3d 530, 825 NYS2d 422, 858 NE2d 1127 (2006) (Code requirement to insulate hot water pipes and insulation does not impose duty to install radiator covers); see *Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, 828 NYS2d 308 (1st Dept 2007) (distinguishing *Rivera v Nelson Realty, LLC*, *supra*, and holding that New York City Administrative Code § 27-809 applies to steam riser pipes). Liability may be predicated upon a violation of a statute or ordinance which became effective after the building was constructed if there is clear legislative intent that it

should apply, see *Jokelson v Allied Stores Corp.*, 31 AD2d 200, 295 NYS2d 730 (1st Dept 1968); *Karlson v 305 East 43rd St. Corp.*, 370 F2d 467 (2d Cir 1967); *Florentine v Church of Our Lady of Mt. Carmel*, 340 F2d 239 (2d Cir 1965); see also *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982).

Generally, an owner of real property cannot be held liable for injuries caused by a defective condition unless it has actual or constructive notice of that condition, *Dwyer v West Bradford Corp.*, 188 AD2d 813, 591 NYS2d 92 (3d Dept 1992); *Meyers v Fifth Ave. Bldg. Associates*, 90 AD2d 824, 456 NYS2d 17 (2d Dept 1982). Where an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect, *Bentley v All-Star, Inc.*, 179 AD3d 618, 118 NYS3d 99 (1st Dept 2020); *Hayes v Riverbend Housing Co., Inc.*, 40 AD3d 500, 836 NYS2d 589 (1st Dept 2007); see *Ivancic v Olmstead*, 66 NY2d 349, 497 NYS2d 326, 488 NE2d 72 (1985). If no such program of inspection is in place, constructive notice of the defect is imputed, *Bentley v All-Star, Inc.*, *supra*; *Hayes v Riverbend Housing Co., Inc.*, *supra*. Where evidence shows that such an inspection would not have disclosed the defect, even if there was a breach of the duty to inspect, it was not causally related to the accident, *Bentley v All-Star, Inc.*, *supra*; *Hayes v Riverbend Housing Co., Inc.*, *supra*; see *Ivancic v Olmstead*, *supra*. A property manager's admission that she lacked knowledge of the age and condition of a fire escape and had not employed anyone to inspect it does not establish *prima facie* a lack of notice, since the owner's statutory duty to maintain the fire escape implies a duty to make timely and adequate inspections, *Showver v Allerton Associates*, 306 AD2d 144, 761 NYS2d 44 (1st Dept 2003).

An owner or possessor of a building open to the public, such as a store, office building or other place of public assembly, is required to provide a safe means of ingress and egress, *Backiel v Citibank, N.A.*, 299 AD2d 504, 751 NYS2d 492 (2d Dept 2002), and to light the exterior of the building at the times that it is open, *Gallagher v St. Raymond's Roman Catholic Church*, 21 NY2d 554, 289 NYS2d 401, 236 NE2d 632 (1968). Where a statute, ordinance, or regulation is involved, such as Multiple Dwelling Law § 26(7-a) (requiring certain owners of multiple dwellings to install and maintain lights at various locations of premises), the pattern charge must be modified, see PJI 2:25, PJI 2:28, PJI 2:29; see PJI 2:105 as to the requirements of various statutes and ordinances. As to municipal liability relating to design of public works, see Introductory Statement preceding PJI 2:225.

The owners of the dominant estates in an easement are responsible for maintaining and repairing the easement, *Morgan v Chong Kwan Jun*, 30 AD3d 386, 817 NYS2d 325 (2d Dept 2006); *Raksin v Crown-Kingston Realty Associates*, 254 AD2d 472, 680 NYS2d 265 (2d Dept 1998), but have no duty to improve the easement for the servient owner's benefit, *Mangusi v Mount Pleasant*, 19 AD3d 656, 799 NYS2d 67 (2d Dept 2005). Ordinarily, a servient owner has no duty to maintain an

easement to which its property is subject, *Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331, 763 NE2d 107 (2001); *Kleyner v New York*, 115 AD3d 710, 981 NYS2d 608 (2d Dept 2014). Indeed, a servient owner has a “passive” duty to refrain from interfering with the rights of the dominant owner. However, the servient owner may have a duty to warn of any latent danger presented by the easement’s use, *Piluso v Bell Atlantic Corp.*, 305 AD2d 68, 759 NYS2d 58 (1st Dept 2003). Further, the owner of the servient estate may retain a duty as a landowner to perform maintenance functions on the portion of the premises subject to the servient easement where the servient easement owner makes use of the easement for its own purposes, that use does not interfere with the legitimate activities of the holder of the dominant estate and no special expertise or unusual risks to the servient estate owner are involved, *Kleyner v New York*, *supra*.

In *Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331, 763 NE2d 107 (2001), maintenance and repair of a utility’s easement required special expertise and needed to be carried out by trained professionals using equipment while working with tree limbs and electric wires high off the ground. The Court granted the servient owner summary judgment dismissing the claim alleging a failure to remedy a dangerous condition because the servient owner was neither equipped nor empowered to undertake such efforts, considering the dangers of dealing with power lines and the importance of those lines in delivering electricity. However, in *Piluso v Bell Atlantic Corp.*, 305 AD2d 68, 759 NYS2d 58 (1st Dept 2003), the court held that while the servient owner had no duty to maintain guy wires running from a utility pole in safe condition, the landowner could be deemed to have a duty to warn of the danger the wires posed if it were determined that the hazard was not open and obvious under the circumstances. Similarly, a servient owner is under no obligation to construct means for the enjoyment of the easement, and it is not under any duty to make any repairs to the easement, absent an agreement to the contrary, *Raksin v Crown-Kingston Realty Associates*, 254 AD2d 472, 680 NYS2d 265 (2d Dept 1998). When an easement is created for the benefit of multiple dominant tenements, all owners are mutually burdened with the construction, maintenance, and repairs of the subject property, *id*.

Protection from Criminal Activity

The duty of the owner or possessor may include, in addition to the obligation to take reasonable care of the physical condition of the premises, protecting individuals against injury caused by the conduct of third persons on the premises, *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (1998); see *Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 730 NYS2d 770, 756 NE2d 58 (2001); *Foreman v B & L Properties Co.*, 261 AD2d 301, 691 NYS2d 405 (1st Dept 1999). The owner or possessor must take minimal precautionary measures to secure the premises if it has notice of a likelihood of criminal intrusions which pose a threat to safety and may be held liable to an individual who is injured in a reasonably foreseeable criminal

encounter that was proximately caused by the absence of adequate security, *Mason v U.E.S.S. Leasing Corp.*, supra; *Miller v State*, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984); *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 724 NYS2d 34 (1st Dept 2001); *Maricle v Mick*, 108 AD2d 1048, 485 NYS2d 622 (3d Dept 1985); *Loeser v Nathan Hale Gardens, Inc.*, 73 AD2d 187, 425 NYS2d 104 (1st Dept 1980); see *Waters v New York City Housing Authority*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987); *Pascarelli v LaGuardia Elmhurst Hotel Corp.*, 294 AD2d 343, 742 NYS2d 98 (2d Dept 2002). However, there can be no recovery for injuries resulting from a criminal attack unless the attack was foreseeable or preventable in the normal course of events, *Colarossi v University of Rochester*, 2 NY3d 773, 780 NYS2d 301, 812 NE2d 1250 (2004); *Virella v 245 North Street Housing Development Fund Corp.*, 188 AD3d 1618, 136 NYS3d 598 (4th Dept 2020) (assault on tenant by intoxicated and violent cotenant not foreseeable); *Gonzalez v Riverbay Corp.*, 150 AD3d 535, 56 NYS3d 36 (1st Dept 2017) (foreseeability is a question of fact where evidence shows landlord aware of perpetrator illegally entering premises in similar fashion several previous times); see *Pink v Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016); *Maheshwari v New York*, 2 NY3d 288, 778 NYS2d 442, 810 NE2d 894 (2004); *Stora v New York*, 117 AD3d 557, 986 NYS2d 81 (1st Dept 2014) (issue of fact where residents of homeless shelter had previously smuggled weapons into premises by jumping over perimeter fence and shelter operator had notice of weakness of fence); *Gross v Empire State Bldg. Associates*, 4 AD3d 45, 773 NYS2d 354 (1st Dept 2004); *Harris v New York City Housing Authority*, 187 AD2d 362, 589 NYS2d 883 (1st Dept 1992).

The duty to protect against criminal intruders most often arises when ambient crime has seriously infiltrated the premises or when the landlord is on notice of a serious risk of such infiltration, *Browning v James Properties, Inc.*, 32 AD3d 1160, 821 NYS2d 696 (4th Dept 2006); *Evans v 141 Condominium Corp.*, 258 AD2d 293, 685 NYS2d 191 (1st Dept 1999); *Todorovich v Columbia University*, 245 AD2d 45, 665 NYS2d 77 (1st Dept 1997). In *Chianese v Meier*, 98 NY2d 270, 746 NYS2d 657, 774 NE2d 722 (2002), the Court held that defendant building owner and managing agent were on notice of a particular recurring safety issue where several tenants had complained about the building's front doors frequently being left open and there was evidence of an assault and multiple burglaries in the building and adjoining buildings owned by defendant within the two years preceding the attack on plaintiff. Where there is little evidence of criminal activity in the building, there are ordinarily insufficient facts to base a finding of foreseeability, *Todorovich v Columbia University*, 245 AD2d 45, 665 NYS2d 77 (1st Dept 1997); *Camacho v Edelman*, 176 AD2d 453, 574 NYS2d 356 (1st Dept 1991); see *Florman v New York*, 293 AD2d 120, 741 NYS2d 233 (1st Dept 2002) (discussing obligation of permittee to provide security).

In cases where a prior history of third-party criminal behavior is

shown, there is no requirement that the past experience relied upon to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected, *Jacqueline S. by Ludovina S. v New York*, 81 NY2d 288, 598 NYS2d 160, 614 NE2d 723 (1993); *Kuti v Sera Security Services*, 182 AD3d 401, 121 NYS3d 263 (1st Dept 2020); *Venetal v New York*, 21 AD3d 1087, 803 NYS2d 609 (2d Dept 2005); *Luisa R. v New York*, 253 AD2d 196, 686 NYS2d 49 (1st Dept 1999); *Splawn v Lextaj Corp., NV*, 197 AD2d 479, 603 NYS2d 41 (1st Dept 1993). Plaintiff must, however, make a showing that the incident was foreseeable, *Pink v Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994, 41 NYS3d 204, 63 NE3d 1148 (2016); *Maheshwari v New York*, 2 NY3d 288, 778 NYS2d 442, 810 NE2d 894 (2004); *Gross v Empire State Bldg. Associates*, 4 AD3d 45, 773 NYS2d 354 (1st Dept 2004); *Florman v New York*, 293 AD2d 120, 741 NYS2d 233 (1st Dept 2002); *Karp v Saks Fifth Ave.*, 225 AD2d 1014, 639 NYS2d 575 (3d Dept 1996). In this connection, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location, *Tambriz v P.G.K. Luncheonette, Inc.*, 124 AD3d 626, 2 NYS3d 150 (2d Dept 2015); *Haire v Bonelli*, 107 AD3d 1204, 967 NYS2d 475 (3d Dept 2013); *Ishmail v ATM Three, LLC*, 77 AD3d 790, 909 NYS2d 540 (2d Dept 2010); *Six Anonymous Plaintiffs v Gehres*, 68 AD3d 1177, 890 NYS2d 675 (3d Dept 2009); *Bryan v Crobar*, 65 AD3d 997, 885 NYS2d 122 (2d Dept 2009); *Maria T. v New York Holding Co. Associates*, 52 AD3d 356, 862 NYS2d 16 (1st Dept 2008); *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 694 NYS2d 445 (2d Dept 1999); see *Inger v PCK Development Co., LLC*, 97 AD3d 895, 948 NYS2d 443 (3d Dept 2012). Therefore, an inquiry still must be made as to the location, nature and extent of previous criminal activities and their similarity, proximity or other relationship to the crime in question, *Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 730 NYS2d 770, 756 NE2d 58 (2001); *Milton v I.B.P.O.E. of World Forest City Lodge, No. 180*, 121 AD3d 1391, 995 NYS2d 360 (3d Dept 2014) (prior minor disturbances not sufficiently similar to knife assault to make assault foreseeable); *Beato v Cosmopolitan Associates, LLC*, 69 AD3d 774, 893 NYS2d 578 (2d Dept 2010) (previously complained of loitering and suspected drug sales in lobby of building insufficiently similar to assault by group of individuals to make assault foreseeable); *Venetal v New York*, 21 AD3d 1087, 803 NYS2d 609 (2d Dept 2005) (crime statistics maintained by housing authority police, which building manager received, indicating that unified housing complex suffered from extensive history of violent crime sufficient to raise issue of fact regarding foreseeability); *Browne v GMRI, Inc.*, 6 AD3d 640, 775 NYS2d 184 (2d Dept 2004) (fistfights too dissimilar to shooting to be foreseeable); *Alonso v Branchinelli*, 277 AD2d 408, 715 NYS2d 761 (2d Dept 2000) (evidence presented by plaintiff consisting of mere hearsay statements regarding previous criminal activity on premises and general crime statistics for neighborhood was insufficient to present triable issue of fact on common law negligence claim or violation of Real Property Law § 231(2)); *Evans v 141 Condominium Corp.*, 258 AD2d 293, 685 NYS2d 191 (1st Dept 1999) (prior incidents noted by

plaintiff were too unrelated to incident at issue to support claim that assault was foreseeable consequence of defendants' leaving lobby unattended); *Maria S. v Willow Enterprises Inc.*, 234 AD2d 177, 651 NYS2d 486 (1st Dept 1996) (lack of specificity makes such inquiry impossible, preventing establishment of element of foreseeability to support either common law negligence claim or violation of Real Property Law § 231(2)); see *Aponte v Chase Manhattan Bank*, 295 AD2d 130, 744 NYS2d 6 (1st Dept 2002). Ambient neighborhood crime, standing alone, is insufficient to establish foreseeability of a particular criminal encounter, *Milton v I.B.P.O.E. of World Forest City Lodge*, No. 180, *supra*; *Six Anonymous Plaintiffs v Gehres*, *supra*; *Maria T. v New York Holding Co. Associates*, *supra*; *Johnson v New York*, 7 AD3d 577, 777 NYS2d 135 (2d Dept 2004); *Buckeridge v Broadie*, 5 AD3d 298, 774 NYS2d 132 (1st Dept 2004); *Novikova v Greenbriar Owners Corp.*, *supra*.

Whether knowledge of criminal activities occurring at various points within a unified public housing complex can be sufficient to make foreseeable an injury to a person in one of the buildings, depends on the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question, *Jacqueline S. by Ludovina S. v New York*, 81 NY2d 288, 598 NYS2d 160, 614 NE2d 723 (1993); *Venetal v New York*, 21 AD3d 1087, 803 NYS2d 609 (2d Dept 2005); *Gray v Forest City Enterprises, Inc.*, 244 AD2d 974, 665 NYS2d 211 (4th Dept 1997) (evidence that owner of mall had notice of six prior criminal incidents at mall, none of which occurred by loading dock where plaintiff was attacked, does not establish necessary elements of foreseeability); *Leyva v Riverbay Corp.*, 206 AD2d 150, 620 NYS2d 333 (1st Dept 1994) (absent evidence of recurring criminal activity at the particular location, landowner not liable for injuries sustained by plaintiff criminally assaulted on obscure secondary outdoor walkway of large residential complex); *Keenan v Dayton Beach Park No. 1 Corp.*, 175 AD2d 862, 573 NYS2d 708 (2d Dept 1991). Police reports of prior episodes involving complaints of solicitation, a person sleeping in a car in the parking lot, harassment of an employee and an unverified claim of a shotgun in a car in the parking lot, do not bear a sufficient relationship to plaintiff's abduction in the parking lot and, therefore, did not place defendant on constructive notice of the likelihood of such occurrence, *Polomie v Golub Corp.*, 226 AD2d 979, 640 NYS2d 700 (3d Dept 1996); see *M.D. v Pasadena Realty Co.*, 300 AD2d 235, 753 NYS2d 457 (1st Dept 2002) (isolated incident involving vagrant loitering in basement not sufficiently related to plaintiff's rape by intruder to place defendant landlord on notice). However, the owner of a building in an area where arson is a common occurrence may be held liable for injuries resulting from an arson where the owner left the building vacant, in disrepair or not fully secured, *New York Cent. Mut. Fire Ins. Co. v Albany*, 247 AD2d 815, 669 NYS2d 450 (3d Dept 1998); see *Whitfield v New York*, 239 AD2d 492, 657 NYS2d 757 (2d Dept 1997). The duty is neither diminished nor expanded because a building is vacant, *Roberts v Jam Realty Co.*, 260 AD2d 230, 688 NYS2d 69 (1st Dept 1999). An owner discharges its common law duty to take minimal

security precautions against reasonably foreseeable criminal acts by third parties by providing locking doors, an intercom service and twenty four hour security, *James v Jamie Towers Housing Co., Inc.*, 99 NY2d 639, 760 NYS2d 718, 790 NE2d 1147 (2003); see *Venetel v New York*, *supra*.

The duty to provide reasonable safety measures applies to governmental as well as private landowners, *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); *Waters v New York City Housing Authority*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987); *Miller v State*, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984); *Johnson v New York City Health & Hospitals Corp.*, 246 AD2d 88, 676 NYS2d 38 (1st Dept 1998) (hospital run by governmental entity must provide reasonable minimal security system); see Introductory Statement preceding PJI 2:225 at I, C (Premises Liability); see also *Crosland v New York City Transit Authority*, 68 NY2d 165, 506 NYS2d 670, 498 NE2d 143 (1986) (Authority, if it has actual knowledge of assault on passenger, may owe duty to summon police); *Weiner v Metropolitan Transp. Authority*, 55 NY2d 175, 448 NYS2d 141, 433 NE2d 124 (1982) (Authority under no duty to protect a person on its premises from assault by a third person, absent facts establishing a special relationship between the Authority and the person assaulted).

The owner or possessor of a building owes no general duty to protect tenants or other members of the public from criminal activity on the sidewalk outside the building, *McAndrew v Pierre Hotel*, 262 AD2d 193, 693 NYS2d 20 (1st Dept 1999); *Evans v 141 Condominium Corp.*, 258 AD2d 293, 685 NYS2d 191 (1st Dept 1999). Furthermore the owner or possessor of a building who fails to keep a front door lock in good repair owes no duty to a crime victim who was accosted on the street, taken inside the building, and assaulted, *Waters v New York City Housing Authority*, 69 NY2d 225, 513 NYS2d 356, 505 NE2d 922 (1987); *Audrey B. v New York City Housing Authority*, 202 AD2d 532, 609 NYS2d 87 (2d Dept 1994); see *Rodriguez by Galvan v Oak Point Management, Inc.*, 87 NY2d 931, 640 NYS2d 868, 663 NE2d 909 (1996) (defendant building owner owed no duty to secure front door of building to protect passersby from the threat of criminal actions by individuals engaged in drug related activity in or around the building); *Patricia B. v Brown*, 149 AD2d 450, 539 NYS2d 791 (2d Dept 1989) (bus company not liable to woman raped in an unlocked bus in the company's parking lot by former employee). Nor may liability be imposed for failure to provide a locked outer door where the outer door led to a locked inner door, *Robinson v New York City Housing Authority*, 150 AD2d 208, 540 NYS2d 811 (1st Dept 1989) (plaintiff was raped by stranger who followed her through the inner door before it could close and lock; MDL § 50-a(2) requires locks on outer doors only when leading directly into lobby).

As to the question of causation, a plaintiff is not prevented from recovering because the precautionary measure that the owner should have taken would not necessarily have been effective against a different

but similar form of criminal or tortious conduct by a third party, *Nash v Port Authority of New York and New Jersey*, 51 AD3d 337, 856 NYS2d 583 (1st Dept 2008), rev'd on other grounds, 17 NY3d 428, 933 NYS2d 164, 957 NE2d 733 (2011), 933 NYS2d 164, 957 NE2d 733. Thus, the fact that the use of certain security precautions would not have prevented other types of terrorist attacks on a building did not preclude recovery for the owner's negligent failure to take security measures that could have prevented the vehicle bombing that actually did occur in the building's basement parking facility in 1993, *id.* To be contrasted are the facts in *Cerda v 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169, 761 NYS2d 220 (1st Dept 2003), in which the absence of a working front door lock was deemed not to be a cause of the crime because a lock would not have prevented the assailant from gaining access to the building.

Generally, a plaintiff basing a claim on a lack of security must, on the issue of proximate cause, demonstrate that the assailant was an intruder and not one of the building's residents or a guest thereof, *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (1998); *Price ex rel. Price v New York City Housing Authority*, 92 NY2d 553, 684 NYS2d 143, 706 NE2d 1167 (1998); *Venetal v New York*, 21 AD3d 1087, 803 NYS2d 609 (2d Dept 2005); *Brewster v Prince Apartments, Inc.*, 264 AD2d 611, 695 NYS2d 315 (1st Dept 1999); *Carmen P. by Maria P. v PS & S Realty Corp.*, 259 AD2d 386, 687 NYS2d 96 (1st Dept 1999); *Mack v New York City Housing Authority*, 234 AD2d 67, 650, 650 NYS2d 226 (1st Dept 1996); *Wright v New York City Housing Authority*, 208 AD2d 327, 624 NYS2d 144 (1st Dept 1995). A landlord has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant, *Virella v 245 North Street Housing Development Fund Corp.*, 188 AD3d 1618, 136 NYS3d 598 (4th Dept 2020); *Britt v New York City Housing Authority*, 3 AD3d 514, 770 NYS2d 744 (2d Dept 2004). A reasonable opportunity or effective means to control a third person do not arise from the mere power to evict, *Virella v 245 North Street Housing Development Fund Corp.*, *supra*; *Siino v Reices*, 216 AD2d 552, 628 NYS2d 757 (2d Dept 1995). A plaintiff who sues a landlord for negligent failure to take minimal precautions to protect tenants from harm can satisfy the proximate cause burden at trial even where the assailant remains unidentified if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance, *Burgos v Aqueduct Realty Corp.*, *supra*; *Angeles v Aronsky*, 109 AD3d 720, 974 NYS2d 329 (1st Dept 2013); *Brewster v Prince Apartments, Inc.*, 264 AD2d 611, 695 NYS2d 315 (1st Dept 1999); *Carmen P. by Maria P. v PS & S Realty Corp.*, 259 AD2d 386, 687 NYS2d 96 (1st Dept 1999); see *Venetal v New York*, *supra*; *Luisa R. v New York*, 253 AD2d 196, 686 NYS2d 49 (1st Dept 1999). Thus, where plaintiff stated in her affidavit that she did not recognize her assailants, who were not wearing masks, although she lived in a relatively small building and was familiar with all of the building's tenants and their families, and plaintiff averred that none of the building's entrances had

functioning locks, these statements sufficiently raised a triable issue of fact as to whether the assailants were intruders who entered the building through a negligently maintained door, *id*; see *Bennett v Twin Parks Northeast Houses, Inc.*, 93 NY2d 860, 688 NYS2d 94, 710 NE2d 659 (1999); *Torres v New York City Housing Authority*, 93 NY2d 828, 687 NYS2d 618, 710 NE2d 264 (1999); *Perez v New York City Housing Authority*, 294 AD2d 279, 742 NYS2d 289 (1st Dept 2002); *Foreman v B & L Properties Co.*, 261 AD2d 301, 691 NYS2d 405 (1st Dept 1999). In the companion case considered in *Burgos*, where plaintiff, who knew most of the building residents by sight, another building resident and a frequent building visitor all testified that they did not recognize the assailant, who entered and left the building through a broken rear door and made no attempt to conceal his identity, even though there were several people who could have identified him, there was a valid line of reasoning that the assailant was an intruder, *Burgos v Aqueduct Realty Corp.*, *supra*; *Angeles v Aronsky*, 109 AD3d 720, 974 NYS2d 329 (1st Dept 2013) (neither plaintiff nor neighbor who had lived in building several years recognized attackers, who made no attempt to hide their faces); *Bello v Campus Realty LLC*, 99 AD3d 638, 953 NYS2d 41 (1st Dept 2012) (plaintiff did not recognize attackers, who were dressed as police officers, as fellow tenants); *Chunn v New York City Housing Authority*, 83 AD3d 416, 922 NYS2d 3 (1st Dept 2011) (assailants made no attempt to conceal faces).

In the absence of such proof, the trier of fact can only speculate that the perpetrator's presence in the building was attributable to defendant's negligence, *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (1998); see *Melville v New York City Housing Authority*, 242 AD2d 244, 661 NYS2d 632 (1st Dept 1997); *Maria S. v Willow Enterprises Inc.*, 234 AD2d 177, 651 NYS2d 486 (1st Dept 1996). Liability may not be imposed for a failure in security where the property owner has no relationship to either the wrongdoer or the victim and there is no connection between the premises and the victim, other than the fact that the crime occurred there, *Audrey B. v New York City Housing Authority*, 202 AD2d 532, 609 NYS2d 87 (2d Dept 1994); *Kulier by Kulier v Harran Transp. Co., Inc.*, 189 AD2d 803, 592 NYS2d 433 (2d Dept 1993); *Parker v D/U Third Realty Co.*, 141 AD2d 301, 530 NYS2d 137 (1st Dept 1988). Nor may liability be imposed upon a landlord for injuries sustained by a passerby as a result of a shooting which took place inside the premises during an attempted robbery where there was no relationship between the landlord and the gunmen, no relationship between the attempted robbery and the illegal drug activity known to take place on the premises, and no relationship between defendants and plaintiff, *Muniz by Gonzales v Flohern, Inc.*, 77 NY2d 869, 568 NYS2d 725, 570 NE2d 1074 (1991); *Harris v New York City Housing Authority*, 187 AD2d 362, 589 NYS2d 883 (1st Dept 1992); see *Rodriguez by Galvan v Oak Point Management, Inc.*, 87 NY2d 931, 640 NYS2d 868, 663 NE2d 909 (1996).

On the issue of whether an attack was targeted or random, the First and Second Departments have enunciated different rules. The

First Department has consistently held that a targeted attack on a resident of an apartment building will not give rise to liability on the part of the building's owner for a failure to provide adequate security where the attack was not a foreseeable result of the building security staff's decision to allow the assailant to enter the building, *Roldan v New York City Housing Authority*, 171 AD3d 418, 97 NYS3d 122 (1st Dept 2019); *Estate of Faughey ex rel. Adam v New 56-79 IG Associates, L.P.*, 149 AD3d 418, 52 NYS3d 12 (1st Dept 2017); *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 907 NYS2d 189 (1st Dept 2010); *Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360, 832 NYS2d 520 (1st Dept 2007). Thus, in *Flynn v Esplanade Gardens, Inc.*, *supra*, the court dismissed the complaint as against the building owner, since the plaintiff's assailant was a companion of a visitor to whom plaintiff had granted free admittance to the building for approximately one year prior to the attack; during that year, the building security staff, without objection, had consistently permitted the visitor to enter the building and proceed, unannounced, to plaintiff's apartment; and plaintiff submitted no evidence that the security staff knew or should have known that the visitor and her companion were entering the building with the intention of harming plaintiff. Accordingly, any negligence by the building security staff was not a proximate cause of plaintiff's injuries, *id.*

In contrast, the Second Department eschewed the targeted/random distinction drawn by the First Department, holding instead that, in a case involving an alleged negligently maintained building entrance, the issue was whether the inadequate security was a concurrent contributory factor in the happening of the criminal occurrence, *Scurry v New York City Housing Authority*, 193 AD3d 1, 140 NYS3d 255 (2d Dept 2021). In *Scurry*, although the attack was targeted, the defendant failed to demonstrate that a broken door lock did not contribute to the assailant gaining access to the building. The *Scurry* court contrasted its holding with a prior Second Department case, *Harris v New York City Housing Authority*, 211 AD2d 616, 621 NYS2d 105 (2d Dept 1995), where the assailant had a variety of friends and acquaintances in the building who could have allowed him access, such that the absence of a lock could not be said to have contributed to the happening of the targeted criminal act.

Liability may not be imposed on an out-of-possession landlord who had not retained dominion or control over the premises and where the lease agreement required the tenant to maintain the premises and make all necessary repairs, *Ahmad v Getty Petroleum Corp.*, 217 AD2d 600, 629 NYS2d 779 (2d Dept 1995); see *Baker v Getty Oil Co.*, 242 AD2d 644, 663 NYS2d 40 (2d Dept 1997); *O'Gorman v Gold Shield Sec. & Investigation, Inc.*, 221 AD2d 325, 633 NYS2d 517 (2d Dept 1995) (landlord not liable where lease agreement did not contain obligation to repair or maintain premises and landlord was not involved in daily operations of tenant). Nor may liability be imposed upon a company whose only connection to the premises was to arrange for the delivery of goods, *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139, 706 NE2d 1163 (1998).

Real Property Law § 231(2) imposes joint and several liability on a property owner who knowingly leases or gives possession of property to a tenant to use the premises unlawfully, or permits such unlawful use, see *Luisa R. v New York*, 253 AD2d 196, 686 NYS2d 49 (1st Dept 1999); *Maria S. v Willow Enterprises Inc.*, 234 AD2d 177, 651 NYS2d 486 (1st Dept 1996). There is no requirement that a landlord-tenant relationship exist for the statute to apply, *Luisa R. v New York*, *supra*. To allege a prima facie violation of the statute, plaintiff must show that defendant was given notice of repeated criminal activity on the premises such that the risk of injury was likely, *Alonso v Branchinelli*, 277 AD2d 408, 715 NYS2d 761 (2d Dept 2000); *Luisa R. v New York*, *supra*; *Maria S. v Willow Enterprises Inc.*, *supra*; see *Beatty v N.A.A.C.P.*, 194 AD2d 361, 599 NYS2d 13 (1st Dept 1993). Plaintiff must also demonstrate that a causal relationship existed between the complained of activities and plaintiff's injuries, *Luisa R. v New York*, *supra*; *Maria S. v Willow Enterprises, Inc.*, *supra*.

The operator of a residential facility that has control over the residents' daily lives may have a duty to prevent foreseeable harm arising from the actions of tenants toward each other. For example, a residential facility that enforced curfew, required attendance at religious activities, conducted regular inspections, set restrictions on personal property and scheduled residents' meal times could be held liable for a fatal stabbing of one resident by another where the facility's staff failed to find the knife that was kept in the offender's dorm room and failed to evict the offender, *Fowler v Yonkers Gospel Mission*, 67 AD3d 635, 889 NYS2d 603 (2d Dept 2009). However, a tenant providing housing and support to individuals with mental illness was not liable for fire caused by a subtenant where the degree of oversight provided by the tenant was limited and the subtenant was able to live independently, *Tower Ins. Co. of New York v Hands Across Long Island, Inc.*, 148 AD3d 1082, 50 NYS3d 112 (2d Dept 2017).

Governmental entities, when acting as landlords in proprietary capacities, are subject to the same duties that apply to private persons, see Introductory Statement preceding PJI 2:225 at I, F (Premises Liability). Thus, a municipal landlord does not owe a duty to tenants to protect them from criminal acts of other tenants whom the municipality had no ability or opportunity to control, *Britt v New York City Housing Authority*, 3 AD3d 514, 770 NYS2d 744 (2d Dept 2004); *Blatt v New York City Housing Authority*, 123 AD2d 591, 506 NYS2d 877 (2d Dept 1986). A failure on the part of a municipal landlord to evict one tenant in order to prevent injury to another tenant does not create liability or a special duty where the injuries resulted from a personal dispute between the two tenants, *Britt v New York City Housing Authority*, *supra*; *Blatt v New York City Housing Authority*, *supra*. Nor does a municipal landlord owe a duty to tenants to investigate and monitor the mental health of other tenants for the purpose of assessing their propensities for committing assaults on tenants, *Gill by Gill v New York City Housing Authority*, 130 AD2d 256, 519 NYS2d 364 (1st Dept 1987).

The state and its public entities may be liable for failure to maintain

minimal security measures, related to a specific building in the face of foreseeable criminal intrusion upon tenants, *Miller v State*, 62 NY2d 506, 478 NYS2d 829, 467 NE2d 493 (1984). The failure to lock outer doors can be considered a proximate cause if there is evidence to support a finding that the assailant was an intruder with no right or privilege to be present in the building, *id.* In addition, there must be evidence that the assailant took advantage of an unlocked outer door to gain entry to the building, *id.*; *Melville v New York City Housing Authority*, 242 AD2d 244, 661 NYS2d 632 (1st Dept 1997); *Dawson v New York City Housing Authority*, 203 AD2d 55, 610 NYS2d 28 (1st Dept 1994). To recover for injuries caused by acts of criminals on the premises, plaintiff must show that defendant knew or should have known of a probability of criminal conduct likely to pose a risk of harm to third persons lawfully on the premises and that defendant failed to take reasonable protective measures, *Vangeli v Schneider*, 194 AD2d 916, 598 NYS2d 837 (3d Dept 1993); *Iannelli v Powers*, 114 AD2d 157, 498 NYS2d 377 (2d Dept 1986); see *Barksdale v Henry*, 228 AD2d 947, 644 NYS2d 591 (3d Dept 1996); *Zdrojeski v Gramercy Court Associates*, 195 AD2d 552, 600 NYS2d 499 (2d Dept 1993) (dismissing plaintiff's Labor Law claims); *Davis v New York*, 183 AD2d 683, 584 NYS2d 64 (1st Dept 1992); *Patricia B. v Brown*, 149 AD2d 450, 539 NYS2d 791 (2d Dept 1989); *Pascarella v New York*, 146 AD2d 61, 538 NYS2d 815 (1st Dept 1989). With respect to a failure to take precautions, absent testimony from a building security expert, the jury may not be permitted to speculate as to what additional safety measures should have reasonably been taken by defendant, *Iannelli v Powers*, *supra*. A private owner who assumes a duty in an indenture memorializing an easement to take proper precaution to prevent breaches of the peace in a subway passageway, which covenant was clearly intended to benefit those members of the general public who used the subject passageway, owed a contractual duty to the subway riding populous, even in the absence of prior criminal activity, *Fontana v Falides Associates*, 202 AD2d 631, 609 NYS2d 640 (2d Dept 1994).

The owner of an automatic teller machine ("ATM") has a duty to take reasonable precautions to secure its premises if it knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of users of the ATM, *Williams v Citibank, N.A.*, 247 AD2d 49, 677 NYS2d 318 (1st Dept 1998); *Dyer v Norstar Bank, N.A.*, 186 AD2d 1083, 588 NYS2d 499 (4th Dept 1992); see *Schaus v Marine Midland Bank, N.A.*, 233 AD2d 919, 649 NYS2d 752 (4th Dept 1996) and *Golombek v Marine Midland Bank, N.A.*, 193 AD2d 1113, 598 NYS2d 891 (4th Dept 1993) (night depository box). The fact that a person using an ATM might be subject to robbery is conceivable, but conceivability alone is not sufficient to hold defendant liable for criminal conduct, *Dyer v Norstar Bank N.A.*, *supra*; see *Cercone v Norstar Bank, N.A., Inc.*, 199 AD2d 987, 608 NYS2d 17 (4th Dept 1993) (night deposit box). Without evidentiary proof of notice of prior criminal activity, the owner's duty to protect those using the premises from such activity never arises, *Williams v Citibank, N.A.*, *supra*. Whether an attack by a third person is reason-

ably foreseeable ordinarily is an issue of fact, *Schaus v Marine Midland Bank, N.A.*, *supra*.

A mass gathering permittee has a common law duty to minimize foreseeable dangers on the property, including the criminal acts of third parties, *Bynum v Keber*, 135 AD3d 1066, 23 NYS3d 654 (3d Dept 2016); see *Maheshwari v New York*, 2 NY3d 288, 778 NYS2d 442, 810 NE2d 894 (2004). The scope of that duty is defined according to the likelihood that such behavior will occur and endanger attendees based on past experience, *Bynum v Keber*, *supra*.

A lessor is not responsible for the conduct of persons brought onto the premises by the tenant unless the lessor has the opportunity to control their conduct and is reasonably aware of the necessity for doing so, *Smith v 2J Management Co., Inc.*, 211 AD2d 418, 621 NYS2d 40 (1st Dept 1995); *Aronson v Hyatt Intern. Corp.*, 202 AD2d 153, 608 NYS2d 187 (1st Dept 1994); *Toma v Charbonneau*, 186 AD2d 846, 588 NYS2d 219 (3d Dept 1992); *Cavanaugh v Knights of Columbus Council 4360*, 142 AD2d 202, 535 NYS2d 275 (3d Dept 1988). However, irrespective of any duty to control the conduct of tenants and their guests, a landlord may be liable for creating a dangerous condition on the premises by allowing its tenant or the tenant's guests to use a turkey fryer in close proximity to continuously running water, particularly where the use of the fryer is prohibited by a fire code, *Boderick v RY Management Co., Inc.*, 71 AD3d 144, 897 NYS2d 1 (1st Dept 2009).

Owners of commercial establishments, such as bars and restaurants, have a duty to exercise reasonable care to prevent harm to patrons on their property, *Daniels v Dairy Queen Grill & Chill*, 175 AD3d 463, 103 NYS3d 841 (2d Dept 2019); *Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767, 952 NYS2d 215 (2d Dept 2012). However, the owner's duty to control the conduct of patrons on its premises arises only when it has the opportunity to control such conduct and is reasonably aware of the need for such control, *Daniels v Dairy Queen Grill & Chill*, *supra*; *Kranenberg v TKRS Pub, Inc.*, *supra*. Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults, *Giambruno v Crazy Donkey Bar and Grill*, 65 AD3d 1190, 885 NYS2d 724 (2d Dept 2009); see *Daniels v Dairy Queen Grill & Chill*, *supra*.

A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where, as a practical matter, the defendant can exercise such control, *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987); *Ramsammy v New York*, 216 AD2d 234, 628 NYS2d 693 (1st Dept 1995); see *Zane v Corbett*, 82 AD3d 1603, 919 NYS2d 625 (4th Dept 2011). It is not enough to allege that the incident resulting in harm was foreseeable, *Morgan v Whitestown American Legion Post No. 1113*, 309 AD2d 1222, 765 NYS2d 106 (4th Dept 2003). The premises owner's duty to protect against harm caused by third persons is limited to conduct on the premises, which it had the opportunity to control and of which it was

reasonably aware, *Virella v 245 North Street Housing Development Fund Corp.*, 188 AD3d 1618, 136 NYS3d 598 (4th Dept 2020); *Morgan v Whitestown American Legion Post No. 1113*, supra; *Taft v Connell*, 285 AD2d 992, 727 NYS2d 572 (4th Dept 2001); *Del Bourgo v 138 Sidelines Corp.*, 208 AD2d 795, 618 NYS2d 59 (2d Dept 1994). A reasonable opportunity or effective means to control a third person do not arise from the mere power to evict, *Virella v 245 North Street Housing Development Fund Corp.*, supra; *Siino v Reices*, 216 AD2d 552, 628 NYS2d 757 (2d Dept 1995).

Alcohol consumption by adults, standing alone, does not give rise to a question of fact as to the foreseeability that an intoxicated person would engage in a fight and cause injury, *Crowningshield v Proctor*, 31 AD3d 1001, 820 NYS2d 330 (3d Dept 2006). Although a landowner may have responsibility for injuries caused by an intoxicated guest, that liability may be imposed only for injuries that occurred where the defendant had the opportunity to supervise the intoxicated guest, a duty which emanates not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (1987); *Virella v 245 North Street Housing Development Fund Corp.*, 188 AD3d 1618, 136 NYS3d 598 (4th Dept 2020). A critical element of the cause of action against the property owner is an allegation that the injury occurred on the premises or in an area under the owner's control, *Morgan v Whitestown American Legion Post No. 1113*, 309 AD2d 1222, 765 NYS2d 106 (4th Dept 2003). However, where the basis of the plaintiff's claim is that the defendant breached a duty to adequately supervise minor guests visiting the defendant's property, the fact that the minor plaintiff's injury occurred off the premises is not dispositive of the claim, *Aquino v Higgins*, 15 NY3d 903, 912 NYS2d 571, 938 NE2d 1006 (2010).

In *Fantuzzo v Attridge*, 291 AD2d 871, 737 NYS2d 192 (4th Dept 2002), plaintiffs raised an issue of fact on their negligence claim relating to whether defendant mother knew that a party was going to take place at her home when she and her husband were out of town and thus whether defendant parents failed to exercise due care in permitting their daughter to host an unsupervised party at their home in their absence. A parent who merely consents to the hosting of a party at his home by his adult children in his absence may not be held liable, based on an alleged agency relationship between the parent and his children, for the negligent failure of the children to control the conduct of third persons at the party absent evidence that the parent requested or directed that the children host the party, that the party was for his benefit, or that the parent was involved with the planning of the party, *Dynas v Nagowski*, 307 AD2d 144, 762 NYS2d 745 (4th Dept 2003). However, in *Aquino v Higgins*, 15 NY3d 903, 912 NYS2d 571, 938 NE2d 1006 (2010), rev'g 68 AD3d 1650, 891 NYS2d 853, the Court of Appeals held that parents, who permitted their daughter to host a supervised party at the parents' home, owed a duty to supervise the departure from the premises of a minor guest who became intoxicated at the party.

In *Lisa I. v Manikas*, 188 AD3d 1392, 135 NYS3d 510 (3d Dept 2020), where the infant plaintiff was allegedly raped by a friend's older relative at a sleepover at the friend's house, there was an issue of fact as to whether the homeowners exercised reasonable care to prevent the criminal conduct when they were aware of prior incidents sexual misconduct by the alleged assailant. The court noted that the issue was not whether the home was a place where criminal conduct should reasonably have been foreseen, but whether the risk of the relative engaging in the sexual misconduct was foreseeable, *id*.

As to the voluntary assumption of a duty to provide protective services, see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606, 407 NE2d 451 (1980); *Evans v 141 Condominium Corp.*, 258 AD2d 293, 685 NYS2d 191 (1st Dept 1999); Comment to PJI 2:24. As to municipal liability for a failure to provide police or fire protection, see Introductory Statement preceding PJI 2:225.

Duty to Illuminate

Absent a hazardous condition or other circumstance giving rise to an obligation to provide exterior lighting for a particular area, landowners are not under a general duty of care to illuminate their property during all hours of darkness, *Miller v Consolidated Rail Corp.*, 9 NY3d 973, 848 NYS2d 599, 878 NE2d 1015 (2007); *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003). In addition, a failure to illuminate, standing alone, does not create a dangerous condition on the property, *Peralta v Henriquez*, *supra*. The Court of Appeals has determined, however, that it "would be hard pressed" to conclude that a landowner with knowledge of a condition easily alleviated by illumination, such as a curb or a step, is not required to light the area, *id*; see *Nobile v Trawinski*, 188 AD3d 1749, 132 NYS3d 918 (4th Dept 2020) (issue of fact regarding duty to illuminate unlit fire pit located at outdoor tiki bar); *Noble v Pound*, 5 AD3d 936, 774 NYS2d 95 (3d Dept 2004). In *Peralta*, the Court concluded that the jury should have been asked to determine if defendant landowners knew or should have known that the existing lighting in their parking lot, which was not open to the public, was adequate given the use and design of the lot. In contrast, a plaintiff who tripped on a truck ramp in a darkened railroad yard was not permitted to recover from the property owner where the absence of illumination was known to the plaintiff when he entered the property and the area that had been illuminated was dark due to a power outage not caused by the property owner, *Miller v Consolidated Rail Corp.*, *supra*.

With respect to residential building interiors, the owner's obligation to illuminate common areas such as hallways and staircases is governed by Multiple Dwelling Law § 37. Section 37(2) provides that owners are responsible for illuminating most such areas from sundown to sunrise, but the subdivision absolves owners from liability where they establish that a light became or remained extinguished without their knowledge or consent. The statutory defense based on lack of knowledge or consent

by the owner also applies to the requirement in Multiple Dwelling Law § 37(3), which mandates continuous illumination in fire-stair areas, fire towers and most windowless interior stairs and public halls, *Kopsachilis v 130 East 18 Owners Corp.*, 11 NY3d 512, 873 NYS2d 241, 901 NE2d 734 (2008); see *Solan v Great Neck Union Free School Dist.*, 43 AD3d 1035, 842 NYS2d 52 (2d Dept 2007) (recognizing owner's obligation to illuminate cement divider obscured by darkness, but exonerating owner from liability where it did not have reasonable time to address darkness problem in minutes between power outage and plaintiff's fall).

As noted in *Viera v Riverbay Corp.*, 44 AD3d 577, 845 NYS2d 12 (1st Dept 2007), the owner has no common-law duty to provide continuous illumination in stairways. Thus, the owner of a three-unit apartment building satisfied his common-law duty by maintaining working light fixtures in the stairwell that are controlled by light switches at the top and bottom of the stairs, *Savage v Desantis*, 56 AD3d 1013, 868 NYS2d 787 (3d Dept 2008). As to the duty of a municipality to illuminate public thoroughfares, see the Comment to PJI 2:225.

Duty to Warn

The duty of the owner or possessor may in some instances be discharged by giving adequate warning of the dangerous condition, even where the condition was left uncorrected, *Preston v State*, 59 NY2d 997, 466 NYS2d 952, 453 NE2d 1241 (1983); *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Haefeli v Woodrich Engineering Co.*, 255 NY 442, 175 NE 123 (1931); *Hudson v Church of Holy Trinity*, 250 NY 513, 166 NE 306 (1929); see *Noble v Pound*, 5 AD3d 936, 774 NYS2d 95 (3d Dept 2004); see also *Carol S. v State*, 185 AD3d 1385, 128 NYS3d 376 (4th Dept 2020) (where claimant was struck by falling tree after entering closed section of park, state fulfilled its duty to warn by posting signs stating, inter alia, that area was restricted and closed; that relatively small group of visitors would disregard signs did not raise issue of fact as to adequacy of warnings); *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012) (state's warnings regarding terrain of property were, as a matter of law, sufficient to warn visitors of peril at issue; size, language and placement of signs in park conveyed specific danger to which claimants and their decedent would be exposed by ignoring warnings); but see *Walter v State*, 185 AD2d 536, 586 NYS2d 391 (3d Dept 1992) (where state was on notice that warnings were being ignored by park patrons, and thus were inadequate to prevent intrusions into the dangerous area, liability may be imposed). A landowner's duty to warn of a dangerous condition on his property is ordinarily a natural counterpart of his duty to maintain the property in reasonably safe condition, *Martino v Stolzman*, 18 NY3d 905, 941 NYS2d 28, 964 NE2d 399 (2012); *Galindo v Clarkstown*, 2 NY3d 633, 781 NYS2d 249, 814 NE2d 419 (2004). That plaintiff did not see a warning sign does not necessarily mean that the sign was inadequate, as a person is bound to see that which he or she, in the ordinary use of his or her senses, should have observed, *Arsenault v State*, *supra* (while claimants asserted that they did not recall seeing warning signs, signs found adequate as a matter of law).

A landowner has no duty to warn of an open and obvious danger, *Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331, 763 NE2d 107 (2001); *Cimino v Hempstead*, 110 AD2d 805, 488 NYS2d 68 (2d Dept 1985), *aff'd*, 66 NY2d 709, 496 NYS2d 425, 487 NE2d 282 (1985); *Doyle v State*, 271 AD2d 394, 705 NYS2d 389 (2d Dept 2000) (no duty to warn where readily apparent sign indicated that park closed at dusk and danger of falling over cliff at edge of plateau was open and obvious); *Edmonds v Fodera*, 239 AD2d 383, 658 NYS2d 325 (2d Dept 1997); *Binensztok v Marshall Stores*, 228 AD2d 534, 644 NYS2d 333 (2d Dept 1996) (no duty to warn of presence of hook on dressing room wall); *Rowell v Hempstead*, 186 AD2d 553, 588 NYS2d 405 (2d Dept 1992); *Zaffiris v O'Loughlin*, 184 AD2d 696, 585 NYS2d 94 (2d Dept 1992); *Tarricone v State*, 175 AD2d 308, 571 NYS2d 845 (3d Dept 1991); *Poerio v State*, 144 AD2d 129, 534 NYS2d 459 (3d Dept 1988); see *Wheeler v Grande'vie Sr. Living Community*, 31 AD3d 992, 819 NYS2d 188 (3d Dept 2006) (no duty to warn of icy conditions during storm in progress); see also *Vega v Restani Const. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 (2012) (discussing "ordinary and obvious" doctrine). By contrast, a latent hazard may give rise to a duty to protect entrants from that danger, *Tagle v Jakob*, *supra*; *Piluso v Bell Atlantic Corp.*, 305 AD2d 68, 759 NYS2d 58 (1st Dept 2003).

The duty to warn, see this Comment, *infra*, does not extend to the open and obvious dangers of natural geographic phenomena that could not be overlooked, *King v Cornell University*, 119 AD3d 1195, 990 NYS2d 329 (3d Dept 2014); *Freese v Bedford*, 112 AD3d 1280, 977 NYS2d 814 (3d Dept 2013); *Torres v New York*, 104 AD3d 593, 961 NYS2d 439 (1st Dept 2013); *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012); *Melendez v New York*, 76 AD3d 442, 906 NYS2d 263 (1st Dept 2010); see *Cohen v State*, 50 AD3d 1234, 854 NYS2d 253 (3d Dept 2008); *Plate v Rochester*, 217 AD2d 984, 629 NYS2d 600 (4th Dept 1995).

A condition is "open and obvious" when it is of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open, *Powers v 31 E 31 LLC*, 123 AD3d 421, 998 NYS2d 23 (1st Dept 2014); *Soto v 2780 Realty Co., LLC*, 114 AD3d 503, 980 NYS2d 93 (1st Dept 2014); *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 773 NYS2d 38 (1st Dept 2004), or is otherwise so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous, *Rivera v Rochester General Health System*, 173 AD3d 1758, 103 NYS3d 225 (4th Dept 2019); *Schneider v Corporate Place, LLC*, 149 AD3d 1503, 53 NYS3d 753 (4th Dept 2017). Although some hazards are "technically visible," such hazards might not be found "open and obvious" as a matter of law if their nature and location makes them likely to be overlooked, *Powers v 31 E 31 LLC*, *supra*; *Soto v 2780 Realty Co., LLC*, *supra*; *Schneider v Corporate Place, LLC*, *supra*. The issue of whether a hazard is latent or open and obvious is generally fact-specific and is usually a jury question, *Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331, 763 NE2d 107 (2001); see *Juoniene v H.R.H. Const. Corp.*, 6 AD3d 199, 774 NYS2d 525 (1st Dept 2004); *Westbrook v WR Activities-*

Cabrera Markets, 5 AD3d 69, 773 NYS2d 38 (1st Dept 2004); Centeno v Regine's Originals, Inc., 5 AD3d 210, 773 NYS2d 62 (1st Dept 2004). Whether a hazard is open and obvious should be determined on the basis of the surrounding circumstances, including whether the condition is obscured by crowds or plaintiff's attention is otherwise distracted, *Mauriello v Port Authority of New York and New Jersey*, 8 AD3d 200, 779 NYS2d 199 (1st Dept 2004) (10-inch high, empty luggage cart in crowded baggage claim area not "open and obvious"); see *Powers v 31 E 31 LLC*, supra; *Atehortua v Lewin*, 90 AD3d 794, 935 NYS2d 102 (2d Dept 2011). There are circumstances where a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion. The court may do so on the basis of clear and undisputed evidence, *Mauriello v Port Authority of New York and New Jersey*, supra, and the inquiry is whether the condition was one that could not have been overlooked by any observer reasonably using his or her senses, *Powers v 31 E 31 LLC*, supra; *King v Cornell University*, 119 AD3d 1195, 990 NYS2d 329 (3d Dept 2014); *Freese v Bedford*, 112 AD3d 1280, 977 NYS2d 814 (3d Dept 2013); *Arsenault v State*, 96 AD3d 97, 946 NYS2d 276 (3d Dept 2012). In *Tagle v Jakob*, the Court concluded, as a matter of law based on photographs in the record, that defendant landowner had no reason to expect that a tenant would not observe electrical wires in a tree or any conceivable risk associated with them, see *Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 19 NYS3d 580 (2d Dept 2015). Therefore the Court held that defendant had no duty to warn the tenant of the hazard. In contrast, in *Piluso v Bell Atlantic Corp.*, 305 AD2d 68, 759 NYS2d 58 (1st Dept 2003), there was a question of fact as to a duty to warn even though plaintiff's bill of particulars asserted that the hazardous condition (guy wires running from a utility pole) was "readily apparent and visible," since there was evidence that plaintiff was unfamiliar with the area, it was dark and hazy at the time of the accident and plaintiff did not see the wire before tripping over it.

The issue of whether a defect was open and obvious relates to the duty to warn, not the duty to keep the premises in a reasonably safe condition, *Fornuto v Nassau*, 149 AD3d 910, 52 NYS3d 435 (2d Dept 2017). Although there is no duty to warn of an open and obvious condition, that principle does not absolve the landowner of the duty to maintain his or her property in reasonably safe condition, *Sweeney v Riverbay Corp.*, 76 AD3d 847, 907 NYS2d 214 (1st Dept 2010); *Juoniene v H.R.H. Const. Corp.*, 6 AD3d 199, 774 NYS2d 525 (1st Dept 2004); *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 773 NYS2d 38 (1st Dept 2004); *Luksch v Blum-Rohl Fishing Corp.*, 3 AD3d 475, 771 NYS2d 136 (2d Dept 2004); *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 (2d Dept 2003); *Cohen v Shopwell, Inc.*, 309 AD2d 560, 765 NYS2d 40 (1st Dept 2003); *MacDonald v Schenectady*, 308 AD2d 125, 761 NYS2d 752 (3d Dept 2003); *Soich v Farone*, 307 AD2d 658, 763 NYS2d 168 (3d Dept 2003). When that duty has been breached, the fact that the dangerous condition may have been open and obvious does not negate liability, but rather raises an issue of fact concerning comparative negligence, *Nobile v Trawinski*, 188 AD3d 1749, 132 NYS3d 918 (4th

Dept 2020); *Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 924 NYS2d 32 (1st Dept 2011); *Sportiello v New York*, 6 AD3d 421, 774 NYS2d 353 (2d Dept 2004); *Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 773 NYS2d 62 (1st Dept 2004); *DiVietro v Gould Palisades Corp.*, 4 AD3d 324, 771 NYS2d 527 (2d Dept 2004); *Moloney v Wal-Mart Stores, Inc.*, 2 AD3d 508, 767 NYS2d 897 (2d Dept 2003); *MacDonald v Schenectady*, supra; see *Barley v Robert J. Wilkins, Inc.*, 122 AD3d 1116, 997 NYS2d 758 (3d Dept 2014). However, the open and obvious character of a danger arising from a natural geographic phenomena absolves a landowner of a duty to protect a person from such a danger, *Melendez v New York*, 76 AD3d 442, 906 NYS2d 263 (1st Dept 2010).

Even where the cause of action is not based on a failure-to-warn theory, the courts have held that a landowner is not liable for injuries caused by open and obvious conditions that are not “inherently dangerous” as a matter of law, *Bellini v Gypsy Magic Enterprises, Inc.*, 112 AD3d 867, 978 NYS2d 73 (2d Dept 2013) (clearly visible wheel stops and concrete dividers in parking lots pose no unreasonable risk of harm); *Gonzalez v Dong Yun Corp.*, 110 AD3d 484, 973 NYS2d 66 (1st Dept 2013) (cardboard box recently unloaded in supermarket aisle); *Atehortua v Lewin*, 90 AD3d 794, 935 NYS2d 102 (2d Dept 2011) (water slide toy situated in backyard not “inherently dangerous”); *Sun Ho Chung v Jeong Sook Joh*, 29 AD3d 677, 815 NYS2d 641 (2d Dept 2006); *Zimkind v Costco Wholesale Corp.*, 12 AD3d 593, 785 NYS2d 108 (2d Dept 2004) (concrete wheel stop in parking lot not “inherently dangerous”); *Bryant v Superior Computer Outlet, Inc.*, 5 AD3d 343, 772 NYS2d 529 (2d Dept 2004); *Hecht v 281 Scarsdale Corp.*, 3 AD3d 551, 770 NYS2d 643 (2d Dept 2004) (overhead pipe and valve near parking garage wall not “inherently dangerous”); *Jang Hee Lee v Sung Whun Oh*, 3 AD3d 473, 771 NYS2d 134 (2d Dept 2004) (three-meter wide, one-meter deep empty cement pond not “inherently dangerous”); see *Grgich v New York*, 2 AD3d 680, 770 NYS2d 91 (2d Dept 2003) (question of fact as to whether tree stump in tree well on public sidewalk was “inherently dangerous”); *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 (2d Dept 2003); see also *Boyd v New York City Housing Authority*, 105 AD3d 542, 964 NYS2d 10 (1st Dept 2013) (unlocked iron gate); *Haynie v New York City Housing Authority*, 95 AD3d 594, 944 NYS2d 104 (1st Dept 2012); *Schulman v Old Navy/The Gap, Inc.*, 45 AD3d 475, 845 NYS2d 341 (1st Dept 2007) (metal bracket on clothing rack).

There is also ordinarily no duty to warn individuals on the premises of dangerous condition emanating from outside the property, unless the landowner created or contributed to the condition, *Galindo v Clarkstown*, 2 NY3d 633, 781 NYS2d 249, 814 NE2d 419 (2004); see *Martino v Stolzman*, 18 NY3d 905, 941 NYS2d 28, 964 NE2d 399 (2012) (no duty to warn or assist driver as he pulled out of landowners’ driveway of vehicles parked adjacent to landowners’ driveway because parked vehicles did not create latent or dangerous condition on landowners’ property); *Badou v New Jersey Transit Rail Operations*, 221 AD2d 303, 633 NYS2d 530 (2d Dept 1995) (landowner has no duty to warn individuals on premises of dangerous conditions emanating from outside property).

Assumption of Risk

Even in the era of comparative fault, plaintiff may be entirely precluded from recovery because plaintiff assumed the risks inherent in participating in activity on the premises, *Morgan v State*, 90 NY2d 471, 662 NYS2d 421, 685 NE2d 202 (1997); *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986) (professional jockey's action against race track owner barred by his participation in races on an overly watered, "cuppy" track, together with his ability to observe the conditions, and general knowledge and experience with such conditions); *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985) (in a case prior to comparative fault, professional baseball player held to have assumed risk of playing on field he knew was wet and soft); see *Marcano v New York*, 99 NY2d 548, 754 NYS2d 200, 784 NE2d 73 (2002) (plaintiff assumed risk of injury when he swung on, and subsequently fell off, exercise apparatus constructed over concrete floor); *DeJesus v New York*, 29 AD3d 401, 815 NYS2d 502 (1st Dept 2006) (experienced 14-year-old bicyclist assumed risk of injury resulting from coming into contact with noncontinuous curb); *Bouchard v Smiley Bros., Inc.*, 258 AD2d 548, 685 NYS2d 289 (2d Dept 1999) (recreational hiker assumed risks inherent in hiking including risk of injury arising from open and obvious physical features of advanced trail where accident took place, such as falling); *Morrelli v Giordano*, 206 AD2d 464, 614 NYS2d 565 (2d Dept 1994) (plaintiff assumed risk of being thrown by horse during horseback riding); *Steegmuller v Siegel*, 202 AD2d 855, 609 NYS2d 359 (3d Dept 1994) (plaintiff softball player assumed risk of being hit by a batted ball); *Morales by Diaz v New York City Housing Authority*, 187 AD2d 295, 589 NYS2d 456 (1st Dept 1992); *Pascucci v Oyster Bay*, 186 AD2d 725, 588 NYS2d 663 (2d Dept 1992) (injured softball player assumed risk presented by light poles on playing field when he had previously played softball at the same field and was aware of the existence and location of the light poles); *Sartoris v State*, 133 AD2d 619, 519 NYS2d 728 (2d Dept 1987) (one who engages in water sports "assumes the reasonably foreseeable risks inherent in the activity"). But assumption of risk may not be properly invoked where defendant's negligence created additional risks not inherent in the sport, *Morgan v State*, supra; *Owen v R.J.S. Safety Equipment, Inc.*, 79 NY2d 967, 582 NYS2d 998, 591 NE2d 1184 (1992); *Warren v Hempstead*, 246 AD2d 536, 667 NYS2d 389 (2d Dept 1998); *Clark v State*, 245 AD2d 413, 666 NYS2d 209 (2d Dept 1997); *Weller v Colleges of the Senecas*, 217 AD2d 280, 635 NYS2d 990 (4th Dept 1995); *Laboy v Wallkill Cent. School Dist.*, 201 AD2d 780, 607 NYS2d 746 (3d Dept 1994); *Lamey v Foley*, 188 AD2d 157, 594 NYS2d 490 (4th Dept 1993), or where participants could not have been aware of the risks involved, *O'Keeffe v State*, 140 AD2d 998, 530 NYS2d 911 (4th Dept 1988) (fishermen unaware of swift nature of current did not assume risk of drowning). Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff, *Maddox v New York*, 66 NY2d 270, 496 NYS2d 726, 487 NE2d 553 (1985); *Kennedy v Rockville Centre Union Free School Dist.*, 186 AD2d 110, 587 NYS2d 442 (2d Dept 1992). An important distinction is to be made between assumption of risk and

comparative negligence, *Weller v Colleges of the Senecas*, 217 AD2d 280, 635 NYS2d 990 (4th Dept 1995) (plaintiff's conduct to be considered as issue of comparative negligence rather than assumption of risk); see *Taylor v Ilion*, 265 AD2d 841, 695 NYS2d 467 (4th Dept 1999). For discussion of ski area operators and alpine (downhill) skiers, see PJI 2:55A and GOL Article 18. As to assumption of risk generally, see PJI 2:55; PJI 2:55A.

The proprietor of a baseball park discharges the duty of reasonable care by providing adequate fencing in that area behind home plate where the danger of being struck by the ball is greatest, and where the protection will be afforded to as many spectators as may reasonably be expected to sit in such area during an ordinary game, *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 (1981); *Procopio v Saugerties*, 20 AD3d 860, 799 NYS2d 316 (3d Dept 2005) (proprietor who provided screening behind home plate had no additional duty to install screening to protect spectator who was standing at concession stand situated near bullpen); see *Clapman v New York*, 63 NY2d 669, 479 NYS2d 515, 468 NE2d 697 (1984); *Davidoff by Davidoff v Metropolitan Baseball Club, Inc.*, 61 NY2d 996, 475 NYS2d 367, 463 NE2d 1219 (1984); see also *Haymon v Pettit*, 9 NY3d 324, 849 NYS2d 872, 880 NE2d 416 (2007) (baseball park operator had no duty to warn or protect non-patron "spectators" outside park who ran into street to retrieve and return foul balls, even though it offered free admission to individuals who caught such balls); *Gilchrist v Troy*, 67 NY2d 1034, 503 NYS2d 717, 494 NE2d 1382 (1986) and *Stern v Madison Square Garden Corp.*, 226 AD2d 444, 641 NYS2d 41 (2d Dept 1996) (hockey rink); *Cannavale v New York*, 257 AD2d 462, 683 NYS2d 528 (1st Dept 1999). However, that limited standard of care was held inapplicable when a spectator at an automobile race was struck by a jagged stone set in motion by a race car, *Cortwright v Brewerton Intern. Speedway, Inc.*, 145 AD2d 297, 539 NYS2d 599 (4th Dept 1989). Because the danger of a stone flying from the racetrack is a constant threat not limited to any particular area of the track, it was therefore error to instruct the jury that defendant only had to provide protection at the areas of greatest danger, *Cortwright v Brewerton Intern. Speedway, Inc.*, *supra*; see *Smith v Lebanon Valley Auto Racing Inc.*, 194 AD2d 946, 598 NYS2d 858 (3d Dept 1993) (automobile race sponsor is held to high degree of care to provide adequate safeguards against reasonably foreseeable dangers to spectators and must enforce observation of such safeguards and precautions, both by participants and spectators).

The doctrine of primary assumption of risk, which serves to relieve a defendant of its duty of reasonable care and is a complete bar to recovery, applies to those situations where the activity in which the plaintiff is voluntarily participating is itself inherently risky, such as sporting and entertainment events, and the injury-causing event is a known, apparent or reasonably foreseeable consequence of such participation, *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49, 502 NE2d 964 (1986); *Walter v State*, 235 AD2d 623, 651 NYS2d 704 (3d Dept 1997). The doctrine of primary assumption of risk has no application to

a Labor Law §§ 200 and 241(6) claim, *Walter v State*, supra; *Lorefice v Reckson Operating Partnership, L.P.*, 269 AD2d 572, 703 NYS2d 507 (2d Dept 2000), but it has been applied to an employee's common-law claim that the owner of a baseball stadium breached its non-delegable duty to provide workers with a safe place to work, *Correa v New York*, 66 AD3d 573, 890 NYS2d 461 (1st Dept 2009). For a detailed discussion of the primary assumption of risk doctrine, see PJI 2:55.

Notice

A property owner's knowledge of an unsafe condition—whether actual, constructive or implied—lies at the heart of cases involving premises liability, *Walsh v Super Value, Inc.*, 76 AD3d 371, 904 NYS2d 121 (2d Dept 2010); see *Daly v 9 East 36th LLC*, 153 AD3d 1145, 61 NYS3d 206 (1st Dept 2017). To establish the notice element, plaintiff must demonstrate that defendant had notice of the condition that plaintiff alleged was dangerous; plaintiff is not required to demonstrate that defendant knew that the condition was dangerous, *Harris v Seager*, 93 AD3d 1308, 941 NYS2d 415 (4th Dept 2012). Prior accidents, or the absence thereof may be relevant on the issues of foreseeability and notice, *Martin ex rel. Martin v Our Lady of Wisdom Regional School*, 151 AD3d 838, 54 NYS3d 692 (2d Dept 2017); see *Hyde v Rensselaer*, 73 AD2d 1021, 424 NYS2d 755 (3d Dept 1980), *aff'd*, 51 NY2d 927, 434 NYS2d 984, 415 NE2d 972 (1980). Subsequent accidents may be relevant on the issue of the existence of a dangerous condition, *Galieta v Young Men's Christian Ass'n of City of Schenectady*, 32 AD2d 711, 300 NYS2d 170 (3d Dept 1969). But evidence of the absence of prior accidents is admissible only if the same conditions existed over a number of years and a significant number of people encountered the condition without injury, *Cassar v Central Hudson Gas & Elec. Corp.*, 134 AD2d 672, 521 NYS2d 337 (3d Dept 1987). Likewise, evidence of prior accidents is admissible only if the conditions of the prior accidents are substantially the same to the conditions involved in the accident at bar, see *O'Buckley v Chemung*, 149 AD3d 1232, 53 NYS3d 209 (3d Dept 2017); *Hyde v Rensselaer*, supra; *Martin ex rel. Martin v Our Lady of Wisdom Regional School*, supra; *Bounds v Western Regional Off Track Betting Corp.*, 256 AD2d 1165, 684 NYS2d 105 (4th Dept 1998); *Weidemann v Knights of Columbus, St. Margaret Mary's Council No. 6758*, 199 AD2d 838, 606 NYS2d 342 (3d Dept 1993); *Rittenhouse v State*, 134 AD2d 774, 521 NYS2d 824 (3d Dept 1987). Where evidence of prior accidents, or their absence, is received, the jury should be instructed as to the limited purpose of such evidence, both at the time the evidence is received and in the final charge, see PJI 1:65, PJI 1:66; see also *Thomassen v J & K Diner, Inc.*, 152 AD2d 421, 549 NYS2d 416 (2d Dept 1989) (while absence of prior accidents could be considered on issue of the condition of the premises, it was error to instruct jury to consider such evidence on the issue of notice, since condition was created by defendant and notice was not required). If evidence of the absence of prior accidents is admitted, the jury should be charged that such evidence is not conclusive, but only a factor for consideration, *Zeigler v Wolfert's Roost Country Club*, 291 AD2d 609, 737 NYS2d 676 (3d Dept 2002).

Post-accident modification of the premises may not be admitted as proof of an admission of negligence, *Weidmann v Knights of Columbus*, supra.

Notice of a defective condition may not be proved by statements made by an employee in the course of employment unless the making of the statement is within the scope of the authority of the employee, *Loschiavo v Port Authority of New York & New Jersey*, 58 NY2d 1040, 462 NYS2d 440, 448 NE2d 1351 (1983); see *Golden v Horn & Hardart Co.*, 244 App Div 92, 278 NYS 385 (1st Dept 1935), aff'd, 270 NY 544, 200 NE 309 (1936); *Cook v Great Atlantic & Pacific Tea Co.*, 244 App Div 63, 278 NYS 777 (4th Dept 1935), aff'd, 268 NY 599, 198 NE 423 (1935); *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 735 NYS2d 132 (1st Dept 2002) (supermarket manager's statement admissible on issue of notice); *Marte v New York City Transit Authority*, 276 AD2d 755, 715 NYS2d 704 (2d Dept 2000) (subway conductor did not have authority to speak on behalf of transit authority). Where the defendant is an institutional landowner, a prima facie showing of a lack of prior actual notice can be established through a sworn statement by a manager or supervisor responsible for maintenance that he or she had no notice of the allegedly unsafe condition without the necessity of producing proof that every one of its employees who might conceivably have received notice of the condition in question and had denied receipt of such notice, *Rivas v 525 Bldg. Co., LLC.*, 306 AD2d 337, 760 NYS2d 539 (2d Dept 2003).

Notice may also be proved by evidence of the long continued existence of the condition, *Galieta v Young Men's Christian Ass'n of City of Schenectady*, 32 AD2d 711, 300 NYS2d 170 (3d Dept 1969); *Bergmann v Daino*, 26 AD2d 889, 274 NYS2d 309 (3d Dept 1966), or by evidence that the defendant's employees traveled, on a daily basis, through the area where the defective condition was situated, *McKee v State*, 75 AD3d 893, 906 NYS2d 632 (3d Dept 2010). Where a well-worn path leading to a cliff extended beyond a fence, the property owner was held to be on notice that the warning signs and fence were being ignored and, thus, were inadequate to prevent intrusions into the dangerous area, *Walter v State*, 185 AD2d 536, 586 NYS2d 391 (3d Dept 1992). However, the occurrence of three similar incidents over a 24 year period on widely used public property was not sufficient to charge the property owner with knowledge of a danger created by the natural, shifting condition of sand bars in the ocean, *Herman v State*, 63 NY2d 822, 482 NYS2d 248, 472 NE2d 24 (1984); see *McIntyre v McIntyre v Beaver Dam Winter Sports Club*, 163 AD2d 277, 557 NYS2d 146 (2d Dept 1990) (three or four prior incidents of children sledding on hill located on privately owned property "not so prevalent" as to put defendants on notice). Additionally, if a defect such as rust would not have alerted a layman to the existence of a dangerous condition, it is considered a "latent defect" and is not sufficient to give defendant constructive notice of the condition, *Rapino v New York*, 299 AD2d 470, 750 NYS2d 319 (2d Dept 2002).

Photographs of the accident site, if taken reasonably close to the

time of the occurrence when conditions are substantially the same, are admissible on the question of constructive notice, *Batton v Elghanayan*, 43 NY2d 898, 403 NYS2d 717, 374 NE2d 611 (1978); see *Pitt v New York City Transit Authority*, 146 AD3d 826, 44 NYS3d 525 (2d Dept 2017); *Zavaro v Westbury Property Inv. Co.*, 244 AD2d 547, 664 NYS2d 611 (2d Dept 1997). However, where photographs were taken four years after the accident, they were not admitted in evidence for the purpose of proving constructive notice of a defect, *Anis v Associated Restaurant Management Corp.*, 202 AD2d 459, 609 NYS2d 51 (2d Dept 1994). The jury may infer from the irregularity, width, depth and appearance of the defect whether the condition existed for such time that the defendant, in the exercise of reasonable care, should have known of it, *Taylor v New York City Transit Authority*, 48 NY2d 903, 424 NYS2d 888, 400 NE2d 1340 (1979); *Reardon v Benderson Development Co., Inc.*, 266 AD2d 869, 697 NYS2d 893 (4th Dept 1999); *Ferlito v Great South Bay Associates*, 140 AD2d 408, 528 NYS2d 111 (2d Dept 1988); see *Cruz v Bronx Lebanon Hosp. Center*, 129 AD3d 631, 13 NYS3d 27 (1st Dept 2015), *aff'd*, 27 NY3d 925, 28 NYS3d 679, 48 NE3d 960 (2016) (plaintiff's testimony alone that portion of rubber mat that caused her trip-and-fall accident was "worn out" supported inference that dangerous condition was visible and apparent for sufficient period of time); *Hecker v New York City Housing Authority*, 245 AD2d 131, 665 NYS2d 660 (1st Dept 1997) (plaintiff described large defect). Videotapes or motion pictures of the accident scene are admissible in the trial court's discretion if they fairly depict the conditions at the scene at the time of the accident, see *Mechanick v Conradi*, 139 AD2d 857, 527 NYS2d 586 (3d Dept 1988).

Notice of a defect in one part of an appurtenance, such as a staircase or platform, may be inferred from notice of a defect in another part which arose from a cause which would operate to impair the whole appurtenance, *Lo Jacono v Schieder*, 281 App Div 799, 119 NYS2d 495 (4th Dept 1953); *Rouillon v Wilson*, 29 App Div 307, 51 NYS 430 (1st Dept 1898); see *Rodriguez by Rodriguez v Amigo*, 244 AD2d 323, 663 NYS2d 873 (2d Dept 1997) (notice of lead paint condition). Evidence that the owner's agent did not know of the age and condition of the fire escape where the accident occurred and had not employed anyone to inspect it did not establish *prima facie* a lack of notice where the owner had a statutorily imposed duty to maintain the fire escape, since in those circumstances the duty to maintain implies a duty to make timely and adequate inspections, *Showverer v Allerton Associates*, 306 AD2d 144, 761 NYS2d 44 (1st Dept 2003).

In a trip-and-fall case, an owner moving for summary judgment has the initial burden of showing that it neither created the alleged hazardous condition nor had actual or constructive knowledge of its existence for a length of time sufficient to discover and remedy it, *Arzola v Boston Properties Ltd. Partnership*, 63 AD3d 655, 880 NYS2d 352 (2d Dept 2009); see *Hayden v Waldbaum, Inc.*, 63 AD3d 679, 880 NYS2d 351 (2d Dept 2009). To sustain the burden of showing lack of actual or constructive notice, the owner must offer some evidence as to when the area was

last inspected relative to the accident, *Dylan P. v Webster Place Associates, L.P.*, 132 AD3d 537, 18 NYS3d 42 (1st Dept 2015), *aff'd*, 27 NY3d 1055, 35 NYS3d 292, 54 NE3d 1163 (2016); *Arzola v Boston Properties Ltd. Partnership*, *supra*; see *Velocci v Stop and Shop*, 188 AD3d 436, 133 NYS3d 569 (1st Dept 2020); *Grossman v TCR*, 142 AD3d 854, 37 NYS3d 514 (1st Dept 2016); *Hayden v Waldbaum, Inc.*, *supra*; see also *Hagin v Sears, Roebuck and Co.*, 61 AD3d 1264, 876 NYS2d 777 (3d Dept 2009) (proof of regular inspections and maintenance, including inspection and remedial action just prior to incident, ordinarily sufficient to satisfy defendant's burden of proof). Thus, an owner that showed that the area in which the accident occurred was inspected 50 to 60 times a day and swept three to four times a day was entitled to summary judgment where plaintiff failed to offer any evidence giving rise to a question of fact, *Hayden v Waldbaum, Inc.*, *supra*; see *Velocci v Stop and Shop*, *supra* (cleaning log showing supermarket floor inspected one and one-half hours prior to accident sufficient to establish *prima facie* lack of constructive notice). In contrast, where no evidence of the last inspection was offered, defendant failed to satisfy its *prima facie* burden and was properly denied summary judgment without regard to whether plaintiff's submissions were sufficient to raise a triable question of fact on the notice issue, *Dylan P. v Webster Place Associates, L.P.*, *supra*; *Arzola v Boston Properties Ltd. Partnership*, *supra*.

It should be noted that notice is not required if the condition is the result of a prior defective repair, *Princiotta v Materdomini*, 45 AD2d 883, 358 NYS2d 13 (2d Dept 1974). Notice is not required if the condition was created by the owner or possessor, *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988); see PJI 2:91, and the jury should be instructed that if they find that the defendant created the condition, they need not consider the issue of notice, *Roberts v Arrow Boat Club, Inc.*, 46 AD2d 815, 361 NYS2d 213 (2d Dept 1974).

Snow, Ice and Rain

As to a dangerous condition on the premises caused by snow and ice, see PJI 2:91; and PJI 2:225C (municipal liability for snow and ice). As to the duty of an owner or possessor to clear snow and ice from an abutting sidewalk, see PJI 2:111A.

With respect to a person on the premises, the general duty to use reasonable care to maintain the premises in a reasonably safe condition applies in snow and ice cases, *Bell v H.M.C. Corp.*, 18 AD2d 1038, 238 NYS2d 592 (3d Dept 1963); *Donahue v Prinzivalli*, 272 App Div 957, 71 NYS2d 644 (4th Dept 1947); *Hunter v Fitz-Roy Development Corp.*, 261 App Div 270, 25 NYS2d 324 (2d Dept 1941). If the dangerous condition was the result of a snowstorm, the party in control of the premises must be given a reasonable amount of time to remedy the dangerous condition, *Currier v Wiltrom Associates Inc.*, 250 AD2d 956, 672 NYS2d 940 (3d Dept 1998). The reasonable time to correct the condition is measured from the end of the storm and liability generally may not be

imposed for an accident which occurred while the storm was still in progress, *Amazon v British American Development Corp.*, 216 AD2d 702, 628 NYS2d 204 (3d Dept 1995) (citing PJI); *Downes v Equitable Life Assur. Soc. of U.S.*, 209 AD2d 769, 617 NYS2d 986 (3d Dept 1994); *Cerra v Perk Development*, 197 AD2d 851, 602 NYS2d 277 (4th Dept 1993); see *Sherman v New York State Thruway Authority*, 27 NY3d 1019, 32 NYS3d 568, 52 NE3d 231 (2016). The doctrine is also applicable where one falls inside a facility because of a slippery condition brought about as a direct consequence of ongoing inclement weather, *Hussein v New York City Transit Authority*, 266 AD2d 146, 699 NYS2d 27 (1st Dept 1999) (defendant had no duty to keep subway station floor free of moisture tracked indoors by passengers from ongoing sleet storm); *Zonitch v Plaza at Latham LLC*, 255 AD2d 808, 680 NYS2d 304 (3d Dept 1998) (slippery entrance way, caused by tracked-in snow and slush, is reality of winter weather that landowner ordinarily is not required to rectify until underlying weather condition has abated); see *Boarman v Siegel, Kelleher and Kahn*, 41 AD3d 1247, 837 NYS2d 822 (4th Dept 2007) (“storm in progress” rule applicable to bus floor); *Gibbs v Port Authority of New York*, 17 AD3d 252, 794 NYS2d 320 (1st Dept 2005). The doctrine may not apply where the only precipitation was rain, see *Hilsman v Sarwil Associates, L.P.*, 13 AD3d 692, 786 NYS2d 225 (3d Dept 2004). However, it has been recognized that a property owner is not obligated to provide a constant remedy to the problem of water being tracked into a building, *Ford v Citibank, N.A.*, 11 AD3d 508, 783 NYS2d 622 (2d Dept 2004); see *Hilsman v Sarwil Associates, L.P.*, *supra*.

It has been suggested that a private landowner’s duty is similar to and not greater than the duty of a municipality to clear snow and ice from its sidewalks, *Mazanti v Wright’s Underwear Co.*, 266 App Div 18, 41 NYS2d 685 (3d Dept 1943); *Dwyer v Woollard*, 205 App Div 546, 199 NYS 840 (3d Dept 1923) and that, therefore, to subject the private owner to liability, the condition on the premises must be more hazardous than that prevailing in the locality, *Schwabl v St. Augustine’s Church, of Rochester*, 288 NY 554, 42 NE2d 16 (1942); *Mazanti v Wright’s Underwear Co.*, *supra*; see *Bonfrisco v Marlib Corp.*, 30 AD2d 655, 291 NYS2d 375 (1st Dept 1968), *aff’d*, 24 NY2d 817, 300 NYS2d 593, 248 NE2d 448 (1969); see also PJI 2:111A and PJI 2:225C. The Second Department, however, in *De Coufle v Frederick Benedict, Inc.*, 93 AD2d 805, 460 NYS2d 604 (2d Dept 1983), has held that the standard of “exceptional” danger applies only to municipal liability.

Where a third party’s contractual undertaking to remove snow from the subject premises was not a comprehensive and exclusive property maintenance obligation that could reasonably be expected to displace the landowner’s duty to maintain the property safely, the third party does not assume a responsibility to a plaintiff walking on the premises, *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); see *Karac v Elmira*, 14 AD3d 842, 788 NYS2d 456 (3d Dept 2005) (duty owed to third-party where private, day-to-day operator of municipal parking garage had comprehensive contractual maintenance obligation; operator coordinated and supervised staff, ac-

counted for revenues and was responsible for physical, mechanical and electrical maintenance of premises). The fact that someone other than the snow plow removal company engaged in snow removal, sanding and salting on the same premises or that the property owner retained the right to request additional services and monitored the contract's performance indicates that there was not a comprehensive and exclusive property maintenance obligation owed by the snow contractor, *Torella v Benderson Development Co., Inc.*, 307 AD2d 727, 763 NYS2d 876 (4th Dept 2003); *Kozak v Broadway Joe's*, 296 AD2d 683, 745 NYS2d 139 (3d Dept 2002); *Borden v Wilmorite Inc.*, 271 AD2d 864, 706 NYS2d 230 (3d Dept 2000). However, the party agreeing to perform the snow removal work may be required to indemnify the landowner if the plaintiff is successful in an action against the landowner, *Coyle v Long Island Sav. Bank*, 248 AD2d 350, 669 NYS2d 628 (2d Dept 1998).

The landowner will not be permitted to seek contribution from the party retained to remove snow from the subject premises unless the landowner can demonstrate that the party owed a duty of care to it independent of the party's contractual duty or that the party owed the plaintiff, as an injured party, a duty of care, *Malcolm v Kapur*, 278 AD2d 926, 718 NYS2d 562 (4th Dept 2000). In *Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 690 NYS2d 213 (1st Dept 1999), the First Department held that the party agreeing to undertake snow removal is obligated to exercise reasonable care in doing so and can be held liable to a plaintiff in negligence where its acts create or increase the snow-related hazard. For a discussion of issues related to an owner's claim for indemnification against a snow removal contractor, see *Salisbury v Wal-Mart Stores Inc.*, 255 AD2d 95, 690 NYS2d 156 (3d Dept 1999).

In *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002), the Court held that defendant, who had contracted to remove snow from the subject premises, did not "launch a force or instrument of harm." The Court held that by merely plowing snow, defendant did not create or exacerbate a dangerous condition, *id*; see *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 850 NYS2d 359, 880 NE2d 845 (2007). A snow removal contractor or one in a similar line of work who creates or exacerbates a harmful condition may generally be liable for any resulting injury, *Espinal v Melville Snow Contractors, Inc.*, *supra*; see *Raynor-Brown v Garden City Plaza Assoc.*, 305 AD2d 572, 759 NYS2d 397 (2d Dept 2003). For a further discussion of a snow removal contractor's liability to third persons, see the Comment to PJI 2:12.

Notice, actual or constructive, of the condition and a reasonable time thereafter to correct it are essential to liability in a snow and ice case, *Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 622 NYS2d 496, 646 NE2d 798 (1994); *Arcuri v Vitolo*, 196 AD2d 519, 601 NYS2d 173 (2d Dept 1993); *Mennes v Syfeld Management, Inc.*, 75 AD2d 936, 428 NYS2d 87 (3d Dept 1980); *Moorhead v Hummel*, 36 AD2d 682, 319 NYS2d 672 (4th Dept 1971); *Caligurie v Schreck's Iron & Metal Corp.*, 8

AD2d 991, 188 NYS2d 697 (4th Dept 1959); see Comment to PJI 2:225C. General awareness that icy conditions may exist is insufficient to establish constructive notice, *Boucher v Watervliet Shores Associates*, 24 AD3d 855, 804 NYS2d 511 (3d Dept 2005). A party in possession or control of real property has a reasonable period of time after the cessation of a storm in which to take protective measures to correct storm-created hazardous ice and snow conditions, *Calvitti v 40 Garden, LLC*, 155 AD3d 1399, 64 NYS3d 776 (3d Dept 2017) (issue of fact whether, during 10-hour lapse of time between defendant's snow removal and plaintiffs fall, there was further precipitation that created dangerous or unsafe condition and whether there was sufficient time for defendant to have discovered and remedied it); *Russo v 40 Garden Street Partners*, 6 AD3d 420, 775 NYS2d 327 (2d Dept 2004) (50 minutes between cessation of storm and accident did not afford defendant reasonable opportunity to act); *Whitt v St. John's Episcopal Hosp.*, 258 AD2d 648, 685 NYS2d 789 (2d Dept 1999) (citing PJI); *Jensen v Roohan*, 233 AD2d 587, 649 NYS2d 100 (3d Dept 1996); see *Rodriguez v Woods*, 121 AD3d 474, 994 NYS2d 583 (1st Dept 2014); *Baum v Knoll Farm*, 259 AD2d 456, 686 NYS2d 83 (2d Dept 1999). If the accident occurs while precipitation is still in progress, the defendant cannot be held liable for the alleged hazardous condition caused by the precipitation, *Hussein v New York City Transit Authority*, 266 AD2d 146, 699 NYS2d 27 (1st Dept 1999); *Taylor v New York City Transit Authority*, 266 AD2d 384, 698 NYS2d 52 (2d Dept 1999); *Baum v Knoll Farm*, supra.

Although a landowner has no duty to clear snow and ice while a storm is in progress, if it gratuitously does so it can be liable for creating or exacerbating a dangerous condition, *Rugova v 2199 Holland Ave. Apartment Corp.*, 272 AD2d 261, 708 NYS2d 390 (1st Dept 2000). The question of whether the owner or possessor acted reasonably both as to time and as to measures taken usually is a question of fact, *Matthiesen v Adrian*, 306 NY 694, 117 NE2d 639 (1954); *Bordonaro v Bank of Blasdell*, 285 NY 606, 33 NE2d 541 (1941); *Bushman v Kiamesha-Concord, Inc.*, 58 AD2d 638, 396 NYS2d 44 (2d Dept 1977). However, it is unreasonable to require a landlord to discover ice within two to three hours after its formation on a late weekend evening where there has been no precipitation and the ice is not visible to people walking upon it, *Boucher v Watervliet Shores Associates*, 24 AD3d 855, 804 NYS2d 511 (3d Dept 2005). Moreover, a property owner's duty does not require him or her to remedy a snow and ice condition in a grassy area adjacent to a driveway, *Wesolowski v Wesolowski*, 306 AD2d 402, 760 NYS2d 886 (2d Dept 2003); *Rosenbloom v New York*, 254 AD2d 474, 680 NYS2d 262 (2d Dept 1998); see also *Garcia v New York City Housing Authority*, 234 AD2d 102, 650 NYS2d 715 (1st Dept 1996); but see *Ettari v 30 Rampasture Owners, Inc.*, 15 AD3d 611, 790 NYS2d 540 (2d Dept 2005). The mere failure to remove all of the snow and ice from a sidewalk or parking lot does not constitute negligence and does not result in the creation or exacerbation of a hazardous condition, *Wheeler v Grande'vie Sr. Living Community*, 31 AD3d 992, 819 NYS2d 188 (3d Dept 2006). Similarly, the failure to salt or sand a sidewalk does not by itself constitute an affirmative act that would constitute an exacerbation of a

dangerous condition, *Glover v Botsford*, 109 AD3d 1182, 971 NYS2d 771 (4th Dept 2013).

Where plaintiff alleged that ice had built up on the stairs to a depth of two inches in spots and was caused by the lack of gutters on the building, the fact that it was snowing on the day of the accident does not prove that ice had not accumulated for a time sufficient for defendant to have either actual or constructive notice of it, *Monroe v New York State Elec. & Gas Corp.*, 186 AD2d 1019, 588 NYS2d 483 (4th Dept 1992); see *Seaman v New York*, 294 AD2d 144, 742 NYS2d 35 (1st Dept 2002). Conversely, evidence establishing that it had snowed a week prior to the accident is insufficient to establish notice where no evidence is introduced that the ice upon which plaintiff allegedly fell was a result of that particular snow accumulation, *Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 622 NYS2d 496, 646 NE2d 798 (1994); see *Baum v Knoll Farm*, 259 AD2d 456, 686 NYS2d 83 (2d Dept 1999); *DeCurtis v T.H. Associates*, 241 AD2d 536, 661 NYS2d 642 (2d Dept 1997). As to causal relationship where there have been successive snowfalls, see *Cruz v New York*, 23 AD2d 491, 255 NYS2d 973 (1st Dept 1965), *aff'd*, 17 NY2d 717, 269 NYS2d 722, 216 NE2d 713 (1966); *Moorhead v Hummel*, 36 AD2d 682, 319 NYS2d 672 (4th Dept 1971); *Pfeffer v New York*, 25 AD2d 889, 270 NYS2d 564 (2d Dept 1966); Comment to PJI 2:225C.

A plaintiff may rely on climatological records to establish that snow or ice existed at the time of the accident or that a defendant had constructive notice of a snow or ice condition, see *Santiago v New York City Health and Hospitals Corp.*, 66 AD3d 435, 886 NYS2d 687 (1st Dept 2009); *Managault v Rensselaer Polytechnic Institute*, 62 AD3d 1196, 879 NYS2d 612 (3d Dept 2009). A defendant may use such records to establish that it lacked constructive notice of a snow or ice condition or that, at the time of the accident, the weather conditions precluded the existence of snow or ice, see *Daley v Janel Tower L.P.*, 89 AD3d 408, 931 NYS2d 865 (1st Dept 2011); *Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 923 NYS2d 81 (1st Dept 2011); *Perez v Canale*, 50 AD3d 437, 855 NYS2d 488 (1st Dept 2008); see also *Rodriguez v Woods*, 121 AD3d 474, 994 NYS2d 583 (1st Dept 2014) (generally, defendant seeking summary judgment in snow or ice case on ground that weather conditions precluded existence of dangerous condition at time of accident must submit both climatological data and expert opinion); a defendant may also use the records to establish that, at the time of the accident, a storm was in progress, see *Rand v Cornell University*, 91 AD3d 542, 937 NYS2d 49 (1st Dept 2012). If the data on which a party relies is from a record of the observations of the weather taken under the direction of the United States Weather Bureau, the data is *prima facie* evidence of the facts stated in the record, CPLR 4528. However, that evidence may be rebutted by the opposing party by other evidence, including lay testimony or averments regarding the weather conditions, *Massey v Newburgh W. Realty, Inc.*, *supra*.

The term "black ice" has been used to describe a transient condition

that is difficult to see or recognize as ice, *Steffens v Sachem Central School District*, 190 AD3d 1003, 140 NYS3d 253 (2d Dept 2021); *Golonka v Saratoga Teen and Recreation of Saratoga Springs Inc.*, 249 AD2d 854, 672 NYS2d 472 (3d Dept 1998). Personal injury actions involving black ice are particularly challenging for plaintiffs; if the slippery black ice condition is not readily visible and apparent, then, by definition, actual or constructive notice of it to the property owner is unlikely and perhaps impossible, depending on the circumstances of the case, *Steffens v Sachem Central School District*, supra. Nevertheless, the unique challenges for plaintiffs in black ice cases do not change the burden of proof that a property owner must meet in order to establish prima facie entitlement to summary judgment, i.e., that it neither created nor had actual or constructive notice of the black ice condition for a sufficient length of time to discover and remedy it, id; see *Cohen v Woodlands Condominium Association*, 186 AD3d 558, 126 NYS3d 668 (2d Dept 2020).

Elevators and Escalators

A. Liability of Owners

The common law duty of owners or possessors of a building to keep the premises in a reasonably safe condition extends to elevators and escalators within the building and on the premises, *Rumetsch v John Wanamaker, New York, Inc.*, 216 NY 379, 110 NE 760 (1915); *Sciolaro v Asch*, 198 NY 77, 91 NE 263 (1910); *Dykes v Starrett City, Inc.*, 74 AD3d 1015, 904 NYS2d 465 (2d Dept 2010); *De Cristofaro v Joann Enterprises Inc.*, 243 AD2d 1015, 663 NYS2d 689 (3d Dept 1997); see *Paz v Trump Plaza Hotel and Casino*, 28 AD3d 212, 812 NYS2d 82 (1st Dept 2006); *Huerta v New York City Transit Authority*, 290 AD2d 33, 735 NYS2d 5 (1st Dept 2001); *Petersen v Forty-Five Nevins St. Corp.*, 22 AD2d 960, 256 NYS2d 113 (2d Dept 1964), *aff'd*, 17 NY2d 885, 271 NYS2d 311, 218 NE2d 343 (1966). To succeed, plaintiff must prove that the defendant had a duty to keep the elevator or escalator in a reasonably safe condition, breached that duty by failing to maintain or repair the dangerous condition, and that the condition caused the injury, *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 852 NYS2d 27 (1st Dept 2007). The plaintiff must also prove that defendant created or had actual or constructive notice of the defect, *Napolitano v Jackson "78" Condominium*, 186 AD3d 1383, 130 NYS3d 498 (2d Dept 2020) (issue of fact as to owner's notice of elevator misalignment based upon documented incidents of misalignment and unsatisfactory inspection report for elevator completed three days prior to incident); *Rivera v Merrill Lynch/WFC/L/Inc.*, 84 AD3d 524, 922 NYS2d 399 (1st Dept 2011); *Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 911 NYS2d 75 (2d Dept 2010); *Espinoza v Federated Dept. Stores, Inc.*, 73 AD3d 599, 904 NYS2d 3 (1st Dept 2010); *Mack v New York Yankees Partnership*, 69 AD3d 542, 894 NYS2d 395 (1st Dept 2010); *Ianotta v Tishman Speyer Properties, Inc.*, supra; *Kelly v Old Navy*, 11 AD3d 345, 784 NYS2d 483 (1st Dept 2004); *Clark v New York City Housing Authority*, 7 AD3d 440, 777 NYS2d 450 (1st Dept 2004).

The duty of the owner of a multiple dwelling is nondelegable, Multiple Dwelling Law § 78; *Mas v Two Bridges Associates* by Nat. Kinney Corp., 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990); *Rogers v Dorchester Associates*, 32 NY2d 553, 347 NYS2d 22, 300 NE2d 403 (1973); *Barkley v Plaza Realty Investors, Inc.*, 149 AD3d 74, 49 NYS3d 105 (1st Dept 2017) (trial court erred in refusing to instruct jury regarding owner's nondelegable duty to maintain and repair elevator pursuant to Multiple Dwelling Law § 78).

Additionally, Labor Law § 255 requires that every elevator used in connection with a factory be so maintained and operable to be safe for all persons, *De Cristofaro v Joann Enterprises Inc.*, 243 AD2d 1015, 663 NYS2d 689 (3d Dept 1997). Where factories are concerned, this duty extends only to the person or entity operating the factory, and not to a non-operating owner, Labor Law § 316(1); *Weiss v New York*, 95 NY2d 1, 709 NYS2d 878, 731 NE2d 594 (2000). With respect to a multi-use tenant-factory building, however, the duty imposed by Labor Law § 255 extends to the owner and not to the tenants, Labor Law § 316(2); *Weiss v New York*, supra.

B. Maintenance Contractors

Despite the general principle that a breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor, *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002); *Bauerlein v Salvation Army*, 74 AD3d 851, 905 NYS2d 215 (2d Dept 2010); see *Stiver v Good & Fair Carting & Moving, Inc.*, 32 AD3d 1209, 822 NYS2d 178 (4th Dept 2006), *aff'd*, 9 NY3d 253, 848 NYS2d 585, 878 NE2d 1001 (2007), a duty of care to noncontracting third parties may arise out of a contractual obligation or the performance thereof, *Church ex rel. Smith v Callanan Industries, Inc.*, supra; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002). Thus, plaintiffs often seek to hold the maintenance contractor liable for the manner in which that contractor performed the duties it assumed by entering into a contract with the premises owner, see *Bauerlein v Salvation Army*, supra; *Overholt v Atlas Elevator Co., Inc.*, 258 AD2d 887, 685 NYS2d 348 (4th Dept 1999); *Potaczala v Fitzsimmons*, 171 AD2d 1015, 568 NYS2d 983 (4th Dept 1991).

An elevator maintenance contractor that has entered into an exclusive maintenance contract with the owner may be held liable for the failure to correct conditions of which it has knowledge or for failure to use reasonable care to discover and correct a condition which it ought to have found, *Rogers v Dorchester Associates*, 32 NY2d 553, 347 NYS2d 22, 300 NE2d 403 (1973); *Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 922 NYS2d 354 (1st Dept 2011); *Oettinger v Montgomery Kone, Inc.*, 34 AD3d 969, 824 NYS2d 447 (3d Dept 2006); *Camaj v East 52nd Partners*, 215 AD2d 150, 626 NYS2d 110 (1st Dept 1995). The terms of the agreement define the duties and liabilities imposed thereby, *Dorfman v Mid-Town Realty Corp.*, 309 AD2d 538, 765 NYS2d 318 (1st Dept 2003);

Lorenz v 575 Fifth Ave. Associates, 187 AD2d 274, 589 NYS2d 432 (1st Dept 1992). To determine whether liability should be imposed under such an agreement, consideration should be given to the agreement's comprehensiveness, *Bryant v Boulevard Story, LLC*, 87 AD3d 428, 928 NYS2d 285 (1st Dept 2011); *Cowsert v Macy's East, Inc.*, 79 AD3d 1319, 912 NYS2d 765 (3d Dept 2010); *Fernandez v Otis Elevator Co.*, 4 AD3d 69, 772 NYS2d 14 (1st Dept 2004) whether it requires routine inspection and maintenance, *Massato v Sears Roebuck & Co.*, 272 AD2d 453, 708 NYS2d 333 (2d Dept 2000); *McMurray v P.S. Elevator, Inc.*, 224 AD2d 668, 638 NYS2d 720 (2d Dept 1996), and the degree to which the owner ceded control, *Hodges v Royal Realty Corp.*, 42 AD3d 350, 839 NYS2d 499 (1st Dept 2007). Where the building owner has ceded all responsibility for the daily operation, maintenance, and repair of an elevator or escalator to a service contractor, *res ipsa loquitur* may be charged solely as against the contractor, see *Hodges v Royal Realty Corp.*, *supra*.

Even if the term of such an agreement has ended and the contractor has ceased to be in possession and exclusive control of an elevator area for months, liability may still be imposed upon the contractor if it had knowledge of the alleged dangerous conditions surrounding the elevator and its appurtenances that it was contractually obligated to correct, and if it failed to ameliorate such conditions or alert the landlord's agent of their existence before its cancellation of the service contract, *Macon v Arnlie Realty Co.*, 190 AD2d 642, 594 NYS2d 12 (1st Dept 1993). If an exclusive maintenance contract never existed, a contractor retained to perform a specific repair does not have a duty to inspect or repair a defect unrelated to the problem it was summoned to correct, *McMurray v P.S. Elevator, Inc.*, 224 AD2d 668, 638 NYS2d 720 (2d Dept 1996); see *Casey v New York Elevator & Elec. Corp.*, 82 AD3d 639, 920 NYS2d 308 (1st Dept 2011).

A contract to annually inspect an elevator or escalator pursuant to New York City Administrative Code § 27-1000 (Local Law No. 10) does not necessarily rise to the level of an exclusive maintenance contract, see *Altinma v East 72nd Garage Corp.*, 54 AD3d 978, 865 NYS2d 109 (2d Dept 2008), but a contractor performing such an inspection may nevertheless be held liable if it fails to exercise reasonable care in the performance of its duties thereby launching a force or instrument of harm, *Bauerlein v Salvation Army*, 74 AD3d 851, 905 NYS2d 215 (2d Dept 2010).

C. Res Ipsa Loquitur

Res ipsa loquitur is the doctrine by which the jury is permitted to infer negligence if the instrumentality that injured plaintiff was within the defendant's exclusive control and the circumstances were such that the injury would not have occurred if defendant had used reasonable care, *Ebanks v New York City Transit Authority*, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987). Thus, a plaintiff seeking a *res ipsa*

charge must demonstrate that the elevator or escalator, which by its nature may be “subject to extensive public contact on a daily basis, was in defendant’s exclusive control,” *Parris v Port of New York Authority*, 47 AD3d 460, 850 NYS2d 53 (1st Dept 2008). What makes this area of liability atypical of *res ipsa* cases generally is that the doctrine is often invoked despite the fact that the elevators and escalators are accessible to vast numbers of people on a regular basis, and this would ordinarily render *res ipsa* inapplicable because of the requirement that the instrumentality be within the defendant’s exclusive control.

Yet, as is especially true in this context, “[e]xclusivity is a relative not an absolute term,” *Duke v Duane Broad Co.*, 181 AD2d 589, 581 NYS2d 767 (1st Dept 1992); *Weeden v Armor Elevator Co., Inc.*, 97 AD2d 197, 468 NYS2d 898 (2d Dept 1983), and *res ipsa* may be charged as to multiple entities, such as the building owner and the maintenance company, when there is shared control of the elevator or one of the instrumentality’s particular components, *DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191, 795 NYS2d 518 (1st Dept 2005); *Myron v Millar Elevator Industries, Inc.*, 182 AD2d 558, 582 NYS2d 201 (1st Dept 1992). *Res ipsa* has been applied even where the plaintiff was unable to identify which of two service elevators she was riding because no dispute existed that defendant exclusively maintained both elevators, *Rodriguez v Serge Elevators Co., Inc.*, 99 NY2d 587, 757 NYS2d 809, 787 NE2d 1155 (2003).

More often than not, a plaintiff has no control over the mechanism of the elevator responsible for the accident, *Feblot v New York Times Co.*, 32 NY2d 486, 346 NYS2d 256, 299 NE2d 672 (1973) (falling elevator and defective interlock); *Coku v Millar Elevator Industries, Inc.*, 12 AD3d 340, 784 NYS2d 149 (2d Dept 2004) (entangled tachometer bands attached to hoist motor); *Walden v Otis Elevator Co.*, 178 AD2d 878, 577 NYS2d 732 (3d Dept 1991) (misalignment of the elevator’s interlock rollers); see *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 852 NYS2d 27 (1st Dept 2007) (device in elevator door that used infra-red beams to detect passengers’ presence). *Res ipsa* has also been applied where plaintiff has not offered expert testimony but where the “erratic behavior of the elevator” was of a type that would not ordinarily have occurred in the absence of negligence, see *Weeden v Armor Elevator Co., Inc.*, 97 AD2d 197, 468 NYS2d 898 (2d Dept 1983). Whether the misleveling of an elevator constitutes an event that ordinarily does not occur in the absence of negligence may depend upon the degree of misleveling, *Burgess v Otis Elevator Co.*, 114 AD2d 784, 495 NYS2d 376 (1st Dept 1985), *aff’d*, 69 NY2d 623, 511 NYS2d 227, 503 NE2d 692 (1986); *Bryant v Boulevard Story, LLC*, 87 AD3d 428, 928 NYS2d 285 (1st Dept 2011); *Gutierrez v Broad Financial Center, LLC*, 84 AD3d 648, 924 NYS2d 333 (1st Dept 2011); *Stewart v World Elevator Co, Inc.*, 84 AD3d 491, 922 NYS2d 375 (1st Dept 2011); *Dickman v Stewart Tenants Corp.*, 221 AD2d 158, 633 NYS2d 35 (1st Dept 1995).

Care should be taken to distinguish cases dealing with the breakdown of operating mechanisms that are relatively inaccessible to

the general public from those that deal with components designed to come into contact with the public and, thus, subject to potentially damaging misuse or vandalism, *Ebanks v New York City Transit Authority*, 70 NY2d 621, 518 NYS2d 776, 512 NE2d 297 (1987); *De Sanctis v Montgomery Elevator Co., Inc.*, 304 AD2d 936, 758 NYS2d 419 (3d Dept 2003); *Chang v F.W. Woolworth Co., Inc.*, 196 AD2d 708, 601 NYS2d 904 (1st Dept 1993).

However, *res ipsa* applies to accidents involving items exposed to significant public traffic where the specific mechanism that malfunctioned was not handled by the general public, *Pavon v Rudin*, 254 AD2d 143, 679 NYS2d 27 (1st Dept 1998); *Chang v F.W. Woolworth Co., Inc.*, 196 AD2d 708, 601 NYS2d 904 (1st Dept 1993).

“Only in the rarest of cases,” can a plaintiff who relies exclusively upon circumstantial evidence obtain a directed verdict on the theory of *res ipsa* and then only if the “proof is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable,” *Morejon v Rais Const. Co.*, 7 NY3d 203, 818 NYS2d 792, 851 NE2d 1143 (2006); *Martinez v Mullarkey*, 41 AD3d 666, 839 NYS2d 148 (2d Dept 2007); *Weeden v Armor Elevator Co., Inc.*, 97 AD2d 197, 468 NYS2d 898 (2d Dept 1983); see *George Foltis, Inc. v New York*, 287 NY 108, 38 NE2d 455 (1941). Of course, where there is inconclusive and sharply disputed evidence concerning the precise cause of the accident, it would be error to direct a verdict on the grounds of *res ipsa* and the issue must be submitted to the jury, *Martinez v Mullarkey*, *supra*. As a matter of law, plaintiff’s act of jumping out of a stalled elevator six feet above the lobby floor after the elevator’s doors had been opened manually was not foreseeable and this superseding cause warranted dismissal of the complaint, *Egan v A.J. Const. Corp.*, 94 NY2d 839, 702 NYS2d 574, 724 NE2d 366 (1999); see *Jennings v 1704 Realty, L.L.C.*, 39 AD3d 392, 834 NYS2d 160 (1st Dept 2007).

D. Escalator-Related Injuries

A premises owner or possessor may be liable for injury caused by its failure to prevent or correct the overcrowding of an escalator, *Finn v Pennsylvania R. Co.*, 6 AD2d 813, 175 NYS2d 425 (2d Dept 1958); see *Perez v Hearn Dept. Store Corp.*, 37 AD2d 842, 326 NYS2d 127 (2d Dept 1971), *aff’d*, 34 NY2d 526, 354 NYS2d 97, 309 NE2d 868 (1974); *Jokelson v Allied Stores Corp.*, 31 AD2d 200, 295 NYS2d 730 (1st Dept 1968). The most common causes of escalator-related injuries, however, are sudden stops, jerking, and bumping, *Bazne v Port Authority of New York and New Jersey*, 61 AD3d 583, 877 NYS2d 321 (1st Dept 2009); *Paz v Trump Plaza Hotel and Casino*, 28 AD3d 212, 812 NYS2d 82 (1st Dept 2006); *Chege v New York City Transit Authority*, 302 AD2d 283, 756 NYS2d 162 (1st Dept 2003); *Williams v Port Authority of New York and New Jersey*, 247 AD2d 296, 669 NYS2d 285 (1st Dept 1998). *Res ipsa* has been held inapplicable to injuries caused by bumping because it could be caused by foreign objects or debris dropped by passengers at any time, *Birdsall v Montgomery Ward and Co., Inc.*, 109 AD2d 969,

486 NYS2d 461 (3d Dept 1985), *aff'd*, 65 NY2d 913, 493 NYS2d 456, 483 NE2d 131 (1985); *Finn v Pennsylvania R. Co.*, *supra*. Where there was testimony that plaintiff “mis-stepped” onto an escalator and that the escalator jerked, *res ipsa* was found inapplicable because the accident could well have occurred in the absence of negligence, *Braithwaite v Equitable Life Assur. Soc. of U.S.*, 232 AD2d 352, 648 NYS2d 628 (2d Dept 1996); see *Bass v Otis Elevator Co.*, 255 AD2d 284, 680 NYS2d 113 (2d Dept 1998). It should be noted that a stopped escalator is not a “reasonably foreseeable hazard” for those who use it as a stair case, and the spacing of the risers is open and obvious, *Adamo v National R.R. Passenger Corp.*, 71 AD3d 557, 897 NYS2d 85 (1st Dept 2010); *Schurr v Port Authority of New York and New Jersey*, 307 AD2d 837, 763 NYS2d 304 (1st Dept 2003).

PJI 2:90A. Premises Liability—Statutory Limitation on Liability—Owner or Possessor of Undeveloped Land

Plaintiff was injured while (he, she) was [*state the activity*] on defendant’s property. In order for plaintiff to recover, plaintiff must prove that there was a dangerous condition and that defendant wilfully or maliciously failed to guard against or warn of the dangerous condition. An act or omission to act is wilful if it is performed or omitted intentionally, with knowledge that the performance or omission of the act would probably result in injury or damage. An act or omission to act is malicious when the person acts deliberately with knowledge of the rights of another and with the intent to interfere with those rights. You may find for plaintiff only if you decide that there was a dangerous condition and either that (a) defendant was aware that plaintiff or someone like plaintiff would probably be injured and defendant intentionally failed to guard against it or warn plaintiff about it; or (b) defendant, knowing what plaintiff was doing and intending that plaintiff be injured, deliberately failed to guard against the condition or warn plaintiff about it.

Comment

Based on GOL § 9-103. The definition of wilful is based on *Matter of Mallon’s Estate*, 110 App Div 61, 97 NYS 23 (2d Dept 1905), *aff’d*, 185 NY 539, 77 NE 1189 (1906); see *Goepp v American Overseas Airlines*, 281 App Div 105, 117 NYS2d 276 (1st Dept 1952), *aff’d*, 305

NY 830, 114 NE2d 37 (1953); *Froman v Pan-American Airways*, 284 App Div 935, 135 NYS2d 619 (1st Dept 1954); *Pekelis v Transcontinental & Western Air, Inc.*, 187 F2d 122 (2d Cir 1951). The definition of malice is adapted from PJI 2:278.

Unless causation is undisputed, a charge on proximate cause must be given, see PJI 2:70.

For a discussion of the applicability of GOL § 9-103, see Introduction to this section.

GOL § 9-103 limits the duty of reasonable care owed by an uncompensated “owner, lessee or occupant” of undeveloped lands (including the State, *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); as to municipalities, see PJI 2:225, 2:228) to hunters, trappers, fishermen, hikers, horseback riders, bicyclists, snowmobile operators, dog trainers, canoeists, hang gliders, cross country skiers, tobogganers, sledders, spelunkers and operators of motorized vehicles for recreational purposes, *Farnham v Kittinger*, 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162 (1994). The protections afforded by the statute apply to landowners who open their land to recreationalists, as well as to those who attempt to prevent members of the public from using their lands, *White v Troy*, 290 AD2d 605, 735 NYS2d 648 (3d Dept 2002).

Under GOL § 9-103, the owner’s or possessor’s liability depends upon proof that there was a wilful or malicious failure to guard against or warn of the dangerous condition, GOL § 9-103(2)(a); *Farnham v Kittinger*, 83 NY2d 520, 611 NYS2d 790, 634 NE2d 162 (1994); *Sega v State*, 60 NY2d 183, 469 NYS2d 51, 456 NE2d 1174 (1983); *McCleary v Glens Falls*, 32 AD3d 605, 819 NYS2d 607 (3d Dept 2006); *Hinchliffe v Orange and Rockland Utilities Co., Inc.*, 216 AD2d 528, 628 NYS2d 806 (2d Dept 1995); *Wiggs by Wiggs v Panzer*, 187 AD2d 504, 589 NYS2d 591 (2d Dept 1992); *Seminara v Highland Lake Bible Conference, Inc.*, 112 AD2d 630, 492 NYS2d 146 (3d Dept 1985); see *Reid by Reid v Kawasaki Motors Corp., U.S.A.*, 189 AD2d 954, 592 NYS2d 496 (3d Dept 1993); PJI 2:90.3. To establish such liability, a plaintiff must demonstrate an “intentional act of unreasonable character performed in disregard of a known or obvious risk so great as to make it highly probable that harm would result,” *Hillman v Penn Cent. Corp.*, 204 AD2d 902, 612 NYS2d 489 (3d Dept 1994); see *Blair v Newstead Snowseekers, Inc.*, 2 AD3d 1286, 769 NYS2d 807 (4th Dept 2003); *Scuderi v Niagara Mohawk Power Corp.*, 243 AD2d 1049, 663 NYS2d 912 (3d Dept 1997). An owner’s actions in creating a dangerous condition must be based upon a showing of particular, not inferred, malice or willfulness, and not on simple negligence, *Farnham v Kittinger*, *supra*; *McCleary v Glens Falls*, *supra*; *Guereschi v Erie Blvd. Hydropower, L.P.*, 19 AD3d 1022, 797 NYS2d 679 (4th Dept 2005); *Hillman v Penn Cent. Corp.*, *supra*.

Note should also be taken of Article 18 of the General Obligations Law which defines the duties of ski area operators and alpine (downhill) skiers. For a discussion of the correlation between GOL Article 18 and principles of assumption of risk, see Comment to PJI 2:55A.

**PJI 2:91. Liability for Condition or Use of Land—
Possessor's Liability—Unsafe Condition—
Foreign Substances—Slip and Fall Cases**

As you have heard, the plaintiff AB has sued the defendant CD, claiming that CD negligently maintained the property at [*state location of property*]. The (owner, managing agent, tenant, possessor) of (land, a building) has a duty to use reasonable care to keep the property in a reasonably safe condition.

To recover, AB must prove: (1) that the property was not in a reasonably safe condition; (2) that CD was negligent in not keeping the property in a reasonably safe condition; and (3) that the unsafe condition was a substantial factor in causing AB's injury. Your verdict will be rendered by the answers you give to a series of written questions, which will be given to you.

You must first consider whether the property was not in a reasonably safe condition. AB claims that [*state AB's claims, such as: (he, she) slipped and fell on the (floor, stairs) in CD's (store, building, apartment house) because there was (wax, grease, food, oil, water)*]. CD claims [*state CD's claims, such as: CD denies that there was any (wax, grease, food, oil, water) on the (floor, stairs) or that, if any (wax, grease, food, oil, water) was there, it did not cause an unsafe condition*].

The first question you will be asked is whether or not the condition, as alleged by AB, existed. If your answer is "No," you will go no further, but report your verdict to the court. If your answer is "Yes," you will be directed to the next question: "Was [*state claimed condition*] an unsafe condition?"

If you decide that the [*state claimed condition*] did not create an unsafe condition, your answer will be "No," and you will proceed no further [*state where appropriate: on this claim*]. If you decide that the [*state claimed condition*] caused an unsafe condi-

tion, you must next consider whether CD was negligent.

Negligence is the lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent (owner, managing agent, tenant, possessor) of (land, a building) would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

[Where the claim is that defendant created the condition, the following should be charged:]

In deciding whether CD was negligent, you must decide whether CD created the *[state claimed condition]*. The next question on the verdict sheet is "Was CD negligent in that (he, she it) created the unsafe condition?" If you find CD created the condition you will find (he, she, it) was negligent. If you find (he, she, it) did not create *[state claimed condition]*, you will find that (he, she, it) is not liable for creating an unsafe condition.

[Where the claim is that defendant did not create the condition but failed to correct it, the following should be charged:]

If CD did not create the *[state claimed condition]* but knew or should have known about the *[state claimed condition]*, you must decide whether CD had sufficient time before the accident to correct the *[state claimed condition]* or to take other suitable precautions.

You will find that CD was negligent if you decide that CD either knew, or in the use of reasonable care should have known, about the *[state claimed condition]* long enough before the accident to have allowed (him, her, it) to correct it or to take other suitable actions and if you further find that (he, she, it) failed to do so. On the other hand,

if you find that CD did not know about or, in the use of reasonable care, would not have been able to discover and correct the *[state claimed condition]* before the accident occurred, or if you find that CD corrected the *[state claimed condition]* or took other suitable precautions, then you will decide that CD was not negligent.

You will decide these issues by answering the following questions: “Did CD know or, in the use of reasonable care, should CD have known that the unsafe condition existed?” “Did CD have sufficient notice of the *[state claimed condition]* before the accident to correct it or take other suitable precautions before the accident occurred?” “Did CD fail to correct the *[state condition claimed by plaintiff]* before the accident or take other suitable precautions before the accident occurred?”

[If plaintiff’s contentions include failure to warn and defendant contends that there was no duty to warn because the condition, if unsafe, was open and obvious, the following instruction should be given:]

As you have heard, AB also claims that CD was negligent for failing to warn of *[state claimed condition]*. CD claims the condition was open and obvious. There is no duty to warn of unsafe conditions that are open and obvious. A condition is open and obvious if, under all of the circumstances, it should have been seen by any person in AB’s position who was reasonably using his or her senses under all of the circumstances.

If you decide that the *[state claimed condition]* was open and obvious to a person in AB’s position under all of the circumstances, you will find for CD on AB’s claim that there was a failure to provide a warning. If you decide that *[state claimed condition]* was not open and obvious to a person in AB’s position under all of the circumstances, you will proceed to consider whether CD was negligent in failing to give an adequate warning. The adequacy of a warning depends on both the information it provides and the way the warning is given.

The next question for you to answer will be: “Was the [state claimed condition] open and obvious to a person in AB’s position?” If your answer is “Yes” you will be instructed as to the next question you should consider. If your answer is “No,” you will be directed to answer the next question which is: “Did CD fail to provide an adequate warning of the *state claimed condition*?”

If, by the answers you have given to the questions presented, you find that CD was negligent, you must next consider whether that negligence was a substantial factor in causing AB’s injury. An act or failure to act is a substantial factor in causing an injury if a reasonable person would regard the act or failure to act as a cause of the injury. If you find that CD’s negligence was not a substantial factor in causing AB’s injury, you will find for CD [add where appropriate: on this claim].

The next question asks you to decide if CD’s actions or inactions were a substantial factor in causing AB’s injuries.

[One or both of the following questions should be given, depending on the evidence in the particular case:]

“Was CD’s failure to correct the unsafe condition or take other suitable precautions a substantial factor in causing AB’s injuries?”

“Was CD’s failure to adequately warn of the [state claimed condition] a substantial factor in causing AB’s injuries?”

If you find that CD’s negligence was a substantial factor in causing AB’s injury, you will proceed to consider [state next appropriate step, e.g., comparative fault, damages, verdict].

[Where there is an issue as to plaintiff’s comparative fault, the following instruction should be given:]

If you find that CD was negligent and that CD’s negligence was a substantial factor in causing the

(accident, injury), you must next consider whether AB was also negligent and whether AB's conduct was also a substantial factor in causing the (accident, injury). The burden is on CD to prove that AB was negligent and that AB's negligence was also a substantial factor in causing the (accident, injury). If you find that AB was not negligent, or if negligent, that (his, her) negligence was not a substantial factor in causing the (the accident, injury), you must find that AB was not at fault and you must go on to consider AB's damages, if any [*in a bifurcated trial, substitute the following for the direction to go on to consider damages: in that event, you should go no further and report your findings to the court*].

If, however, you find that AB was negligent and that (his, her) negligence was also a substantial factor in causing the (accident, injury), you must then apportion the fault between AB and CD [*or, where appropriate: among AB, CD and EF*].

Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both AB and CD [*or, where appropriate: of AB, CD and EF*] and decide what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.

Using the same principles I outlined for you in determining whether CD was negligent you will be asked to answer the following questions:

"Was AB negligent?" If your answer is "Yes," you will then be asked: "Was AB's negligence also a substantial factor in causing (his, her) own injuries?" If your answer to this question is also "Yes," you will then be asked: "What was the percentage of fault of CD, [*where appropriate EF*], AB? Your answers must add up to 100%.

See PJI 2:36.1 for an example that may be given to the jury to assist it to understand the process of arriving at percentages of fault. See PJI 2:36.2 for a charge to be

given in the damages phase of a bifurcated trial before the same jury that decided liability.

The following special verdict form should be used in conjunction with PJI 2:91. PJI 1:97 should also be charged.

Special Verdict Form PJI 2:91SV-I

NOTE: The following special verdict form sets forth questions concerning several theories of liability, only some of which may be at issue in a specific trial.

After each question, insert an instruction that is dependent on the answer and that directs the jurors to the next appropriate question, e.g. "If your answer is "Yes," proceed to Question No. __," or, "If your Answer is "No," proceed no further but report your verdict to the court."

1. Was there *[state claimed condition]*?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

2. Was *[state claimed condition]* an unsafe condition?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

[Note: The special verdict form questions should be drafted to include only the specific negligence theories that the evidence in the case presents]

3. Was CD negligent in that (he, she, it) created the unsafe condition?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

4. Was CD's negligence in creating the unsafe condition a substantial factor in causing AB's injuries?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

5. Did CD know or, in the use of reasonable care, should CD have known that the unsafe condition existed?

Yes ____ No ____

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

6. Did CD have sufficient notice of the *[state claimed condition]* before the accident to correct it or take other suitable precautions before the accident occurred?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

7. Did CD fail to correct the *[state claimed condition]* or take other suitable precautions before the accident occurred?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

8. Was CD's failure to correct the unsafe condition or take other suitable precautions a substantial factor in causing AB's injuries?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

[Note: Where failure to warn is an issue, the following questions should be inserted]

9. Was the [state claimed condition] open and obvious to a person in AB's position?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

10. Did CD fail to provide an adequate warning of the [state claimed condition]?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

11. Was CD's failure to adequately warn of the [state claimed condition] a substantial factor in causing AB's injuries?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

[Note: Where comparative fault is an issue, the following questions should be inserted]

12. Was AB negligent?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

13. Was AB's negligence also a substantial factor in causing (his, her) own injuries?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

14. What was the percentage of fault of: defendant CD, plaintiff AB *[where appropriate: and EF]*?

CD ____%

EF ____%

AB ____%

Total 100%

At least five jurors must agree on the answer to this question.

[Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer]

15. *[Insert appropriate damage interrogatories]*

Comment

[See also Introductory Statement to this division, supra.]

Caveat: The pattern charge has been drafted to incorporate the open-and-obvious doctrine. When applicable, this doctrine relieves a defendant of the duty to warn of an unsafe condition that is open and

obvious to a reasonable person, but does not relieve the defendant of the duty to maintain the premises in reasonably safe condition, *Alexander v St. Mary's Institute*, 78 AD3d 1475, 912 NYS2d 153 (3d Dept 2010). It should be noted, however, that most of the Appellate Division decisions applying the open-and-obvious doctrine arise in contexts other than slip-and-fall cases, see *Page v State*, 72 AD3d 1456, 902 NYS2d 199 (3d Dept 2010) (trip and fall); *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 773 NYS2d 38 (1st Dept 2004) (trip and fall); *MacDonald v Schenectady*, 308 AD2d 125, 761 NYS2d 752 (3d Dept 2003) (trip and fall). Although there are some Appellate Division decisions that explicitly apply the open-and-obvious doctrine to slip-and-fall cases, *Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610, 916 NYS2d 155 (2d Dept 2011); *Sullivan v RGS Energy Group, Inc.*, 78 AD3d 1503, 910 NYS2d 776 (4th Dept 2010); *Headley v M & J Ltd. Partnership*, 70 AD3d 1312, 894 NYS2d 804 (4th Dept 2010); *Sewitch v LaFrese*, 41 AD3d 695, 839 NYS2d 114 (2d Dept 2007); see *Baines v G & D Ventures, Inc.*, 64 AD3d 528, 883 NYS2d 256 (2d Dept 2009); *Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420, 861 NYS2d 26 (1st Dept 2008) no appellate authority exists specifically analyzing the extent to which the open and obvious nature of slippery conditions on floors or steps is a valid defense to a claim based on the owner's failure to warn.

Based on cases cited in the first paragraph of the Comment to PJI 2:90.

The pattern charge is a specific application of the general principles dealt with in PJI 2:90. It integrates questions of unsafe condition, notice, opportunity to correct and adequate warning. As to foreseeability, see PJI 2:12; as to comparative fault, see PJI 2:36. As to the principles governing cases in which there is a claim that the hazardous condition was open and obvious, see Comment to PJI 2:90.

To establish a prima facie case against an owner or possessor, plaintiff must be able to demonstrate that defendant either created the condition that caused the accident or that it had actual or constructive notice of the condition, *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003) (citing PJI); *Eddy v Tops Friendly Markets*, 91 AD2d 1203, 459 NYS2d 196 (4th Dept 1983), *aff'd*, 59 NY2d 692, 463 NYS2d 437, 450 NE2d 243 (1983); *Hanley v Affronti*, 278 AD2d 868, 718 NYS2d 753 (4th Dept 2000); *Browne v Big V Supermarkets Inc.*, 188 AD2d 798, 591 NYS2d 223 (3d Dept 1992); *Kane v Human Services Center, Inc.*, 186 AD2d 539, 588 NYS2d 361 (2d Dept 1992). Where defendant created the unsafe condition, the question of defendant's knowledge or notice is ordinarily irrelevant and should be omitted from the charge, see *Ohanessian v Chase Manhattan Realty Leasing Corp.*, 193 AD2d 567, 598 NYS2d 204 (1st Dept 1993); *Roberts v Arrow Boat Club, Inc.*, 46 AD2d 815, 361 NYS2d 213 (2d Dept 1974). The Second Department has noted, however, that there may be circumstances in which the facts support an argument that defendant created a dangerous condition without immediately realizing either the condition's existence or its danger, *Walsh v Super Value, Inc.*, 76 AD3d 371, 904 NYS2d

121 (2d Dept 2010). In those situations, the court reasoned, defendant's knowledge or notice may be a factor in establishing its negligence and the knowledge element must be included in the charge even though the condition was created by defendant, *id.*

A. Landowner's Duty In General

The dangers to be reasonably anticipated are part of the measure the owner's duty of care and, thus, are factors in determining the frequency of inspection and the intensity of the maintenance required, *Cameron v H. C. Bohack Co.*, 27 AD2d 362, 280 NYS2d 483 (2d Dept 1967). Moreover, the location of the hazard may affect the owner's duty of care. For example, in *Weisenthal v Pickman*, 153 AD2d 849, 545 NYS2d 369 (2d Dept 1989), the court declined to apply the holding in *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 (1986), which involved an accident that occurred on the crowded outdoor front steps of a popular museum, to a case involving a fall on a debris-strewn indoor stairwell that could have been swept clean daily. The reasoning of *Weisenthal* has been applied to actions involving falls at other indoor settings where debris had collected over time, *Benn v Municipal Housing Authority for City of Yonkers*, 275 AD2d 755, 713 NYS2d 544 (2d Dept 2000); *Fundaro v New York*, 272 AD2d 516, 708 NYS2d 149 (2d Dept 2000); but see *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267 (2005) (beer bottle left overnight in stairwell of apartment building).

1. *Statutes and Ordinances Affecting Standard of Care*

There are instances where the applicable standard of care is set by statute. Thus, the provisions of Multiple Dwelling Law § 80(1) and (2) must be charged with respect to the duty owed by the owner of a multiple dwelling to keep the hallways clean, *Labetti v Fanley Associates Inc.*, 27 AD2d 654, 276 NYS2d 904 (1st Dept 1967). However, the statute or ordinance must be one that is relevant to the occurrence involved in the case. For example, while Multiple Residence Law § 174 requires an owner to keep premises in good repair, clean and free of matter dangerous to life or health, the statute is intended to provide for sanitation but does not cover rain, snow and ice and, therefore, should not be charged in a snow and ice case, *Doyle v Streifer*, 34 AD2d 183, 310 NYS2d 165 (3d Dept 1970), or a case involving a moss-like substance on an outdoor walkway, *Hamlin v McTighe*, 240 AD2d 792, 658 NYS2d 150 (3d Dept 1997).

Since statutes concerning cleanliness of floors, stairs and yards are not construed to impose absolute liability, notice, actual or constructive, is required in an action based on such a statute, see *Labetti v Fanley Associates Inc.*, 27 AD2d 654, 276 NYS2d 904 (1st Dept 1967); *Zapin v Israel*, 285 App Div 968, 138 NYS2d 675 (2d Dept 1955). Likewise, where Multiple Residence Law § 174 imposes a duty to keep the premises in good repair, clean and free of dangerous matter, liability attaches only if defendant had actual or constructive notice of the defec-

tive condition and failed to make the needed repairs within a reasonable time after acquiring such notice, *Contento v Albany Medical Center Hospital*, 57 AD2d 691, 394 NYS2d 74 (3d Dept 1977); see *Hamlin v McTighe*, 240 AD2d 792, 658 NYS2d 150 (3d Dept 1997).

For charges with respect to violations of statutes or ordinances, see PJI 2:25 and PJI 2:29.

2. Defendant's Self-Imposed Custom and Practice

Evidence of defendant's self-imposed custom and practice that exceeds the duty of reasonable care may not be used to establish a duty different from that imposed by the common law, *Pomahac v TrizecHahn* 1065 Ave. of Americas, LLC, 65 AD3d 462, 884 NYS2d 402 (1st Dept 2009); see *Newsome v Cservak*, 130 AD2d 637, 515 NYS2d 564 (2d Dept 1987) (no liability for failing to follow self-imposed policy of sanding and salting mall parking lot and roads during snowfall).

For a charge on the effect of customary business practices on the standard of care, see PJI 2:16.

B. Actual or Constructive Notice Requirement

1. In General

In a common-law action based on an unsafe condition not created by defendant, notice, actual or constructive, is essential, *Herman v State*, 63 NY2d 822, 482 NYS2d 248, 472 NE2d 24 (1984); *Bogart v F.W. Woolworth Co.*, 24 NY2d 936, 301 NYS2d 995, 249 NE2d 771 (1969); *Appleby v Webb*, 186 AD2d 1078, 588 NYS2d 228 (4th Dept 1992); *Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d 378, 521 NYS2d 678 (1st Dept 1987). A factual issue regarding actual notice may be established prima facie by evidence that a wet-floor sign was placed near the accident scene, *Hilsman v Sarwil Associates, L.P.*, 13 AD3d 692, 786 NYS2d 225 (3d Dept 2004). However, the presence of such a sign will not preclude a finding that defendant lacked actual notice of the wet-floor condition in a proper case, *id.*

A general awareness that litter or some other unsafe condition may be present is not sufficient to place defendant on constructive notice, *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 (1986); *Smith v May Dept. Store, Co.*, 270 AD2d 870, 705 NYS2d 153 (4th Dept 2000); see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493, 646 NE2d 795 (1994); *Stewart v Canton-Potsdam Hosp. Foundation, Inc.*, 79 AD3d 1406, 912 NYS2d 773 (3d Dept 2010) (ice condition); *Boucher v Watervliet Shores Associates*, 24 AD3d 855, 804 NYS2d 511 (3d Dept 2005); see also *Solazzo v New York City Transit Authority*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 (2005) (general awareness that subway stairs and platform become wet during inclement weather insufficient to constitute constructive knowledge of specific condition of subway steps during ongoing

snow, sleet and rain storm); *Bader v River Edge at Hastings Owners Corp.*, 159 AD3d 780, 72 NYS3d 145 (2d Dept 2018) (general awareness that, at times, icy condition developed at unspecified locations in parking lot insufficient to constitute notice of specific black ice condition at location where plaintiff fell). Likewise, plaintiff's observation of a similar object at a different location shortly before the occurrence does not charge defendant with notice of the condition that caused the injury, *Gordon v American Museum of Natural History*, *supra*.

The jury may infer from the irregularity, width, depth and appearance of the defect whether the condition existed for such time that defendant, in the exercise of reasonable care, should have known of it, *Taylor v New York City Transit Authority*, 48 NY2d 903, 424 NYS2d 888, 400 NE2d 1340 (1979); *Reardon v Benderson Development Co., Inc.*, 266 AD2d 869, 697 NYS2d 893 (4th Dept 1999); *Ferlito v Great South Bay Associates*, 140 AD2d 408, 528 NYS2d 111 (2d Dept 1988); see *Hecker v New York City Housing Authority*, 245 AD2d 131, 665 NYS2d 660 (1st Dept 1997) (plaintiff described large defect).

With respect to constructive notice, the condition must have existed for a sufficient length of time so that, in the exercise of reasonable care, defendant not only should have discovered it but also could have corrected it, *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267 (2005); *Kennedy v Wegmans Food Markets, Inc.*, 90 NY2d 923, 664 NYS2d 259, 686 NE2d 1353 (1997), *rev'g* for the reasons stated in the AD dissent, 239 AD2d 898, 660 NYS2d 103; *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 (1986); *Madrid v New York*, 42 NY2d 1039, 399 NYS2d 205, 369 NE2d 761 (1977); *Hightower v Alexander*, 207 AD2d 960, 617 NYS2d 74 (4th Dept 1994) (issues of fact as to whether oily spot in parking lot where plaintiff fell existed long enough to permit defendants' employees to remedy defect and whether condition was visible and apparent). In the absence of any evidence of how long a substance was on a floor before plaintiff fell, plaintiff may not rely on a theory of constructive notice, *Kennedy v Wegman's Food Markets, Inc.*, *supra*; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 781 NYS2d 648 (1st Dept 2004); *Grimes v Golub Corp.*, 188 AD2d 721, 590 NYS2d 590 (3d Dept 1992); *Torri v Big V of Kingston, Inc.*, 147 AD2d 743, 537 NYS2d 629 (3d Dept 1989); see *Faricelli v TSS Seedman's, Inc.*, 94 NY2d 772, 698 NYS2d 588, 720 NE2d 864 (1999) (standing alone, existence of blackened banana peel on floor in housewares section of department store not sufficient to establish constructive notice); *Andersen v Park Center Associates*, 250 AD2d 473, 673 NYS2d 396 (1st Dept 1998) (existence of wet spot, in and of itself, cannot demonstrate requisite notice).

Constructive notice may be established by evidence of the long continued existence of the condition, *Andersen v Park Center Associates*, 250 AD2d 473, 673 NYS2d 396 (1st Dept 1998); *Galieta v Young Men's Christian Ass'n of City of Schenectady*, 32 AD2d 711, 300 NYS2d 170 (3d Dept 1969); *Bergmann v Daino*, 26 AD2d 889, 274 NYS2d 309 (3d Dept 1966). How much time is required to establish constructive no-

tice depends both on the nature and location of the foreign substance or other hazard. For example, an hour is insufficient with respect to fecal matter on an apartment house stoop, *Goodman v Silverman*, 231 App Div 84, 246 NYS 319 (1st Dept 1930). In contrast, the presence of beans on a food market floor for 15 or 20 minutes, *Wheeler v Deutch*, 242 App Div 641, 272 NYS 161 (2d Dept 1934), or melted ice cream on a supermarket floor for 30 to 45 minutes presented a jury question concerning constructive notice, *Greco v Acme Super Markets, Inc.*, 17 AD2d 899, 233 NYS2d 406 (4th Dept 1962). Likewise, a jury question was presented as to the presence of broken jars of baby food on a supermarket floor, which had not been cleaned or inspected for at least 50 minutes, where the trier of fact could find that a hazardous condition had been present for more than 15 to 20 minutes, *Negri v Stop and Shop, Inc.*, 65 NY2d 625, 491 NYS2d 151, 480 NE2d 740 (1985); see *Allein v Niagara Frontier Services, Inc.*, 209 AD2d 926, 619 NYS2d 226 (4th Dept 1994) (evidence that oily substance similar to salad dressing contained in bottles on nearby display had accumulated underneath and soaked rug raised factual issue whether substance had been present for length of time sufficient to place defendant on constructive notice). Notice of the danger created by water resulting from rain or snow cannot be inferred from the fact that a heavy rain began shortly before plaintiff was injured, *Boccaccino v Our Lady of Pity Roman Catholic Church*, 18 AD2d 1055, 238 NYS2d 911 (1st Dept 1963). However, such notice may be inferred from the existence of a brown and yellow ceiling stain from which water was leaking, *Andersen v Park Center Associates*, *supra*.

Where the evidence might justify an inference that the unsafe condition existed for a sufficient period of time but is equally consistent with a finding that the dangerous condition had been created shortly before plaintiff's fall, plaintiff is not entitled to recover, *Anderson v Klein's Foods, Inc.*, 139 AD2d 904, 527 NYS2d 897 (4th Dept 1988), *aff'd*, 73 NY2d 835, 537 NYS2d 481, 534 NE2d 319 (1988); *Pianforini v Kelties Bum Steer*, 258 AD2d 634, 685 NYS2d 804 (2d Dept 1999); *Young v Whitman Deli, Inc.*, 214 AD2d 560, 625 NYS2d 232 (2d Dept 1995); see *Ruggiero v Waldbaums Supermarkets, Inc.*, 242 AD2d 268, 661 NYS2d 37 (2d Dept 1997). Standing alone, the fact that an item was crushed, dirty, withered, or shriveled up is normally insufficient to raise a triable issue with respect to notice, *Strowman v Great Atlantic and Pacific Tea Co., Inc.*, 252 AD2d 384, 675 NYS2d 82 (1st Dept 1998); *Cuddy v Waldbaum, Inc.*, 230 AD2d 703, 646 NYS2d 51 (2d Dept 1996).

The fact that defendant's employees may have been in the vicinity of the accident, standing alone, is not sufficient by itself to establish constructive notice, *Strowman v Great Atlantic and Pacific Tea Co., Inc.*, 252 AD2d 384, 675 NYS2d 82 (1st Dept 1998); *Benware v Big V Supermarkets, Inc.*, 177 AD2d 846, 576 NYS2d 461 (3d Dept 1991). However, constructive notice has been inferred where there is evidence that defendant's employees were in the immediate vicinity of the dangerous condition and could easily have noticed and removed it, *Rose v Da Ecib USA*, 259 AD2d 258, 686 NYS2d 19 (1st Dept 1999); see *Qevani by Qevani v 1957 Bronxdale Corp.*, 232 AD2d 284, 649 NYS2d

11 (1st Dept 1996) (given that defendant employed two building maintenance people at time of accident, it could not be said, as a matter of law, that 90 minutes was insufficient time to allow for correction of visible and apparent defect). An inference of notice may also fairly be drawn from an inspection report, prepared a sufficient length of time before the accident, indicating the existence of the defective condition, and evidence that the defective condition was not repaired or inspected between the time the report was prepared and the accident, *Perez v New York City Transit Authority*, 289 AD2d 119, 735 NYS2d 38 (1st Dept 2001).

2. Notice of Recurrent Conditions

Notwithstanding that general awareness that some unsafe condition may be present is not sufficient for constructive notice, the courts have reasoned that actual knowledge of a specific recurrent dangerous condition is qualitatively different and may give rise to a finding of notice, *Black v Kohl's Dept. Stores, Inc.*, 80 AD3d 958, 914 NYS2d 469 (3d Dept 2011); *Benn v Municipal Housing Authority for City of Yonkers*, 275 AD2d 755, 713 NYS2d 544 (2d Dept 2000); *Loguidice v Fiorito*, 254 AD2d 714, 678 NYS2d 225 (4th Dept 1998); *Migli v Davenport*, 249 AD2d 932, 672 NYS2d 551 (4th Dept 1998); see *Erikson v J.I.B. Realty Corp.*, 12 AD3d 344, 783 NYS2d 661 (2d Dept 2004); *Colt v Great Atlantic & Pacific Tea Co., Inc.*, 209 AD2d 294, 618 NYS2d 721 (1st Dept 1994). Thus, in *Weisenthal v Pickman*, 153 AD2d 849, 545 NYS2d 369 (2d Dept 1989), the court held that when the evidence supports a finding that a landowner has actual knowledge that a particular dangerous condition recurs, the landowner is charged with constructive notice of each specific recurrence of that condition, see *Anderson v Great Eastern Mall, L.P.*, 74 AD3d 1760, 902 NYS2d 283 (4th Dept 2010); *Sewitch v LaFrese*, 41 AD3d 695, 839 NYS2d 114 (2d Dept 2007); *Erikson v J.I.B. Realty Corp.*, *supra*; *Uhlich v Canada Dry Bottling Co. of New York*, 305 AD2d 107, 758 NYS2d 650 (1st Dept 2003); *Lowe v Spada*, 282 AD2d 815, 722 NYS2d 820 (3d Dept 2001); *Endres v Mingles Restaurant, Ltd.*, 271 AD2d 207, 706 NYS2d 32 (1st Dept 2000); *Loguidice v Fiorito*, *supra* (recurrent icy condition); *Migli v Davenport*, *supra*; *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 (1st Dept 1996). Further, in *Black v Kohl's Dept. Stores, Inc.*, *supra*, the Third Department held that knowledge of a recurring dangerous condition can give rise to constructive notice of that condition, even where there is no claim that the condition was regularly unaddressed and there is evidence that defendant's employee inspected the area less than an hour before the accident. Notably, the Black court applied the recurring-condition principle to a hazard created by store patrons, who regularly left merchandise on the floor, *id.*

A jury question was presented where plaintiff's evidence tended to show that defendant negligently maintained the staircase in question by failing to implement a cleanup schedule sufficiently frequent to avoid the creation of a recurrent dangerous condition of which it had constructive notice, *Lopez v New York City Housing Authority*, 255 AD2d 160,

679 NYS2d 398 (1st Dept 1998). Similarly, a question of fact existed as to defendant's notice of a dangerous wet condition on an interior stair in a subway station, where plaintiff stated that he had observed the same condition on many prior occasions and that the source of the condition was a leaky pipe, *Darbinyan v 1806 Ocean Realty, LLC*, 185 AD3d 1003, 129 NYS3d 184 (2d Dept 2020); *Mauge v Barrow Street Ale House*, 70 AD3d 1016, 895 NYS2d 499 (2d Dept 2010); *Talavera v New York City Transit Authority*, 41 AD3d 135, 836 NYS2d 610 (1st Dept 2007); see *Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 641, 127 NYS3d 584 (2d Dept 2020) (issue of fact as to whether gymnasium's wet floor caused by leaking roof was recurring condition). However, a defendant could not be charged with having constructive notice of drinks spilled on a dance floor on the ground that such spills were a recurring condition on the premises, *Gloria v MGM Emerald Enterprises, Inc.*, 298 AD2d 355, 751 NYS2d 213 (2d Dept 2002); see *Bader v River Edge at Hastings Owners Corp.*, 159 AD3d 780, 72 NYS3d 145 (2d Dept 2018) (prima facie evidence of lack of recurring condition where defendant lacked knowledge of any prior ponding of water or icy condition in parking lot); *Mauge v Barrow Street Ale House*, 70 AD3d 1016, 895 NYS2d 499 (2d Dept 2010) (no recurrent condition giving rise to notice where no evidence of prior complaints and area in question given sufficient regular inspections).

C. Conditions Created by Defendant

Generally, plaintiff is not required to prove notice of the unsafe condition when the condition was created by defendant or defendant's agent or employee, *McKee v State*, 75 AD3d 893, 906 NYS2d 632 (3d Dept 2010); *Schwartz v Mittelman*, 220 AD2d 656, 632 NYS2d 667 (2d Dept 1995); *Ohanessian v Chase Manhattan Realty Leasing Corp.*, 193 AD2d 567, 598 NYS2d 204 (1st Dept 1993); *Cruz v New York City Transit Authority*, 136 AD2d 196, 526 NYS2d 827 (2d Dept 1988). Thus, notice is not required if the condition is the result of a prior defective repair, *Princiotta v Materdomini*, 45 AD2d 883, 358 NYS2d 13 (2d Dept 1974). In *Walsh v Super Value, Inc.*, 76 AD3d 371, 904 NYS2d 121 (2d Dept 2010), the court stated that there may be circumstances where the facts support an argument that defendant created a dangerous condition without immediately realizing either the condition's existence or its danger. In those situations, the Walsh court stated, defendant owner's knowledge or notice of the danger is an element of plaintiff's negligence claim, *id.*

Plaintiff does not establish prima facie that defendant created the condition that caused the accident by evidence that a greasy substance that looked like soup was on the floor of a restaurant in an area traversed by waiters going to and from the kitchen, *Beutenmiller v West End Tavern*, 1 NY2d 652, 150 NYS2d 21, 133 NE2d 510 (1956); *Mauge v Barrow Street Ale House*, 70 AD3d 1016, 895 NYS2d 499 (2d Dept 2010), by evidence that the small box in a supply room over which plaintiff tripped had not been there 15 minutes prior to the occurrence, *Fink v Board of Educ. of City of N.Y.*, 117 AD2d 704, 498 NYS2d 440

(2d Dept 1986); or by evidence that there was a jello-like substance on the floor of a mental hospital, *Pascual v State*, 23 AD2d 518, 255 NYS2d 450 (3d Dept 1965).

D. Causation

The dangerous condition must have been a proximate cause of plaintiff's injury, *Richardson-Dorn v Golub Corp.*, 252 AD2d 790, 676 NYS2d 260 (3d Dept 1998); *Carlson v Rondout Nat. Bank*, 14 AD2d 644, 218 NYS2d 261 (3d Dept 1961); see *Acunia ex rel. Salgado v New York City Dept. of Educ.*, 68 AD3d 631, 891 NYS2d 70 (1st Dept 2009). However, where there are several unsafe conditions present, it is not necessary that plaintiff prove which condition caused the injury, as long as it is natural and reasonable to infer that the injury was caused by one of them, *Gramm v State*, 28 AD2d 787, 281 NYS2d 235 (3d Dept 1967), *aff'd*, 21 NY2d 1025, 291 NYS2d 7, 238 NE2d 498 (1968) (worn, dirty, littered stairs); see *Ohadi v Magnetic Construction Group Corp.*, 182 AD3d 474, 122 NYS3d 612 (1st Dept 2020) (after plaintiff fell down stairs in area that had just been sanded and painted, his clothes were dusty and his jacket was wet with paint); *Kelsey v Port Authority of New York and New Jersey*, 52 AD2d 801, 383 NYS2d 347 (1st Dept 1976) (cigarette butts, paper cups and wetness on steps).

Further, where there is evidence of a spill in the area where plaintiff slipped and fell, plaintiff is not required to identify the precise substance that caused the accident or demonstrate the precise manner in which the accident occurred, *Mott v Big V Supermarkets Inc.*, 188 AD2d 870, 591 NYS2d 581 (3d Dept 1992); *Weisenthal v Pickman*, 153 AD2d 849, 545 NYS2d 369 (2d Dept 1989); see *Munno v State*, 266 AD2d 694, 698 NYS2d 107 (3d Dept 1999). Nonetheless, while plaintiff bears no burden to identify the substance that caused the slip and fall, mere speculation regarding causation is inadequate to sustain a cause of action, *Zanki v Cahill*, 2 AD3d 197, 768 NYS2d 471 (1st Dept 2003), *aff'd*, 2 NY3d 783, 780 NYS2d 307, 812 NE2d 1257 (2004) (evidence that plaintiff's sleeve was wet after fall and allegations of recurrent condition of spilled food, drink and ice on stairs insufficient to establish dangerous condition proximately causing accident); *Segretti v Shorenstein Co., East, L.P.*, 256 AD2d 234, 682 NYS2d 176 (1st Dept 1998) (plaintiff's testimony that there was oily substance on his shoes after accident and that he saw "stuff" on lobby floor insufficient to prove causation).

Indeed, a plaintiff's inability to identify the cause of a fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused plaintiff's injuries would be based on speculation, *Torres v Board of Education of City of New York*, 175 AD3d 1584, 109 NYS3d 346 (2d Dept 2019); *Smith v Maloney*, 91 AD3d 1259, 936 NYS2d 791 (3d Dept 2012); *Califano v Maple Lanes*, 91 AD3d 896, 938 NYS2d 140 (2d Dept 2012); *Siegel v New York*, 86 AD3d 452, 928 NYS2d 1 (1st Dept 2011); see *Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189, 772 NYS2d 59 (1st Dept 2004). The rationale for this rule is that if a plaintiff cannot identify the cause of a fall, it is just as likely that the fall could

have been caused by some factor for which the defendant is not responsible, e.g., misstep by plaintiff or loss of balance, *Califano v Maple Lanes*, supra; *Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 790 NYS2d 693 (2d Dept 2005); see *Torres v Board of Education of City of New York*, supra. To satisfy the requirement that he or she identify the cause of a fall, the plaintiff must identify the defect or hazard itself; mere identification of the approximate location of the accident is insufficient, see *Siegel v New York*, supra. Plaintiff need not identify the defect or hazard at the time of the accident, see *Tomaino v 209 East 84th Street Corp.*, 72 AD3d 460, 900 NYS2d 245 (1st Dept 2010). Rather, plaintiff can identify the defect or hazard after the accident occurs, provided there is evidence that, at the time plaintiff identified the defect or hazard, the defect or hazard was in the same condition as it was at the time of the accident, see id.

If causation is undisputed, the pattern charge should be modified to delete that issue. If there is a claim of intervening or concurrent causation, further charges on those issues are required, see PJI 2:71, 2:72.

E. Comparative Fault

Slip and fall cases are subject to comparative-fault analysis, but not the doctrine of primary assumption of risk, *Alexander v St. Mary's Institute*, 78 AD3d 1475, 912 NYS2d 153 (3d Dept 2010). As is true with other premises-liability cases, the open and obvious nature of the condition may be relevant to plaintiff's comparative fault, id.

F. Common Conditions Causing Slip and Fall Accidents

Washed floors or stairs—Washing can give rise to slippery floors and stairs and may lead to unreasonably unsafe conditions in some circumstances, *Sharac v Perretta*, 3 AD2d 935, 163 NYS2d 138 (2d Dept 1957), aff'd, 3 NY2d 965, 169 NYS2d 35, 146 NE2d 792 (1957) (triable question of negligence raised where person washing stairs directed plaintiff to proceed over wet stairway and safer path was blocked by washer's pail). The time and place of the floor washing are factors in determining whether the conduct may be deemed negligent. For example, washing the floor of a railroad station, *Curtiss v Lehigh Valley R. Co.*, 233 NY 554, 135 NE 915 (1922), or an apartment hall or stairway, *Samuels v Terry Holding Co.*, 227 App Div 68, 237 NYS 99 (1st Dept 1929), aff'd, 253 NY 593, 171 NE 797 (1930); *Wigdorowitz v Abrahams*, 237 App Div 81, 260 NYS 326 (1st Dept 1932), is not, by itself, unreasonable. However, washing the floor of a store during business hours, rather than after closing, may present a question of fact as to negligence, *Walz v Paul Helfer, Inc.*, 286 NY 408, 36 NE2d 640 (1941); *McDonald v Louis K. Liggett Co.*, 241 App Div 913, 272 NYS 95 (4th Dept 1934).

Wet Weather—The presence of puddles, slush or mud resulting from rain or snow is not alone sufficient to impose liability, unless the construction of the entranceway or floor is inherently dangerous or the

owner or possessor, with actual or constructive notice that the entranceway or floor has become so wet as to be dangerous, fails to remedy the condition in a timely manner, *Miller v Gimbel Bros.*, 262 NY 107, 186 NE 410 (1933); *Hilsman v Sarwil Associates, L.P.*, 13 AD3d 692, 786 NYS2d 225 (3d Dept 2004); *Keir v State*, 188 AD2d 918, 591 NYS2d 621 (3d Dept 1992); *Wessels v Service Merchandise Inc.*, 187 AD2d 837, 589 NYS2d 971 (3d Dept 1992); see *Ford v Citibank, N.A.*, 11 AD3d 508, 783 NYS2d 622 (2d Dept 2004). A factual issue regarding actual notice of a wet floor may be established prima facie by evidence that a wet-floor sign was placed near the accident scene, *Hilsman v Sarwil Associates, L.P.*, supra. However, the presence of such a sign will not preclude a finding that defendant lacked actual notice of the condition in a proper case, *id*; see *Beck v Stewart's Shops Corp.*, 156 AD3d 1040, 66 NYS3d 79 (3d Dept 2017).

Under the storm-in-progress rule, a wet, slippery entranceway caused by tracked-in snow and slush is a reality of winter weather that a landowner ordinarily is not required to rectify until the underlying weather condition has abated, *Zonitch v Plaza at Latham LLC*, 255 AD2d 808, 680 NYS2d 304 (3d Dept 1998); see *Solazzo v New York City Transit Authority*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 (2005) (storm-in-progress rule applicable to subway steps that become wet during ice and snow storm). Similarly, a defendant will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter, *Sherman v New York State Thruway Authority*, 27 NY3d 1019, 32 NYS3d 568, 52 NE3d 231 (2016). Additionally, a defendant is not obligated to provide a constant remedy to the problem of water being tracked into a building as a result of rainy weather, *Gibbs v Port Authority of New York*, 17 AD3d 252, 794 NYS2d 320 (1st Dept 2005); *Ford v Citibank, N.A.*, 11 AD3d 508, 783 NYS2d 622 (2d Dept 2004). The fact that an outdoor walkway becomes wet from rainfall is insufficient by itself to establish the existence of a dangerous condition, *Cavorti v Winston*, 307 AD2d 1018, 763 NYS2d 777 (2d Dept 2003). Likewise, the fact that subway steps regularly become wet during inclement weather was held insufficient to place the Transit Authority on notice of the specific slippery condition resulting from snow and sleet that led to plaintiff's accident, *Solazzo v New York City Transit Authority*, supra; see *Santiago v JP Morgan Chase and Co.*, 96 AD3d 642, 947 NYS2d 103 (1st Dept 2012) (evidence of known problems with slippery floor whenever weather was inclement and failure to use previously used corrective measures sufficient to raise triable issue of fact). The flooding of a building's lobby by rainwater is distinguishable from situations in which the storm-in-progress rule is typically applied, *Rijos v Riverbay Corp.*, 105 AD3d 423, 963 NYS2d 26 (1st Dept 2013). Further, even where the doctrine is applicable to indoor accidents, defendant's maintenance efforts must be scrutinized to ascertain whether defendant exercised reasonable care to remedy the dangerous condition, *id*.

Flooring material—The use of flooring material that is inherently slippery is not, by itself, actionable negligence, *Cietek v Bountiful Bread*

of Stuyvesant Plaza, Inc., 74 AD3d 1628, 903 NYS2d 213 (3d Dept 2010); Sarmiento v C & E Associates, 40 AD3d 524, 837 NYS2d 57 (1st Dept 2007); Waiters v Northern Trust Co. of New York, 29 AD3d 325, 816 NYS2d 18 (1st Dept 2006); Bennett v New York City Transit Authority, 4 AD3d 265, 772 NYS2d 320 (1st Dept 2004), *aff'd*, 3 NY3d 745, 787 NYS2d 711, 821 NE2d 137 (2004); Duffy v Universal Maintenance Corp., 227 AD2d 238, 642 NYS2d 282 (1st Dept 1996), even where there is evidence that defendant may have had notice of the condition, Eichelbaum v Douglas Elliman, LLC, 52 AD3d 210, 859 NYS2d 145 (1st Dept 2008); DeMartini v Trump 767 5th Avenue, LLC, 41 AD3d 181, 837 NYS2d 137 (1st Dept 2007). The same is true of inherently slippery flooring that becomes more slippery when wet, Wasserstrom v New York City Transit Authority, 267 AD2d 36, 699 NYS2d 378 (1st Dept 1999). Thus, the fact that terrazzo is slippery when wet does not make construction with such material inherently dangerous, and the use of such flooring is not in itself negligent, Berman v H. J. Enterprises, Inc., 13 AD2d 199, 214 NYS2d 945 (1st Dept 1961); see Madrid v New York, 42 NY2d 1039, 399 NYS2d 205, 369 NE2d 761 (1977) (no actionable dangerous condition created by light drizzle that fell on terrazzo entrance during five minutes before opening of hospital clinic; in any event, defendant had insufficient opportunity to provide remedy). No liability may be imposed for the use of an inherently smooth, potentially slippery tiled or stone floor absent evidence of a defect or applicable industry standard, Kalish v HEI Hospitality, LLC, 114 AD3d 444, 980 NYS2d 80 (1st Dept 2014). The same rule applies to bath mats, *id*; see Azzaro v Super 8 Motels, Inc., 62 AD3d 525, 880 NYS2d 14 (1st Dept 2009) (no liability where plaintiff failed to identify common-law, statutory or relevant industry standard imposing duty on hotel owners to supply nonskid surfacing in bathtub area). Expert evidence regarding a flooring material's unsafe coefficient of friction value may be sufficient to raise a question of fact as to negligence, but only if a specific industry standard is referenced, Sarmiento v C & E Associates, *supra*, and the basis for the expert's safety standard is identified, Pomahac v TrizecHahn 1065 Ave. of Americas, LLC, 65 AD3d 462, 884 NYS2d 402 (1st Dept 2009); see Murphy v Conner, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796 (1994). Further, in a slip-and-fall case involving an injured patron or customer, standards such as those provided by the Occupational Safety and Health Administration, which pertain only to the safety of employees, are inapplicable, Cietek v Bountiful Bread of Stuyvesant Plaza, Inc., *supra*.

The failure to use safety measures such as rubber mats on floors that are inherently slippery when wet may constitute negligence, Pignatelli v Gimbel Bros., Inc., 285 App Div 625, 140 NYS2d 23 (1st Dept 1955), *aff'd*, 309 NY 901, 131 NE2d 578 (1955) (jury question where evidence presented that terrazzo floor sloped ten inches downward and rubber mats not used). Expert testimony as to customary safety practices, such as the proper placement of mats, sawdust or wax on a wet slippery floor, may be used to establish a *prima facie* case of negligence, Fortgang v Chase Manhattan Bank, 23 NY2d 895, 298 NYS2d 92, 245 NE2d 818 (1969); Young v New York, 33 AD2d 915, 307 NYS2d 576 (2d

Dept 1970); *Berman v H. J. Enterprises, Inc.*, 13 AD2d 199, 214 NYS2d 945 (1st Dept 1961).

Slippery Substances Such as Paint, Wax and Oil Applied to Surfaces—Under the traditional rule, evidence that a floor is smooth or slippery because of wax, polish, paint or oil does not give rise to an inference of negligence; instead, there must be evidence of negligent washing or application of wax or oil, *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796 (1994); *Galler v Prudential Ins. Co. of America*, 63 NY2d 637, 479 NYS2d 509, 468 NE2d 691 (1984) (citing PJI); *Conroy v Montgomery Ward & Co.*, 300 NY 540, 89 NE2d 255 (1949); *Nelson v Salem Danish Lutheran Church*, 296 NY 870, 72 NE2d 608 (1947); *De Paris v Women's Nat. Republican Club, Inc.*, 148 AD3d 401, 48 NYS3d 383 (1st Dept 2017); *Goldin v Riverbay Corp.*, 67 AD3d 489, 889 NYS2d 557 (1st Dept 2009); *Purcell v York Bldg. Maintenance Corp.*, 57 AD3d 210, 869 NYS2d 32 (1st Dept 2008); *Kudrov v Laro Services Systems, Inc.*, 41 AD3d 315, 837 NYS2d 153 (1st Dept 2007); *German v Campbell Inn*, 37 AD3d 405, 829 NYS2d 631 (2d Dept 2007); *Majchrzak v Harry's Harbour Place Grille, Inc.*, 28 AD3d 1109, 814 NYS2d 424 (4th Dept 2006). However, the Second Department has stated that a person who knowingly makes a floor dangerously slippery by causing wax, polish or paint to be applied acts negligently and is not shielded by the traditional rule regardless of the manner in which the substance was applied, *Walsh v Super Value, Inc.*, 76 AD3d 371, 904 NYS2d 121 (2d Dept 2010).

An inference of negligence may arise from the placement of a loose mat or runner on top of a waxed floor, *Curren v O'Connor*, 304 NY 515, 109 NE2d 605 (1952); *Napolitano v Dhingra*, 249 AD2d 523, 672 NYS2d 369 (2d Dept 1998); *Olsen v St. Margaret of Scotland Roman Catholic Church*, 21 AD2d 827, 251 NYS2d 512 (2d Dept 1964); but see *Portanova v Trump Taj Mahal Associates*, 270 AD2d 757, 704 NYS2d 380 (3d Dept 2000) (no recovery for hotel guest who slipped on bath mat placed on marble bathroom floor), or from evidence that there was a piece or ridge of wax on the floor, a residue of wax, a streak in the wax or oil on the floor where plaintiff slipped, or oil or wax on plaintiff's shoes, clothing or hands, *Harrison v Senator-Ridge Corporation*, 290 NY 770, 50 NE2d 104 (1943); *Conroy v Montgomery Ward & Co.*, 275 App Div 980, 90 NYS2d 169 (3d Dept 1949), *aff'd*, 300 NY 540, 89 NE2d 255 (1949); *Ullman v Cohn*, 248 AD2d 200, 669 NYS2d 591 (1st Dept 1998); *Garrison v Lockheed Aircraft Service-New York, Inc.*, 24 AD2d 998, 266 NYS2d 282 (2d Dept 1965); see *Galler v Prudential Ins. Co. of America*, 63 NY2d 637, 479 NYS2d 509, 468 NE2d 691 (1984); *Budrow v Grand Union Co.*, 302 NY 804, 99 NE2d 559 (1951). A *prima facie* case of negligent application of wax may be established through testimony from a qualified expert, *Pike v Sillins*, 31 AD2d 805, 297 NYS2d 406 (1st Dept 1969).

Swimming Pool Decks and Bath House Floors—In general, a defendant will not be held liable for a slippery condition of platform, deck, or ledge surrounding a swimming pool or on the floor of a bath

house, as those conditions are “necessarily incidental” to the use of those facilities, *Conroy v Saratoga Springs Authority*, 259 App Div 365, 19 NYS2d 538 (3d Dept 1940), *aff’d*, 284 NY 723, 31 NE2d 197 (1940); *Sciarello v Coast Holding Co.*, 242 App Div 802, 274 NYS 776 (2d Dept 1934), *aff’d*, 267 NY 585, 196 NE 591 (1935); *Dove v Manhattan Plaza Health Club*, 113 AD3d 455, 978 NYS2d 184 (1st Dept 2014); *Rizzo v Sherwin-Williams Co.*, 49 AD3d 847, 854 NYS2d 216 (2d Dept 2008); *Martinez v New York*, 276 AD2d 756, 715 NYS2d 167 (2d Dept 2000); *Valdez by Valdez v New York*, 148 AD2d 697, 539 NYS2d 445 (2d Dept 1989); see *Herrera v Piano*, 125 AD2d 548, 509 NYS2d 829 (2d Dept 1986). However, water accumulation on an indoor pool deck from a leaking overhead pipe or ductwork is not “necessarily incidental” to the use of a pool, and a defendant may be held liable for a plaintiff’s slip and fall caused by such condition, *O’Brien v Asphalt Green, Inc.*, 193 AD3d 1061, 147 NYS3d 114 (2d Dept 2021).

Miscellaneous Substances and Items—The following substances and items have been found to create dangerous conditions: spilled baby food, *Negri v Stop and Shop, Inc.*, 65 NY2d 625, 491 NYS2d 151, 480 NE2d 740 (1985); lettuce leaves, *Bianchi v Loblaw Groceterias, Inc.*, 304 NY 886, 110 NE2d 500 (1953); *Browne v Big V Supermarkets Inc.*, 188 AD2d 798, 591 NYS2d 223 (3d Dept 1992); garbage and rubbish and other debris on a stairway or parking lot, *Diehl v Myron Garden Apartments*, 297 NY 1021, 80 NE2d 539 (1948); *Uhlich v Canada Dry Bottling Co. of New York*, 305 AD2d 107, 758 NYS2d 650 (1st Dept 2003); *Weisenthal v Pickman*, 153 AD2d 849, 545 NYS2d 369 (2d Dept 1989); *Regan v State*, 19 AD2d 574, 239 NYS2d 992 (3d Dept 1963); wet paper towels, *Fundaro v New York*, 272 AD2d 516, 708 NYS2d 149 (2d Dept 2000); mashed fruit hidden by sawdust, *Reilly v American Meat & Supply Co.*, 248 NY 536, 162 NE 515 (1928); paste, grease and rubbish resulting from laying stair treads, *Willett v United States Rubber Co.*, 236 NY 546, 142 NE 277 (1923); cigarette butts and paper wrappings on worn, wet, dirty stairway, *Gramm v State*, 28 AD2d 787, 281 NYS2d 235 (3d Dept 1967), *aff’d*, 21 NY2d 1025, 291 NYS2d 7, 238 NE2d 498 (1968); cigarette butts and paper cups on steps, *Kelsey v Port Authority of New York and New Jersey*, 52 AD2d 801, 383 NYS2d 347 (1st Dept 1976); egg drippings on the floor of a supermarket, *Bransfield v Grand Union Co.*, 24 AD2d 586, 261 NYS2d 1006 (2d Dept 1965), *aff’d*, 17 NY2d 474, 266 NYS2d 981, 214 NE2d 161 (1965); vegetables on supermarket floor, *Imbese v First Nat. Stores, Inc.*, 23 AD2d 850, 259 NYS2d 178 (2d Dept 1965); melted ice cream, *Greco v Acme Super Markets, Inc.*, 17 AD2d 899, 233 NYS2d 406 (4th Dept 1962).

G. Methods of Proof

1. *Regular Inspections and Maintenance*

Proof of regular inspections and maintenance of the area in which an accident occurred, including an inspection and remedial action just prior to the accident, is ordinarily sufficient to satisfy defendant’s burden of showing absence of notice on a motion for summary judg-

ment, *Stewart v Canton-Potsdam Hosp. Foundation, Inc.*, 79 AD3d 1406, 912 NYS2d 773 (3d Dept 2010); *Hagin v Sears, Roebuck and Co.*, 61 AD3d 1264, 876 NYS2d 777 (3d Dept 2009). However, proof of regular inspections and maintenance is not required, where defendant submits other evidence concerning the condition of the premises shortly before and at the time of the accident, *Austin v CDGA Nat. Bank Trust*, 114 AD3d 1298, 980 NYS2d 660 (4th Dept 2014).

2. Defendant's Employees' Statements

Notice to defendant of a defective condition may be proved by statements made by an employee in the course of employment, but only if the making of the statement is an activity within the scope of the authority of the employee, *Tyrrell v Wal-Mart Stores Inc.*, 97 NY2d 650, 737 NYS2d 43, 762 NE2d 921 (2001); *Loschiavo v Port Authority of New York & New Jersey*, 58 NY2d 1040, 462 NYS2d 440, 448 NE2d 1351 (1983); *Townsend v Mid Hudson Vending, Inc.*, 7 AD3d 514, 775 NYS2d 596 (2d Dept 2004); *Laguesse v Storytown U.S.A. Inc.*, 296 AD2d 798, 745 NYS2d 323 (3d Dept 2002); *Fontana v Fortunoff*, 246 AD2d 626, 668 NYS2d 394 (2d Dept 1998); *Lowen v Great Atlantic & Pacific Tea Co., Inc.*, 223 AD2d 534, 636 NYS2d 393 (2d Dept 1996); see *Golden v Horn & Hardart Co.*, 244 App Div 92, 278 NYS 385 (1st Dept 1935), *aff'd*, 270 NY 544, 200 NE 309 (1936); *Cook v Great Atlantic & Pacific Tea Co.*, 244 App Div 63, 278 NYS 777 (4th Dept 1935), *aff'd*, 268 NY 599, 198 NE 423 (1935); *Marte v New York City Transit Authority*, 276 AD2d 755, 715 NYS2d 704 (2d Dept 2000); *Johnson v Hallam Enterprises Ltd.*, 208 AD2d 1110, 617 NYS2d 405 (3d Dept 1994); *Risoli v Long Island Lighting Co.*, 195 AD2d 543, 600 NYS2d 497 (2d Dept 1993); *Sherman v Tamarack Lodge*, 146 AD2d 767, 537 NYS2d 249 (2d Dept 1989).

Photographs of the accident site, if taken reasonably close to the time of the occurrence when conditions are substantially the same, are admissible on the question of constructive notice, *Batton v Elghanayan*, 43 NY2d 898, 403 NYS2d 717, 374 NE2d 611 (1978); see *Zavaro v Westbury Property Inv. Co.*, 244 AD2d 547, 664 NYS2d 611 (2d Dept 1997). However, where the photographs were taken four years after the accident, they were not admitted in evidence for the purpose of proving constructive notice of a defect, *Anis v Associated Restaurant Management Corp.*, 202 AD2d 459, 609 NYS2d 51 (2d Dept 1994). Videotapes or motion pictures of the accident scene are also admissible in the trial court's discretion if they fairly depict the conditions at the scene at the time of the accident, see *Mechanick v Conradi*, 139 AD2d 857, 527 NYS2d 586 (3d Dept 1988).

3. Prior incidents

Evidence that others had slipped at the same place on the same day is relevant to notice, as well as to the dangerousness of the condition, *Hyde v Rensselaer*, 73 AD2d 1021, 424 NYS2d 755 (3d Dept 1980), *aff'd*, 51 NY2d 927, 434 NYS2d 984, 415 NE2d 972 (1980); *Pratt v*

American Stores Co., 262 App Div 931, 28 NYS2d 829 (3d Dept 1941), as is evidence that a witness who used the stairs shortly before plaintiff's accident observed no debris, although such evidence is not conclusive, *Labetti v Fanley Associates Inc.*, 27 AD2d 654, 276 NYS2d 904 (1st Dept 1967). However, evidence of prior accidents offered as evidence of notice of a dangerous condition is admissible only upon a showing that the relevant conditions of the subject accident and the previous one were substantially the same, *O'Buckley v Chemung*, 149 AD3d 1232, 53 NYS3d 209 (3d Dept 2017); *Bounds v Western Regional Off Track Betting Corp.*, 256 AD2d 1165, 684 NYS2d 105 (4th Dept 1998).

(2) LESSOR'S LIABILITY

PJI 2:100. Liability for Condition or Use of Land—To Persons on the Land—Out-of-Possession Lessor's Liability for Lessor's Failure to Warn of Latent Dangerous Conditions—Premises Leased for Private Use

As you have heard, the plaintiff AB claims that *[state plaintiff's claim, such as: (he, she, it) was injured as a result of a fire caused by faulty wiring in (his, her its) apartment]*. The defendant CD claims that *[state defendant's claims, such as: (he, she, it) did not know of the faulty wiring and could not have reasonably discovered it]*.

A landlord who rents property to a tenant is required to tell the tenant about any dangerous condition on the property that exists when the tenant takes possession, if the landlord knows or has reason to know of the dangerous condition and the tenant would not be able to discover it upon a reasonable inspection.

A dangerous condition is one that creates a risk of *[state as appropriate: personal injury, injury to property]* to such an extent that a reasonable person would give warning.

To recover from CD, AB must prove: (1) that *[state claimed condition]* existed at the time (AB, the tenant) took possession of the property; (2) that *[state claimed condition]* was a dangerous condition; (3) that (AB, the tenant) did not know of the *[state claimed condition]* and would not have discovered it upon reasonable inspection; (4) that CD knew of the *[state claimed condition]* at the time (AB, the tenant) took possession or, in the use of reasonable care, would have known of the *[state claimed condition]*; (5) that CD knew or, in the use of reasonable care, would have known that the condition was dangerous; (6) that CD did not warn (AB, the tenant) of *[state claimed condition]* or tell (AB, the tenant) about the facts and circumstances that gave

CD reason to believe that [state claimed condition] existed; and (7) that the [state claimed condition] was a substantial factor in [state as appropriate: bringing about the accident, producing AB's injury].

If you decide: (1) that [state claimed condition] did not exist at the time (the tenant, AB) took possession of the property; or (2) that [state claimed condition] was not a dangerous condition; or (3) that (AB, the tenant) knew of the [state claimed condition] or would have discovered it upon reasonable inspection; or (4) that CD did not know of the [state claimed condition] at the time (AB, the tenant) took possession and, in the use of reasonable care, would not have known of the [state claimed condition]; or (5) that CD did not know and, in the use of reasonable care, would not have known that the [state claimed condition] was dangerous; or (6) that CD either warned (AB, the tenant) of [state claimed condition] or told (AB, the tenant) about the facts and circumstances that gave CD reason to believe that [state claimed condition] existed, or (7) that the [state claimed condition] was not a substantial factor in [state as appropriate: bringing about the accident, producing AB's injury], then you will find for CD and go no further [state where appropriate: on this claim].

On the other hand, if you decide: (1) that [state claimed condition] existed at the time (AB, the tenant) took possession of the property; and (2) that [state claimed condition] was a dangerous condition; and (3) that (AB, the tenant) did not know of the [state claimed condition] and would not have discovered it upon reasonable inspection; and (4) that CD knew of the [state claimed condition] at the time (AB, the tenant) took possession or, in the use of reasonable care, would have known of the [state claimed condition]; and (5) that CD knew or, in the use of reasonable care, would have known that [state claimed condition] was dangerous; and (6) CD did not warn (AB, the tenant) of [state claimed condition] and did not tell (AB, the tenant) about the facts and circumstances that gave CD reason to

believe that [state claimed condition] existed; and (7) the [state claimed condition] was a substantial factor in [state as appropriate: bringing about the accident, producing AB's injury], you will find for AB [state as appropriate: and go on to consider AB's damages].

Comment

[See also Introductory Statement to this division, supra.]

Caveat: The term “substantial factor” is used in the pattern charge to incorporate the element of proximate cause and should be defined and expanded upon as indicated in PJI 2:70 and Comment.

Based on *Steeffel v Rothschild*, 179 NY 273, 72 NE 112 (1904); *Cesar v Karutz*, 60 NY 229 (1875); *Smith v Donnelly*, 93 App Div 569, 87 NYS 893 (2d Dept 1904); see *Edwards v New York & H.R. Co.*, 98 NY 245 (1885); *Jaffe v Harteau*, 56 NY 398 (1874); *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 (2d Dept 2011); see also *Prosser & Keeton, Torts* (5th Ed.) § 63; 5 *Harper, James and Gray, The Law of Torts*, § 27.16; *Restatement, Second, Torts* § 358.

As to comparative negligence, see PJI 2:36.

The principles discussed in this section apply only to out-of-possession lessors. Therefore, care must be taken to ensure that a putative lessor is in fact a lessor, see *Gronski v Monroe*, 18 NY3d 374, 940 NYS2d 518, 963 NE2d 1219 (2011). If no leasehold was created by an agreement between a landowner and one in possession of the property, a landowner owes only the general duty of care to maintain the property in a reasonably safe condition, see *id.* That duty, however, may be limited or obviated if the landowner transfers control of the property to another, see *id.*, except where a landowner owes a nondelegable duty to another, see, for example, *Multiple Dwelling Law* § 78; PJI 2:112 (blasting operations).

The pattern charge covers one of the exceptions to the general rule. The general rule is that an out-of-possession lessor is not liable for injuries resulting from the condition of the demised premises, since liability is an incident of occupation and control, *Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 114 NYS3d 21, 137 NE3d 476 (2019); *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976); *Ritto v Goldberg*, 27 NY2d 887, 317 NYS2d 361, 265 NE2d 772 (1970); *Gilbert Properties, Inc. v New York*, 33 AD2d 175, 305 NYS2d 650 (1st Dept 1969), *aff'd*, 27 NY2d 594, 313 NYS2d 408, 261 NE2d 406 (1970); *Dalzell v McDonald's Corp.*, 220 AD2d 638, 632 NYS2d 635 (2d Dept 1995); *Tanoury v Cancilla*, 149 AD2d 960, 540 NYS2d 91 (4th Dept 1989); *Howell v Gagliano*, 52 AD2d 1040, 384 NYS2d 576 (4th Dept 1976); see *Gronski v Monroe*, 18 NY3d 374, 940 NYS2d 518, 963 NE2d 1219 (2011); *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001);

Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 929 NYS2d 620 (2d Dept 2011); see generally *Buckowski v Smith*, 185 AD2d 556, 586 NYS2d 386 (3d Dept 1992). The pattern charge addresses cases in which a lessor, who with knowledge of an existing latent defect fails to disclose it, incurs liability for injuries resulting from the defect. This principle may be applicable not only to the tenant, but to those whose presence on the premises is reasonably foreseeable, *Restatement, Second, Torts* § 358; see *Jackson v Martin*, 271 App Div 796, 65 NYS2d 192 (2d Dept 1946), *aff'd*, 297 NY 487, 74 NE2d 189 (1947); see also *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976). It covers not only personal injury but property damage, *Steefel v Rothschild*, 179 NY 273, 72 NE 112 (1904). Since liability is based on the lessor's concealment or nondisclosure of the condition, *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); *Steefel v Rothschild*, *supra*; *Restatement, Second, Torts* § 358, Comment c, the lessor is not liable if the condition is open and obvious or observable on reasonable inspection, or is, in fact, observed by the tenant, *Jackson v Martin*, *supra*.

The phrase “constructive notice” generally refers to situations in which a defective condition existed on the premises for a sufficient period of time that reasonable inspection would have led to its discovery by the lessor. Some confusion may exist with respect to whether such “constructive notice” is sufficient to impose liability on the lessor, see *Smith v Donnelly*, 93 App Div 569, 87 NYS 893 (2d Dept 1904). A lessor who demises premises on which there is a nuisance arising out of negligence can also be held liable, see PJI 2:116. In those cases the lessor has the duty of making a reasonable inspection and constructive notice is, therefore, sufficient. In the case dealt with by the pattern charge, however, the lessor has no obligation to inspect and may be held liable only if the lessor actually knew or had reason to know of the condition, *Cesar v Karutz*, 60 NY 229 (1875) (“knew, or had reasonable notice”); *Jaffe v Harteau*, 56 NY 398 (1874) (“knew, or had any reason to suspect”).

The fact that the building was erected by the lessor, see *Jaffe v Harteau*, 56 NY 398 (1874), that the lessor is a person of more than reasonable intelligence, *Restatement, Torts* § 12(1), or that the lessor had notice of a defect in a part of an appurtenance arising from a cause that would operate to impair the whole appurtenance, may bear on the issue of knowledge, *Lo Jacono v Schieder*, 281 App Div 799, 119 NYS2d 495 (4th Dept 1953); *Rouillon v Wilson*, 29 App Div 307, 51 NYS 430 (1st Dept 1898); see *Rodriguez by Rodriguez v Amigo*, 244 AD2d 323, 663 NYS2d 873 (2d Dept 1997) (knowledge of lead paint condition). Knowledge or reason to know gained after execution of the lease but before possession is transferred is, apparently, sufficient to impose liability, *Steefel v Rothschild*, 179 NY 273, 72 NE 112 (1904). Knowledge of a defect itself will not impose liability, however, unless the defect is such that the lessor realizes, or should realize, that the defect poses a danger, *Smith v Donnelly*, 93 App Div 569, 87 NYS 893 (2d Dept 1904); *Restatement, Second, Torts* § 358, Comments b and d.

In addition to the rule imposing liability for the lessor's failure to disclose a known dangerous condition, there are a number of other exceptions to the rule of the lessor's non-liability for defects in demised premises. First, a lessor may incur liability to persons outside the premises if a nuisance exists on the premises at the time of demise, see PJI 2:116. Second, a lessor who rents for use for a public purpose is subject to liability, see PJI 2:101. Other exceptions are: (1) situations in which the lessor's duty is expanded by statute, *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996) (Multiple Dwelling Law changed common law rule as to lead paint hazard in dwellings covered by its provisions); *Altz v Leiberson*, 233 NY 16, 134 NE 703 (1922) (Tenement House Law; predecessor of Multiple Dwelling Law § 78); see *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 (2d Dept 2011) (recognizing that duty may be imposed by statute, by contract or by course of conduct); Comment to PJI 2:105; see generally *Rivera v Nelson Realty, LLC*, 7 NY3d 530, 825 NYS2d 422, 858 NE2d 1127 (2006); (2) situations in which the lessor has covenanted to repair, *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001); *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976); see PJI 2:105 and 2:106; and (3) situations in which the lessor, although not obligated to do so, makes repairs but does so negligently, *Marks v Nambil Realty Co.*, 245 NY 256, 157 NE 129 (1927); *Schiermeister v Kahn*, 22 AD2d 829, 255 NYS2d 117 (2d Dept 1964); see *Chapman v Silber*, *supra*; *Prosser and Keeton, Torts* (5th Ed.) § 63 at p. 445.

GOL § 5-321 invalidates agreements that purport to exempt the lessor from liability for its own negligence, *Graphic Arts Supply, Inc. v Raynor*, 91 AD2d 827, 458 NYS2d 115 (4th Dept 1982); see *Bandbox Sportswear, Inc. v Fashion Wear Realty Co.*, 33 AD2d 537, 304 NYS2d 275 (1st Dept 1969). However, where the parties to a commercial lease negotiated between two sophisticated parties allocate the risk of liability to third parties by providing for insurance, GOL § 5-321 is not violated, *Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 823 NYS2d 765, 857 NE2d 60 (2006); *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 397 NYS2d 602, 366 NE2d 263 (1977); see *Brentano's, Inc. v Charter Management Corp.*, 46 AD2d 861, 361 NYS2d 665 (1st Dept 1974). For a further discussion of GOL § 5-321, see Comment to PJI 2:275, *infra*.

Special Verdict Form PJI 2:100 SV-I

NOTE: The following special verdict form sets forth questions concerning several theories of liability, only some of which may be at issue in a specific trial.

1. Did [set forth claimed condition] exist at the time (AB, the tenant) took possession of the premises?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 1 is “no,” you should proceed no further *[add where appropriate: on this claim]*. If your answer to Question No. 1 is “yes,” you should go on to Question No. 2.

2. Was *[set forth claimed condition]* a dangerous condition?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 2 is “no,” you should proceed no further *[add where appropriate: on this claim]*. If your answer to Question No. 2 is “yes,” you should go on to Question No. 3.

3. Did (AB, the tenant) know of the *[set forth claimed condition]*?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 3 is “yes,” you should proceed no further *[add where appropriate: on this claim]*. If your answer to Question No. 3 is “no,” you should go on to Question No. 4.

4. Could (AB, the tenant) have discovered *[set forth claimed condition]* upon reasonable inspection?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 4 is “yes,” you should proceed no further *[add where appropriate: on this claim]*. If your answer to Question No. 4 is “no,” you should go on to Question No. 5.

5. Did CD know of the *[set forth claimed condition]* at the time (AB, the tenant) took possession of the premises?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 5 is “no,” you should go on to answer Question No. 6. If your answer to Question No. 5 is “yes,” you should omit Question No. 6 go on to Question No. 7.

6. Would CD, in the use of reasonable care, have known of the *[set forth claimed condition]* at the time AB took possession of the premises?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 6 is “no,” you should proceed no further *[add where appropriate: on this claim]*. If your answer to Question No. 6 is “yes,” you should go on to Question No. 7.

7. Did CD know that the *[set forth claimed condition]* was dangerous?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 7 is “no,” you should proceed to

Question No. 8. If your answer to Question No. 7 is “yes,” you should omit Question No. 8 and go on to Question No. 9.

8. Should CD have known, in the exercise of reasonable care, that the [set forth claimed condition] was dangerous?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 8 is “no,” you should proceed no further [add where appropriate: on this claim]. If your answer to Question No. 8 is “yes,” you should go on to Question No. 9.

9. Did CD warn (AB, the tenant) about [set forth claimed condition] or tell AB about the facts and circumstances that gave CD reason to believe that [set forth claimed condition] existed?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 9 is “yes,” you should proceed no further [add where appropriate: on this claim]. If your answer to Question No. 9 is “yes,” you should go on to Question No. 10.

10. Was the [set forth claimed condition] a substantial factor in producing [set forth as appropriate: the accident, AB’s injury].

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[Insert signature lines]

If your answer to Question No. 10 is “no,” you should proceed no further [add where appropriate: on this claim]. If your answer to Question No. 10, is “yes,” you should go on to consider AB’s damages.

[Insert appropriate damage interrogatories].

PJI 2:101. Liability for Condition or Use of Land—To Persons on the Land—Lessor's Liability re Premises Demised as a Place of Public Assembly

An (owner, possessor) who leases (land, a building) to another for a purpose that invites the admission of the public is under a duty to use reasonable care to inspect and repair the premises before giving possession to the tenant. The purpose of such inspection and repair is to prevent any unreasonable risk of harm to members of the public who may enter the premises. Reasonable care means that degree of care that a reasonably prudent (owner, possessor) would use under the same circumstances. The (owner, possessor) is liable to members of the public for injuries resulting from a defective condition that was known to the (owner, possessor) or that should have been discovered by reasonable inspection at the time the lease was made.

Comment

[See also Introductory Statement to this division, supra.]

Based on *Campbell v Elsie S. Holding Co.*, 251 NY 446, 167 NE 582 (1929); *Junkermann v Tilyou Realty Co.*, 213 NY 404, 108 NE 190 (1915); *Barrett v Lake Ontario Beach Imp. Co.*, 174 NY 310, 66 NE 968 (1903); *Camp v Wood*, 76 NY 92 (1879); *Marshall v Mastodon, Inc.*, 51 AD2d 21, 379 NYS2d 177 (3d Dept 1976); see *Lafredo v Bush Terminal Co.*, 261 NY 323, 185 NE 398 (1933); *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); *O'Toole v Thousand Island Park Ass'n*, 206 App Div 31, 200 NYS 502 (4th Dept 1923); see also *Prosser & Keeton, Torts* (5th Ed.) § 63; *Restatement, Second, Torts* § 359; 2 *Harper, James & Gray, The Law of Torts* § 27.16 (2nd Ed.); 2B *Warren, Negligence, Landlord and Tenant*, § 3.03 (4th Ed.); *Annot.* 17 ALR3d 422. Proximate cause must be charged unless the facts are undisputed, see PJI 2:70.

Generally, an out-of-possession owner who has relinquished control over the premises will not be held liable for subsequent injuries resulting from dangerous conditions on the premises, *June v Bill Zikakis Chevrolet Inc.*, 199 AD2d 907, 606 NYS2d 390 (3d Dept 1993). For a discussion of a lessor's liability for a vicious animal maintained by a tenant on the premises, see Comment to PJI 2:220.

An exception to the general rule exists where the lessor rents premises for a public use when the lessor knows, or it should have known, that the premises are in a dangerous condition at the time of the lease, *id*; *Ostermeier v Victorian House, Inc.*, 121 AD2d 611, 503 NYS2d 644 (2d Dept 1986); see *Landau v Beach Haven Shopping Center, L.L.C.*, 276 AD2d 752, 715 NYS2d 334 (2d Dept 2000) (granting lessor's motion for summary judgment since it neither knew nor should have known of alleged dangerous condition at time lease was entered into); see also *Tarantelli v 7401 Willowbrook Road Associates, LLC*, 13 AD3d 1184, 787 NYS2d 587 (4th Dept 2004) (out-of-possession landlord may be liable if it rented premises for public use for which it knew they were unsuited). Constructive notice will suffice to impose liability on a lessor for negligence when the property is demised for public use, *Junkermann v Tilyou Realty Co.*, 213 NY 404, 108 NE 190 (1915); *Marshall v Mastodon, Inc.*, 51 AD2d 21, 379 NYS2d 177 (3d Dept 1976).

Although several cases accepted the concept of the original Restatement that "public" use necessarily involved a large number of persons, see *Philpot v Brooklyn Nat. League Baseball Club*, 303 NY 116, 100 NE2d 164 (1951); *Campbell v Elsie S. Holding Co.*, 251 NY 446, 167 NE 582 (1929); *Tantillo v Goldstein Bros. Amusement Co.*, 248 NY 286, 162 NE 82 (1928); *Wernig v Parents and Bros. Two Inc.*, 195 AD2d 944, 600 NYS2d 852 (3d Dept 1993); *Davis v Schmitt Bros.*, 199 App Div 683, 192 NYS 15 (2d Dept 1922), the Restatement, Second has abandoned that concept, see the Restatement, Second, Torts § 359, Comment d. The *Davis* case also refused to apply the rule to use of a private house without charge for a rummage sale conducted by a charitable association, but see Restatement, Second, Torts, § 359, Comment g. The rule does not apply when a use involving admission of the public was not contemplated by the lease, *Edwards v New York & H.R. Co.*, 98 NY 245 (1885); *Mattera v New York*, 169 AD2d 759, 565 NYS2d 126 (2d Dept 1991), or when the injury occurs outside the area open to the public, see Restatement, Second, Torts § 359, Comment f.

The rule does not extend to defects arising after transfer of possession to the tenant in the absence of a covenant by the lessor to maintain or repair the premises, *Schlesinger v Rockefeller Center, Inc.*, 119 AD2d 462, 500 NYS2d 510 (1st Dept 1986). Because the duty is imposed by law, the tenant's acceptance of the premises "as is," *Inverso v Whitestone Transit Mix Corp.*, 30 AD2d 565, 290 NYS2d 953 (2d Dept 1968), or the tenant's agreement to repair the condition, will not relieve the lessor of liability, *Junkermann v Tilyou Realty Co.*, 213 NY 404, 108 NE 190 (1915); *Swords v Edgar*, 59 NY 28 (1874); *Warner v Lucey*, 207 App Div 241, 201 NYS 658 (3d Dept 1923), *aff'd*, 238 NY 638, 144 NE 924 (1924). It appears, however, that the lessor may avoid responsibility if the lease prohibits use of the property until repairs have been made, *Junkermann v Tilyou Realty Co.*, *supra*; Restatement, Second, Torts, § 359, Comment i. The lease need not be for any particular period of time. In *Fox v Buffalo Park*, 21 App Div 321, 47 NYS 788 (4th Dept 1897), *aff'd*, 163 NY 559, 57 NE 1109 (1900), the lease was for but one day. The principle also applies to conditions existing at the time of the

renewal as well as at the time of the original lease, where the lessor has the right to re-enter and examine the premises, *Lusk v Peck*, 132 App Div 426, 116 NYS 1051 (4th Dept 1909), *aff'd*, 199 NY 546, 93 NE 377 (1910).

The rule is applicable to a defect in construction as well as to a condition arising out of negligent maintenance, *Lang v Stadium Purchasing Corporation*, 216 App Div 558, 215 NYS 502 (1st Dept 1926); see *Atkinson v Golub Corp. Co.*, 278 AD2d 905, 718 NYS2d 546 (4th Dept 2000) (owner of retail store liable for dangerous condition created by third party's performance of maintenance contract). Thus, liability may be founded on the construction of aluminum risers which had a homogeneous appearance and created a risk that a user would fall, *Elmlinger v Board of Educ. of Town of Grand Island*, 132 AD2d 923, 518 NYS2d 257 (4th Dept 1987). It has also been held that a defect created during construction in places of public assembly continues to be the owner's responsibility, even after the completion of the work, and notice is not required inasmuch as the condition was created by the owner or its contractor, *Reynolds v Sead Development Group*, 257 AD2d 940, 684 NYS2d 361 (3d Dept 1999); *Richardson v David Schwager Associates, Inc.*, 249 AD2d 531, 672 NYS2d 114 (2d Dept 1998); *Thomassen v J & K Diner, Inc.*, 152 AD2d 421, 549 NYS2d 416 (2d Dept 1989); see *Fox v Buffalo Park*, 21 App Div 321, 47 NYS 788 (4th Dept 1897), *aff'd*, 163 NY 559, 57 NE 1109 (1900). Notice of a defect in part of an appurtenance arising from a cause that would operate to impair the whole appurtenance is sufficient to impose upon the owner a duty of inspection of the whole appurtenance and, thus, constructive notice of like defects, *Lo Jacono v Schieder*, 281 App Div 799, 119 NYS2d 495 (4th Dept 1953); *Rouillon v Wilson*, 29 App Div 307, 51 NYS 430 (1st Dept 1898); see *Rodriguez by Rodriguez v Amigo*, 244 AD2d 323, 663 NYS2d 873 (2d Dept 1997) (lead paint condition).

GOL § 5-326 invalidates agreements exempting the owner or operator of pools, gymnasiums, places of public amusement or recreation, or similar establishments from liability for negligences.

For a discussion of GOL § 5-321, which invalidates certain agreements purporting to exempt lessors from liability for negligence, see Comment to PJI 2:275. For a discussion of GOL § 5-323, which invalidates certain agreements purporting to exempt contractors from liability for negligence, see Comment to PJI 2:10A. For a discussion of GOL § 5-326, which invalidates certain agreements purporting to exempt owners and operators of pools, gymnasiums, places of public amusement or recreation, or similar establishments from liability for negligence, see Comment to PJI 2:10A.

PJI 2:105. Liability for Condition or Use of Land—To Persons on the Land—Lessor's Liability re Premises Over Which Control Retained

A lessor is under a duty to use reasonable care

to keep in safe condition those portions of the premises over which the lessor retains control but which the tenant is permitted to use. In order for plaintiff to recover against Defendant AB (*the lessor*), plaintiff must show that he or she was injured and that the injury occurred in a portion of the premises over which Defendant AB (*the lessor*) retained control.

Whether a lessor has retained control of a portion of the premises depends upon whether the lessor reserved the right to enter that portion of the premises at any time and make repairs. [*In cases tried in the Second Department, the preceding sentence should be replaced by the following sentence: Whether a lessor has retained control depends upon whether the lessor has the ability to remedy dangerous conditions. (See Caveat 1)*] In deciding whether Defendant AB (*the lessor*) had retained control of the portion of the premises in which plaintiff claims to have been injured, you will take into consideration [*here list relevant facts on which evidence has been presented, such as:—*] the provisions of the lease with respect to the use of that portion of the premises and by whom it was in fact used; the provisions of the lease with respect to the making of repairs to that portion of the premises and by whom repairs were in fact made before plaintiff's injury; whether defendant employed a ((doorman, guard)) at the entrance to that portion of the premises; [*In cases tried in the Second Department, this clause—whether defendant employed a (doorman, guard) at the entrance to that portion of the premises—should be deleted. (See Caveat 1)*] whether after plaintiff's injury defendant's employees made an investigation (and, or) repaired that portion of the premises).

If you find that Defendant AB (*the lessor*) did not retain control of the portion of the premises where the injury occurred, then you will proceed no further (as to this defendant). If you find that Defendant AB (*the lessor*) did retain control, you will proceed to consider the other issues in the

case. [*Here continue with PJI 2:90 from second paragraph to end.*]

Comment

[*See also Introductory Statement to this division, supra.*]

Caveat 1: The Second Department has held that “control,” as used in the charge, refers to an out-of-possession landlord’s ability to remedy dangerous conditions, *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 (2d Dept 2011). The Alnashmi court also held that liability may be imposed on such a landlord for injuries resulting from the condition of the demised premises only if a duty to keep the premises reasonably safe is imposed on the landlord by statute or assumed by the landlord by contract or a course of conduct, *id.*, citing *Rivera v Nelson Realty, LLC*, 7 NY3d 530, 825 NYS2d 422, 858 NE2d 1127 (2006); *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001); *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996). The Alnashmi court’s definition of “control” is narrower and more restrictive than the definition embraced by the pattern charge in that the court rejected a “broad right of entry to inspect and repair” as “sufficient control,” at least “where the lease placed the burden of maintenance and repair squarely on the tenant.” Therefore, trial courts within the Second Department should consider modifying the pattern charge as suggested above.

Caveat 2: As to repairs after injury the jury must be told that it may consider such repairs only on the issue of control and not on the issue of negligence, see Comment to PJI 1:65.

Based on *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976); *Harrington v 615 West Corp.*, 2 NY2d 476, 161 NYS2d 106, 141 NE2d 602 (1957); *De Clara v Barber S. S. Lines*, 309 NY 620, 132 NE2d 871 (1956); *Noble v Marx*, 298 NY 106, 81 NE2d 40 (1948); *Loucks v Dolan*, 211 NY 237, 105 NE 411 (1914); *Dollard v Roberts*, 130 NY 269, 29 NE 104 (1891); see *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001) (outlining common law duty of landlord for lead paint poisoning); *Prosser & Keeton, Torts* (5th Ed.) § 63; 2 *Harper, James & Gray, The Law of Torts* § 27.17 (2nd Ed.); *Restatement, 2nd, Torts*, §§ 360, 361; 85 *NYJur2d*, *Premises Liability*, §§ 115, 135, 136, 140, 141, 153, 154; 2B *Warren, Negligence, Landlord and Tenant* §§ 2, 4–6 (4th Ed.); *Annot*: 49 *ALR3d* 387; 66 *ALR3d* 202; 67 *ALR3d* 490; 67 *ALR3d* 587; 68 *ALR3d* 382.

The principles discussed in this section generally apply only to lessors. Therefore, care must be taken to ensure that a putative lessor is in fact a lessor, see *Gronski v Monroe*, 18 NY3d 374, 940 NYS2d 518, 963 NE2d 1219 (2011). However, even if no leasehold is created by an agreement between a landowner and one in possession of the landowner’s property, some of the principles in this section may apply if the landowner transferred control of the property to the possessor. Where a

landowner and one in possession of the property entered into a written agreement delineating the parties' respective rights and obligations, a court must scrutinize both the agreement and the parties' course of conduct to determine whether and to what extent a landowner surrendered control over the property sufficient to limit or extinguish the landowner's duty, *id.* This principle may not apply where a landowner owes a nondelegable duty to another, e.g., Multiple Dwelling Law § 78; PJI 2:112 (blasting operations).

The lessor remains responsible for common passageways in a building where separate apartments, offices or lofts are rented to different tenants. Such common areas include the roof, *Harrington v 615 West Corp.*, 2 NY2d 476, 161 NYS2d 106, 141 NE2d 602 (1957); and the lessor has a duty to exercise reasonable care to prevent injury resulting from the use of or access to a roof which was not part of the premises demised and where the lessor has notice that the tenants and guests were using, *Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 599 NYS2d 526, 615 NE2d 1010 (1993); hallways, *Dollard v Roberts*, 130 NY 269, 29 NE 104 (1891); porches, *Loucks v Dolan*, 211 NY 237, 105 NE 411 (1914); stairways including outside stairways, *Cook v Rezende*, 32 NY2d 596, 347 NYS2d 57, 300 NE2d 428 (1973); *Lievano v Browning School*, 265 AD2d 233, 696 NYS2d 452 (1st Dept 1999) (issue of fact as to whether plaintiff's fall was proximately caused by defectively designed staircase handrails); *Goldstein v Consolidated Edison Co. of New York, Inc.*, 115 AD2d 34, 499 NYS2d 47 (1st Dept 1986) (lighting for staircase during power blackout); see *Schachter v Cohen*, 258 App Div 487, 17 NYS2d 88 (1st Dept 1940); fire escape landings, *Kellman v 45 Tiemann Associates, Inc.*, 87 NY2d 871, 638 NYS2d 937, 662 NE2d 255 (1995); yards, *Murtha v Ridley*, 232 NY 488, 134 NE 542 (1922); water pipes and sprinkler systems, *Melodee Lane Lingerie Co. v American Dist. Tel. Co.*, 18 NY2d 57, 271 NYS2d 937, 218 NE2d 661 (1966); sidewalks, though not as to natural accumulations of ice thereon, *Klein v U.S.*, 339 F2d 512 (2d Cir 1964); lobby entrance doors, see also *Gordils v Audobon Equities, Ltd.*, 291 AD2d 318, 738 NYS2d 49 (1st Dept 2002) (issue of fact existed as to whether infant plaintiff's use of fire escape as means of ingress from apartment was foreseeable consequence of defendant's failure to maintain building intercom system); *Sherman v Concourse Realty Corp.*, 47 AD2d 134, 365 NYS2d 239 (2d Dept 1975); basement areas and elevators, and any other area which the tenants are permitted to use in common.

The lessor also generally has control of, and is responsible for, the outside walls of the building, *Howe v Howe*, 266 App Div 799, 42 NYS2d 15 (2d Dept 1943); see *Zolezzi v Bruce-Brown*, 243 NY 490, 154 NE 535 (1926), and for lighting the exterior stairway of a public building, such as a store, office building or other place of public assembly, during the hours when the building is open to the public, *Gallagher v St. Raymond's Roman Catholic Church*, 21 NY2d 554, 289 NYS2d 401, 236 NE2d 632 (1968); *Kurth v Wallkill Associates*, 132 AD2d 529, 517 NYS2d 267 (2d Dept 1987); see Multiple Dwelling Law § 26(7) (requiring certain owners of multiple dwellings to install and maintain lights at various loca-

tions of premises). Whether common use is permitted may be a question for the jury, *Murtha v Ridley*, 232 NY 488, 134 NE 542 (1922). A jury question is sometimes presented when the building is a two-family house, *Loucks v Dolan*, 211 NY 237, 105 NE 411 (1914), because the lessor has no obligation with respect to, e.g., a stairway used exclusively by one tenant, *Schachter v Cohen*, 258 App Div 487, 17 NYS2d 88 (1st Dept 1940); *Hollman v Kayell Realty Co.*, 120 Misc 546, 199 NYS 39 (AppT 1923); see *Sargent v Ross*, 113 NH 388, 308 A2d 528 (1973). Similarly, whether repairs are structural may also be a jury question, *Targonski v Tausik*, 25 AD2d 650, 268 NYS2d 578 (1st Dept 1966).

As to those portions of the premises demised to the various tenants, the general rule is that the lessor is not liable for injuries resulting from the condition of the premises, *Rivera v Nelson Realty, LLC*, 7 NY3d 530, 825 NYS2d 422, 858 NE2d 1127 (2006) (no duty to install radiator covers in apartment known to be occupied by family with child); *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 (2d Dept 2011); see PJI 2:100. Control over the particular portion of the premises is usually essential to a finding that the lessor is liable for injuries sustained, see *Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 114 NYS3d 21, 137 NE3d 476 (2019); *Ritto v Goldberg*, 27 NY2d 887, 317 NYS2d 361, 265 NE2d 772 (1970); *Alnashmi v Certified Analytical Group, Inc.*, *supra*; *Buckowski v Smith*, 185 AD2d 556, 586 NYS2d 386 (3d Dept 1992) (out of possession landowner can be held liable only if plaintiff shows that the landowner exercised some control over the land, was contractually obligated to repair the premises, assumed responsibility to maintain any portion of the premises or created the dangerous condition); *Del Giacco v Noteworthy Co.*, 175 AD2d 516, 572 NYS2d 784 (3d Dept 1991); *Gelardo v ASMA Realty Corp.*, 137 AD2d 787, 525 NYS2d 334 (2d Dept 1988); *Clarke v Unanue*, 97 AD2d 888, 470 NYS2d 712 (3d Dept 1983); *Caparatta v De Rosa*, 66 AD2d 764, 410 NYS2d 872 (2d Dept 1978). Control may be established by proof of the landlord's promise, either written or otherwise, to keep certain premises in repair, *Helena v 300 Park Ave., LLC*, 306 AD2d 170, 763 NYS2d 542 (1st Dept 2003); *Colon v Mandelbaum*, 244 AD2d 292, 664 NYS2d 302 (1st Dept 1997) (water heater); *Gelardo v ASMA Realty Corp.*, *supra*; see *Alnashmi v Certified Analytical Group, Inc.*, *supra*. In the absence of control over the leased premises, an out-of-possession landlord may be liable if it affirmatively created the dangerous condition, *Miller v Genoa AG Center, Inc.*, 124 AD3d 1113, 2 NYS3d 650 (3d Dept 2015). As to liability for an owner who is aware, or has reason to be aware, of a dangerous condition existing prior to leasing the premises, see Comment to PJI 2:116. The terms of the lease will often determine, as between the lessor and tenant, who has the responsibility for maintenance of the premises, see *Maganias v Scott Realty Co.*, 187 AD2d 417, 589 NYS2d 556 (2d Dept 1992), and the lease may be considered by the jury, *Baynes v New York NH & Hartford R. Co.*, 279 App Div 598, 107 NYS2d 472 (2d Dept 1951), under proper instructions from the court as to its meaning and effect, *Lee v Mount Ivy Indus. Developers, Inc.*, 31 AD2d 958, 298 NYS2d 813 (2d Dept 1969); see *Adolf v Erie County Industrial Development Agency*, 174 AD3d 1519, 103 NYS3d 340 (4th

Dept 2019) (lease established that defendant-LLC was out-of-possession landlord with no duty to remove ice and snow from parking lot); *Targonski v Tausik*, 25 AD2d 650, 268 NYS2d 578 (1st Dept 1966).

The Second Department has held that “control” refers to an out-of-possession landlord’s ability to remedy dangerous conditions, *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 (2d Dept 2011). The *Alnashmi* court also held that liability may be imposed on such a landlord for injuries resulting from the condition of the demised premises only if a duty is imposed on the landlord by statute or assumed by the landlord by contract or a course of conduct, *id.*, citing *Rivera v Nelson Realty, LLC*, 7 NY3d 530, 825 NYS2d 422, 858 NE2d 1127 (2006); *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001); *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996).

Retention of control or assumption of responsibility for the premises may also be inferred by the jury from evidence that the lessor made repairs after the plaintiff was hurt and while the tenant still occupied the premises, *Antonsen v Bay Ridge Sav. Bank*, 292 NY 143, 54 NE2d 338 (1944); *Scudero v Campbell*, 288 NY 328, 43 NE2d 66 (1942), or that the lessor promised to make repairs prior to plaintiff’s injury, and had complete freedom of access to the premises, *Noble v Marx*, 298 NY 106, 81 NE2d 40 (1948); see *Leskody v Atlantic Stevedoring Co.*, 21 AD2d 894, 251 NYS2d 882 (2d Dept 1964); *Miller v Morse*, 9 AD2d 188, 192 NYS2d 571 (4th Dept 1959), or by a course of conduct making it reasonable to infer an assumption of responsibility by the lessor for the leased area, see *Ritto v Goldberg*, 27 NY2d 887, 317 NYS2d 361, 265 NE2d 772 (1970); *Mikolajczyk v M.C. Morgan Contractors, Inc.*, 273 AD2d 864, 709 NYS2d 283 (4th Dept 2000). Retention by the lessor of a license to pass through the demised premises to reach another part of the building is not enough, however, *Kilmer v White*, 254 NY 64, 171 NE 908 (1930), nor is the reservation of a right to inspect when there is no right to repair, *Harris v Smith*, 25 AD2d 477, 266 NYS2d 561 (3d Dept 1966); *Berman v H. J. Enterprises, Inc.*, 13 AD2d 199, 214 NYS2d 945 (1st Dept 1961); see *Ritto v Goldberg*, *supra*; *Adolf v Erie County Industrial Development Agency*, 174 AD3d 1519, 103 NYS3d 340 (4th Dept 2019) (lease established that landlord-LLC had no duty to remove ice and snow from parking lot and landlord’s contractual right to re-enter premises did not establish that it retained control over parking lot).

The reservation in a lease of a right of reentry and repair by the lessor does not impose liability for any dangerous condition that subsequently arises, *Star v Berridge*, 77 NY2d 899, 568 NYS2d 904, 571 NE2d 74 (1991); *Hinds v Consolidated Rail Corp.*, 263 AD2d 590, 693 NYS2d 284 (3d Dept 1999); *Sagnelli v R.P.I. 6 Harrison Street, Ltd. Partnership*, 185 AD2d 153, 586 NYS2d 8 (1st Dept 1992); *Gelardo v ASMA Realty Corp.*, 137 AD2d 787, 525 NYS2d 334 (2d Dept 1988); absent statutory regulation, *Kilimnik v Mirage Restaurant, Inc.*, 223 AD2d 530, 635 NYS2d 702 (2d Dept 1996); *Levy v Daitz*, 196 AD2d 454,

601 NYS2d 294 (1st Dept 1993). Similarly, an out-of-possession owner who retains a right of reentry for repairs and inspection is not deemed to have constructive notice of a defective condition on the premises absent a specific structural or design defect that is contrary to a specific statutory safety provision, *Wayman v Roy Stanley, Inc.*, 122 AD3d 1119, 997 NYS2d 522 (3d Dept 2014); *Boice v PCK Development Co., LLC*, 121 AD3d 1246, 995 NYS2d 250 (3d Dept 2014); *Khan v Bangla Motor and Body Shop, Inc.*, 27 AD3d 526, 813 NYS2d 126 (2d Dept 2006); *McDonald v Riverbay Corp.*, 308 AD2d 345, 764 NYS2d 185 (1st Dept 2003); see *Quing Sui Li v 37-65 LLC*, 114 AD3d 538, 981 NYS2d 14 (1st Dept 2014). Liability may be imposed where the condition of the premises was subject to statutory regulation and the lessor in the lease reserved a right of entry to inspect the premises and to repair, *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987); *Worth Distributors, Inc. v Latham*, 59 NY2d 231, 464 NYS2d 435, 451 NE2d 193 (1983); *Nameny v East New York Sav. Bank*, 267 AD2d 108, 699 NYS2d 412 (1st Dept 1999); *Davis v HSS Properties Corp.*, 257 AD2d 500, 685 NYS2d 16 (1st Dept 1999); see *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996); *Tkach v Montefiore Hospital for Chronic Diseases*, 289 NY 387, 46 NE2d 333 (1943); see also *McDonald v Riverbay Corp.*, 308 AD2d 345, 764 NYS2d 185 (1st Dept 2003) (N.Y.C. Health Code § 135.17(c), requiring commercial premises to be free from unsafe or hazardous conditions, and N.Y.C. Building Code § 27-128, making owners responsible at all times for safe maintenance of building and facilities, are not sufficiently specific to furnish a basis for liability); *Gantz v Kurz*, 203 AD2d 240, 610 NYS2d 279 (2d Dept 1994); *Garcia v Dormitory Authority of State of N.Y.*, 195 AD2d 288, 599 NYS2d 600 (1st Dept 1993). No liability will be imposed under Multiple Dwelling Law § 78, however, on an owner who has completely surrendered possession and control of the building and has been barred from taking any role in the management of the building, *Gomez by DeJesus v Walton Realty Associates*, 258 AD2d 307, 685 NYS2d 201 (1st Dept 1999). Moreover, because the duty imposed by OSHA runs only from employers to employees, a violation of OSHA regulations by a lessor does not give rise to liability for personal injuries to employees or invitees of a lessee, *Khan v Bangla Motor and Body Shop, Inc.*, *supra*. A regulatory agreement between an out-of-possession landlord and HUD requiring the landlord to establish a reserve fund that the tenant could use for maintenance of the property did not conflict with the lease's provision requiring the tenant to maintain the premises, and did not render the landlord susceptible to liability for an accident caused by an alleged dangerous condition on the premises, *Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 114 NYS3d 21, 137 NE3d 476 (2019).

The First Department has held that only a significant structural or design defect in violation of a specific statutory safety provision will furnish a basis for such liability, *Humareda v 500A East 87th Street, LLC*, 117 AD3d 533, 986 NYS2d 433 (1st Dept 2014); *Quinones v 27 Third City King Restaurant, Inc.*, 198 AD2d 23, 603 NYS2d 130 (1st Dept 1993); *Levy v Daitz*, 196 AD2d 454, 601 NYS2d 294 (1st Dept

1993); see *Silverman v Blenheim Associates Realty Corp.*, 291 AD2d 214, 737 NYS2d 343 (1st Dept 2002); *Avila v Rahman N.Y. Inc.*, 275 AD2d 271, 713 NYS2d 17 (1st Dept 2000) (missing drain cover not a significant structural or design defect). The Second Department has held that the landlord cannot be held liable in such circumstances where the regulation is non-specific and reflects only a general duty to maintain the premises, *Ortiz v RVC Realty Co.*, 253 AD2d 802, 677 NYS2d 598 (2d Dept 1998); see *Dorestant v Snow, Inc.*, 274 AD2d 542, 712 NYS2d 131 (2d Dept 2000) (drainage system violated codes). For a discussion of the common law liability of a landlord for injuries caused by lead paint poisoning, see the discussion of *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001), *infra*.

The common law rule of nonliability with respect to demised premises has been modified by statute, see Multiple Dwelling Law § 78; *Altz v Leiberson*, 233 NY 16, 134 NE 703 (1922); see also *Rivera v Nelson Realty, LLC*, 7 NY3d 530, 825 NYS2d 422, 858 NE2d 1127 (2006); *Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, 828 NYS2d 308 (1st Dept 2007). The landlord's duty to repair under Multiple Dwelling Law § 78 extends to all parts of the premises, including parts over which the landlord does not have control, *Isaacs v West 34th Apts. Corp.*, *supra*; see *Rivera v Nelson Realty, LLC*, *supra*. Liability may even be imposed on an owner who net leases the premises without reserving a right of re-entry or inspection, *Bonifacio v 910-930 Southern Blvd. LLC*, 295 AD2d 86, 743 NYS2d 105 (1st Dept 2002).

To be exempt from the duty imposed by Multiple Dwelling Law § 78, a landlord must surrender all forms of control over the premises, *Bonifacio v 910-930 Southern Blvd. LLC*, 295 AD2d 86, 743 NYS2d 105 (1st Dept 2002). However, the unit owners in a condominium are not responsible for the safe maintenance of the premises, since their shared ownership of the condominium's common areas does not make them "owners" within the meaning of the statute, *Pekelnaya v Allyn*, 25 AD3d 111, 808 NYS2d 590 (1st Dept 2005); see *Jerdonek v 41 West 72 LLC*, 143 AD3d 43, 36 NYS3d 17 (1st Dept 2016). The Multiple Dwelling Law is applicable only to cities of 325,000 or more and to municipalities of less population that elect to be governed by its provisions, Multiple Dwelling Law § 3. The law contains specific and detailed provisions that may govern a particular case; for example, Multiple Dwelling Law § 37 describes the lighting to be provided in halls and on stairways, and failure to comply with its provisions subjects the lessor to liability, *Wank v Herman*, 2 AD2d 867, 156 NYS2d 161 (2d Dept 1956); see also, Multiple Dwelling Law § 26(7-a) (requiring certain owners of multiple dwellings to install and maintain lights at various locations of premises). In addition, the obligation to light stairways is governed by Multiple Dwelling Law § 37(3). Under that provision, an owner is responsible for extinguished lights even where the condition has occurred without the owner's knowledge or consent, *Kopsachilis v 130 East 18 Owners Corp.*, 43 AD3d 744, 841 NYS2d 449 (1st Dept 2007), *rev'd*, 11 NY3d 512, 873 NYS2d 241, 901 NE2d 734 (2008).

The law also contains general provisions under which (i) the owner,

and under some circumstances the tenant, is under a non-delegable duty to keep "in good repair" the "multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated," § 78; see *Morales v Felice Properties Corp.*, 221 AD2d 181, 633 NYS2d 305 (1st Dept 1995); (ii) the owner has a duty to keep the "dwelling, the lot on which it is situated, and the roofs, yards, courts, passages, areas or alleys appurtenant thereto, clean and free from vermin, dirt, filth, garbage or other thing or matter dangerous to life or health," § 80(1); and (iii) specific procedures are set forth for the removal of nuisances, defined as including "[w]hatever is dangerous to human life or detrimental to health," § 309. Also see Multiple Dwelling Law § 68 and Multiple Residence Law § 15, with respect to the installation and maintenance of smoke detectors, and Multiple Dwelling Law §§ 35, 37 regarding exterior lighting.

Breach of a landlord's general statutory duty to maintain leased premises in a safe condition does not impose liability without fault, but requires a showing of those elements comprising common law negligence, *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996). Therefore, any breach of the obligation imposed by Section 78 (and by analogy breach of the other sections) which is a proximate cause of injury subjects the owner to liability, where notice, actual or constructive has been proved, when the entire premises has been leased, *Weiner v Leroco Realty Corporation*, 279 NY 127, 17 NE2d 796 (1938); *Benjamin v Jonathan Woodner Co.*, 22 AD2d 68, 253 NYS2d 649 (1st Dept 1964); *Weiss v Wallach*, 256 App Div 354, 10 NYS2d 69 (1st Dept 1939). Thus, the statute imposes upon a landlord "a duty to persons on its premises to maintain them in a reasonably safe condition," *Juarez by Juarez v Wavecrest Management Team Ltd.*, *supra*; *Mas v Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 555 NYS2d 669, 554 NE2d 1257 (1990). New York City landlords are further charged under the Administrative Code of the City of New York with the nondelegable responsibility for safe maintenance of their buildings and facilities, Administrative Code §§ 27-127, 27-128; see *Juarez by Juarez v Wavecrest Management Team Ltd.*, *supra*; *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987). Sections 27-127 and 27-128 do not impose liability in the absence of a breach of some specific safety provision of the Administrative Code, *Plung v Cohen*, 250 AD2d 430, 673 NYS2d 114 (1st Dept 1998); see *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732, 819 NYS2d 776 (2d Dept 2006) (§§ 27-127 and 27-128 constitute nonspecific mandates reflecting only general duty to maintain premises in safe condition). The provisions contained in sections 27-127 and 27-128 of the Administrative Code of the City of New York are applicable only to owners of buildings and do not apply to lessees, *Beck v Woodward Affiliates*, 226 AD2d 328, 640 NYS2d 205 (2d Dept 1996).

The Multiple Residence Law and the New York City Administrative Code likewise modify the common law rule of non-liability and those laws should also be considered in all references to the Multiple

Dwelling Law in the remainder of this Comment, see *Kellman v 45 Tiemann Associates, Inc.*, 87 NY2d 871, 638 NYS2d 937, 662 NE2d 255 (1995). New York City Administrative Code provisions imposing a specific duty have the force of statute, *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996). The Court of Appeals has held that the Building Code provisions of the New York City Administrative Code, which impose a specific duty on landowners, have the force and effect of statute in the City of New York, *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987) (duties relating to safe maintenance of premises, minimum handrail clearance and minimum illumination); see also *Bittrolff v Ho's Development Corp.*, 77 NY2d 896, 568 NYS2d 902, 571 NE2d 72 (1991). However, in *Elliott v New York*, 95 NY2d 730, 724 NYS2d 397, 747 NE2d 760 (2001), the court held that these decisions merely restate the basic proposition that a provision of the Administrative Code, similar to a statute, is the controlling authority “within its sphere of operation.” The Court observed that the fact that a section of the Administrative Code has the force of statute with respect to application does not determine its tort consequences, *id.* In *Elliott*, the Court held that a violation of a section of the Administrative Code of the City of New York constitutes some evidence of negligence, regardless of whether the provision is specific. A violation of the State Uniform Fire Prevention and Building Code, a set of regulations enacted pursuant to the Executive Law, does not establish negligence per se, *Velazquez v Tyler Graphics, Ltd.*, 214 AD2d 489, 625 NYS2d 537 (1st Dept 1995). For an example of the intricacy involved in determining whether, in a particular case, state or local law governs, see *Karlson v 305 East 43rd St. Corp.*, 370 F2d 467 (2d Cir 1967).

In *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996), the Court of Appeals addressed the liability of a landlord for failure to comply with the lead abatement provision of the Administrative Code of the City of New York, which at that time required the owner of a multiple dwelling to “remove or cover” paint containing specified hazardous levels of lead in any apartment in which a child six years of age or younger resides, Administrative Code of the City of New York, § 27-2013(h) (repealed); see *Crespo v A.D.A. Management*, 292 AD2d 5, 739 NYS2d 49 (1st Dept 2002); *Morales v Felice Properties Corp.*, 221 AD2d 181, 633 NYS2d 305 (1st Dept 1995). The Court held that to establish liability under this provision, a plaintiff must demonstrate that the building owner had actual or constructive notice that a child six years of age or under was living in one of its residential units. If plaintiff establishes such notice, the landlord is chargeable with notice of any hazardous lead condition in that unit, *Juarez by Juarez v Wavecrest Management Team Ltd.*, *supra*; *Crespo v A.D.A. Management*, *supra*; see *Velez v Stopanjac*, 273 AD2d 22, 708 NYS2d 397 (1st Dept 2000). An infant “reside[s]” in an apartment for the purposes of applying Administrative Code § 27-2013(h) if she lives in the unit with the intent of retaining it as a residence, *Yaniveth R. ex rel. Ramona S. v LTD Realty Co.*, 27 NY3d 186, 32 NYS3d 10, 51 NE3d 521 (2016) (infant who spent approximately 50 hours per week in caregiver’s apartment but did not live there did not “reside” in it).

Whether a landlord has satisfied its duty to remedy a hazardous lead condition is governed by a standard of reasonableness that allows a landlord to persuade the fact finder that the existence of a lead paint hazard existed despite the landlord's diligent and reasonable efforts to prevent it, *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996). Thus, even if the administrative code provision were violated, where a landlord establishes that it exercised due care, it will not be held liable if it was acting reasonably under the circumstances, *id*; see *Guzman v 560 Realty Co.*, 273 AD2d 25, 708 NYS2d 403 (1st Dept 2000) (merely repainting room was not satisfactory to abate lead condition). The provisions relating to the lead paint hazards in the Administrative Code of the City of New York § 27-2013(h) addressed in *Juarez* were subsequently repealed and replaced with the provisions contained at Administrative Code § 27-2056.1 *et seq.* The latter provisions were subsequently invalidated for failure to comply with State and local environmental regulations, *New York City Coalition to End Lead Poisoning, Inc. v Vallone*, 100 NY2d 337, 763 NYS2d 530, 794 NE2d 672 (2003). They were replaced by Local Law 1 of 2004 (codified at New York City Admin. Code § 27-2056.1, *et seq.*), see *Yaniveth R. ex rel. Ramona S. v LTD Realty Co.*, 27 NY3d 186, 32 NYS3d 10, 51 NE3d 521 (2016). Unlike its predecessors, the present Local Law 1 does not require the complete removal of all lead-based paint in the home, but instead calls for the abatement of lead-based paint hazards such as peeling, cracking, or bubbling lead-based paint; see *Polanco v Creston Ave. Properties, Inc.*, 84 AD3d 1337, 924 NYS2d 512 (2d Dept 2011) (Local Law 1 applies only to hazardous lead conditions located in the interior of a "dwelling unit," *i.e.* an apartment).

In cases commenced in New York City involving premises not covered by the Administrative Code (*e.g.*, single family residence), notice of a lead-based paint condition cannot be based solely upon a conclusory assertion that the use of lead-based paint in older buildings was "commonly known," *Andrade by Andrade v Wong*, 251 AD2d 609, 675 NYS2d 112 (2d Dept 1998); *Brown by Brown v Marathon Realty, Inc.*, 170 AD2d 426, 565 NYS2d 219 (2d Dept 1991); see *Durand ex rel. Assad v Roth Bros. Partnership Co.*, 265 AD2d 448, 696 NYS2d 234 (2d Dept 1999) (fact that lead paint hazards frequently were subject of media reports did not place defendant landlord on notice that dangerous condition existed in plaintiff's apartment). In such actions, notice of chipping and peeling paint is not the equivalent of notice of a dangerous lead paint condition, *Durand ex rel. Assad v Roth Bros. Partnership Co.*, *supra*. The Court of Appeals subsequently held that knowledge of peeling paint on the premises may raise a triable issue of fact under traditional common-law principles, if coupled with additional factors, *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001).

On a motion for summary judgment to dismiss a claim based on a provision of the Administrative Code, it is the movant's burden to establish the inapplicability of Administrative Code provisions, *Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 (1st Dept 2000).

Outside of New York City where the Administrative Code does not govern, an owner may have constructive notice of a lead condition in an apartment where the owner has actual notice of a lead condition in another apartment in the same building, *Rodriguez by Rodriguez v Amigo*, 244 AD2d 323, 663 NYS2d 873 (2d Dept 1997). The basis for this rule is that knowledge of a dangerous condition in one portion of a structure may impose upon the owners an obligation to examine other portions of the structure for defects arising from the same cause, and to ascertain that which is ascertainable with the exercise of reasonable care, *id.* In *Lanthier by Lanthier by Lanthier v Feroletto*, 237 AD2d 877, 654 NYS2d 531 (4th Dept 1997), the court held that even if defendant landlord knew of chipping and peeling paint in an apartment, that knowledge did not constitute actual or constructive notice of a hazardous lead paint condition, see *Andrade by Andrade v Wong*, 251 AD2d 609, 675 NYS2d 112 (2d Dept 1998); *Busto v Tamucci*, 251 AD2d 441, 674 NYS2d 406 (2d Dept 1998). The Court of Appeals subsequently held that knowledge of peeling paint on the premises may raise a triable issue of fact under traditional common law principles, if coupled with additional factors, *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001); see *Haggray v Malek*, 21 AD3d 683, 799 NYS2d 689 (3d Dept 2005).

The absence of a statutory scheme is not fatal to an action by a plaintiff-tenant in a lead paint poisoning case against a landlord. To impose liability upon a landlord for a lead paint condition, a plaintiff must establish that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition, *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001); *Cunningham v Anderson*, 85 AD3d 1370, 925 NYS2d 693 (3d Dept 2011). A plaintiff may raise a triable issue of fact in opposition to a defendant landlord's motion for summary judgment by demonstrating that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead based paint to young children and (5) knew that a young child lived in the apartment, *Chapman v Silber*, *supra*; *Cunningham v Anderson*, *supra*; *Parra v Lopez*, 293 AD2d 458, 739 NYS2d 450 (2d Dept 2002) (finding triable issue of fact); *Patterson v Brennan*, 292 AD2d 582, 740 NYS2d 96 (2d Dept 2002); see *Haggray v Malek*, 21 AD3d 683, 799 NYS2d 689 (3d Dept 2005).

The Court of Appeals has expressly declined to impose a new duty on landlords to test for the existence of lead in leased properties based solely upon the "general knowledge" of the dangers of lead-based paints in older homes, *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001). In *Chapman*, the Court acknowledged that it had never held that general knowledge of a particular type of risk creates a duty to test for, or remedy, it. The Court only held that a landlord who actually knows of the existence of many conditions indicating a lead

paint hazard to young children may, in the minds of the jury, also be charged constructively with notice of the hazard.

The Residential Lead-Based Hazard Reduction Act of 1992, 42 USC § 4852d, which requires sellers and lessors of residential housing to provide purchasers and lessees with a lead-hazard information pamphlet and to disclose the presence of any known lead-based paint or lead-based paint hazards, is intended only to protect the actual purchasers and lessees of premises. Thus, the statute does not protect the child of a purchaser or lessee or give rise to a private right of action in favor of such a child even if the child was allegedly injured as a result of undisclosed lead paint hazards on the purchased or leased premises, *Skerritt v Bach*, 23 AD3d 1080, 805 NYS2d 213 (4th Dept 2005); see *Brown v Maple3, LLC*, 88 AD3d 224, 928 NYS2d 740 (2d Dept 2011) (neither lessee's daughter nor lessee's granddaughter has standing to maintain cause of action under Residential Lead-Based Paint Hazard Reduction Act). However, Congress intended the Residential Lead-Based Paint Hazard Reduction Act to be implemented in conjunction with state and local laws that require abatement of lead-based paint, *Brown v Maple3, LLC*, *supra*. Thus, a plaintiff unable to assert a private cause of action under the Act may still pursue causes of action cognizable under New York law, e.g., common law negligence, *id*.

Absent a special relationship, no liability may be imposed upon a municipality for failure to enforce municipal laws and regulations regarding lead-based paint hazards, *Gibbs ex rel. Gibbs v Paine*, 280 AD2d 517, 720 NYS2d 184 (2d Dept 2001). In *Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 111, 810 NE2d 393 (2004), the Court of Appeals held that Public Health Law §§ 1370–1376, which require the Department of Health to create programs to establish and coordinate lead-poisoning prevention programs, do not give rise to a private right of action against municipalities for negligent implementation of such programs. Thus, an injured person's claim to having a special relationship with the municipality cannot be predicated on the municipality's breach of any statutory duty imposed by these provisions. Further, the activities of municipal employees in offering nutrition and hygiene advice, eliciting medical information about the plaintiffs' children, promising to conduct reinspections and ensure abatement and providing erroneous advice about the need for testing did not constitute the kind of voluntary assumption of a duty to act on the plaintiffs' behalf that would give rise to a special relationship, since the activities did not extend beyond the mandates of the lead paint laws. Finally, the municipality's action in monitoring and prodding the building owners to meet their lead abatement responsibilities and in providing health and hygiene advice did not constitute the kind of positive direction or control of the situation that would create the necessary special relationship, *id*.

A public housing administrator under the Federal section 8 housing assistance payment program is not liable for failing to conduct inspections pursuant to the Federal Lead Based Poisoning Prevention Act (42 USC 4822 et seq.) on a common law negligence theory absent a special

relationship between the administrator and the plaintiff since these inspections constituted a government function, *Messam v Williams*, 284 AD2d 437, 727 NYS2d 450 (2d Dept 2001). However, liability may be imposed on an independent contractor retained by the City of New York to perform a lead abatement project where the contractor, by failing to exercise reasonable care in the performance of the project, exposed the plaintiff-tenant to a dangerous, toxic environment, *Vega v S.S.A. Properties, Inc.*, 13 AD3d 298, 788 NYS2d 28 (1st Dept 2004).

Whether liability is predicated on the common law obligation of the lessor concerning common passageways and demised areas over which the lessor has retained control or violation of the general provisions of the Multiple Dwelling Law, notice, actual or constructive, of the defect causing the injury is a prerequisite to liability, *Chapman v Silber*, 97 NY2d 9, 734 NYS2d 541, 760 NE2d 329 (2001); *Worth Distributors, Inc. v Latham*, 59 NY2d 231, 464 NYS2d 435, 451 NE2d 193 (1983); *Stoliker v Crandall*, 25 NY2d 991, 305 NYS2d 506, 253 NE2d 219 (1969); *Idel v Mitchell*, 158 NY 134, 52 NE 740 (1899); *Cohen v Cotheal*, 156 App Div 784, 142 NYS 99 (1st Dept 1913), *aff'd*, 215 NY 659, 109 NE 1070 (1915); *Hamlin v McTighe*, 240 AD2d 792, 658 NYS2d 150 (3d Dept 1997) (MDL § 174); *Serrano v Spengler*, 96 AD2d 935, 466 NYS2d 385 (2d Dept 1983); *Benjamin v Jonathan Woodner Co.*, 22 AD2d 68, 253 NYS2d 649 (1st Dept 1964) (MDL § 78); *Zapin v Israel*, 285 App Div 968, 138 NYS2d 675 (2d Dept 1955) (MDL § 80); see *Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628, 649 NYS2d 115, 672 NE2d 135 (1996); *Labetti v Fanley Associates Inc.*, 27 AD2d 654, 276 NYS2d 904 (1st Dept 1967), unless the statute expressly provides otherwise, *Mermelstein v 417 Riverside Drive, Inc.*, 25 AD2d 522, 267 NYS2d 330 (1st Dept 1966) (involving MDL § 37, which in subd 2 puts the burden on the owner “to show that the light became and remained extinguished without his knowledge or consent”), or, being designed for the safety and protection of the public, imposes an absolute duty, *Smulczeski v City Center of Music & Drama, Inc.*, 3 NY2d 498, 169 NYS2d 1, 146 NE2d 769 (1957); *Reider v Whitebrook Realty Corp.*, 23 AD2d 691, 257 NYS2d 635 (2d Dept 1965) (involving MRL § 109); see *Abrash v Long Island University*, 22 AD2d 940, 255 NYS2d 930 (2d Dept 1964).

The fact that a lessee of the entire premises has actual notice is not sufficient to impose liability on the owner under MDL § 78, *Becker v Manufacturers Trust Co.*, 262 App Div 525, 30 NYS2d 542 (1st Dept 1941), but if the owner has authority under the lease to enter the interior of the apartments, he or she may be charged with constructive notice of defects in them, *Tkach v Montefiore Hospital for Chronic Diseases*, 289 NY 387, 46 NE2d 333 (1943); see *Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 516 NYS2d 451, 509 NE2d 51 (1987) (lessor’s right to reenter commercial premises sufficient to charge it with constructive notice of violations of New York City Administrative Code); but see *Sagnelli v R.P.I. 6 Harrison Street, Ltd. Partnership*, 185 AD2d 153, 586 NYS2d 8 (1st Dept 1992) (right to reenter commercial premises leased to film studio was not sufficient to charge lessor with constructive notice of tenant’s daily operations such

as placement of cables or layout of sets). The Tkach case reserved the question whether the lessor can be charged with constructive notice in the absence of such a lease provision. In the latter connection, see *Rodriguez v Levin*, 36 Misc2d 239, 232 NYS2d 108 (Sup 1962) and *Benjamin v Kimble*, 43 Misc2d 497, 251 NYS2d 708 (Sup 1964), that authority to enter may be implied from the requirement of MDL § 78 that the demised premises be kept in good repair. Constructive notice means notice imputed from the fact that the condition existed for so long a time that knowledge of it should have been acquired in the exercise of reasonable care, *Batton v Elghanayan*, 43 NY2d 898, 403 NYS2d 717, 374 NE2d 611 (1978); *Appleby v Webb*, 186 AD2d 1078, 588 NYS2d 228 (4th Dept 1992); *Fischer v Battery Bldg. Maintenance Co.*, 135 AD2d 378, 521 NYS2d 678 (1st Dept 1987); see *Karten v New York*, 109 AD2d 126, 490 NYS2d 503 (1st Dept 1985). As to the extent of the duty imposed by MDL § 78, see *Worth Distributors, Inc. v Latham*, 59 NY2d 231, 464 NYS2d 435, 451 NE2d 193 (1983); *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982).

Under *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976), the liability of a landowner to one injured upon its property is to be governed not by the common-law distinctions among trespassers, licensees and invitees but under the “single standard of reasonable care under the circumstances whereby foreseeability shall be a measure of liability,” *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (2003); *Scurti v New York*, 40 NY2d 433, 387 NYS2d 55, 354 NE2d 794 (1976). Thus, liability, whether common-law or statutory, extends to tenants and all others whose presence on the premises can reasonably be foreseen, and a defense available against the tenant, in that the tenant was aware of the defective condition, may not be available against a person visiting the tenant, *Loucks v Dolan*, 211 NY 237, 105 NE 411 (1914); *Inverso v Whitestone Transit Mix Corp.*, 30 AD2d 565, 290 NYS2d 953 (2d Dept 1968). The common-law status of the injured party does have continuing relevance, however, in determining whether his or her presence on the property was foreseeable, *Peralta v Henriquez*, *supra*; *Quinlan v Cecchini*, 41 NY2d 686, 394 NYS2d 872, 363 NE2d 578 (1977); *Scurti v New York*, *supra*.

While the Multiple Dwelling Law does not impose liability upon a managing agent, *Gardner v 1111 Corp.*, 286 App Div 110, 141 NYS2d 552 (1st Dept 1955), *aff'd*, 1 NY2d 758, 152 NYS2d 303, 135 NE2d 55 (1956), the common-law rule is that when a managing agent has complete and exclusive control of the management and operation of the building, the agent is liable for negligence just as the owner would be and is not excused by claiming that he or she was guilty only of nonfeasance, *id*; see *Mollino v Ogden & Clarkson Corporation*, 243 NY 450, 154 NE 307 (1926). As to the responsibility of a mortgagee in possession, see *Introductory Statement*, *supra*.

As to the validity of agreements exempting lessors from liability for negligence, see GOL § 5-321 and Comment to PJI 2:101. As to the validity of other agreements limiting liability, see GOL § 5-323 (building ser-

vice or maintenance contractors); GOL § 5-325 (garages and parking places); GOL § 5-326 (places of public amusement and similar establishments) and Comment to PJI 2:101.

For a charge on comparative negligence, see PJI 2:36.

For purposes of imposing personal liability for defective conditions on premises owned by tenants in common, a co-tenant's right to use and enjoy the entire premises translates into a duty to maintain it safely, *Butler ex rel. Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567, 792 NE2d 1055 (2003). The common law doctrine of tenancy-in-common presumptively gives each co-tenant full possession of the entire premises and, therefore, a defective condition causing injury to a third party results in joint and several liability as to each co-tenant. These general rules of a tenancy-in-common will not control where there is a contrary agreement, *id.* Where co-tenants enter into an agreement regarding possession and control of the premises and are faithful to its terms, liability for personal injuries will fall only on the tenant who exercises possession and control over the area in question, *id.*; see *Ritto v Goldberg*, 27 NY2d 887, 317 NYS2d 361, 265 NE2d 772 (1970); *Kraft v Loso*, 154 AD3d 1265, 63 NYS3d 566 (3d Dept 2017) (defendant who surrendered possession and control of premises to co-owner was not liable for alleged dangerous condition).

PJI 2:106. Liability for Condition or Use of Land—To Persons on the Land—Lessor's Liability Under Covenant to Repair

Section . . . of the lease provides: [*Here, if appropriate, read applicable provision calling for repairs by the lessor.*] **That provision requires the lessor to use reasonable care to keep the premises in safe condition. In order for plaintiff to recover, plaintiff must show that he or she was injured, that the injury occurred in a portion of the premises that was in a defective condition; that the defective condition of the premises was a substantial factor in causing the injury; and that the lessor knew of the defective condition for a sufficient length of time before plaintiff's injury to permit the lessor in the use of reasonable care to have corrected it; or that the condition had existed for a sufficient length of time that in the use of reasonable care the lessor should have known of its existence and corrected it. Reasonable care means that degree of care that a reasonably prudent lessor would use under the same circumstances.**

Comment

Caveat: Comment d to Restatement, Second, Torts § 357 provides that the contract defines the extent of the lessor's duty and that, unless it states that the lessor shall inspect the land to ascertain the need for repairs, a contract to keep the premises in safe condition subjects the lessor to liability only if the lessor does not exercise reasonable care after receiving notice of the need for repairs. Accordingly, in an appropriate case, the constructive notice portion of the pattern charge may have to be modified to conform to the actual language of the contract.

Based on *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976); Restatement, Second, Torts, § 357, see *De Clara v Barber S. S. Lines*, 309 NY 620, 132 NE2d 871 (1956); *Inverso v Whitestone Transit Mix Corp.*, 30 AD2d 565, 290 NYS2d 953 (2d Dept 1968) (sublessor); *Prosser & Keeton*, Torts (5th Ed) 443–446. The duty imposed under the covenant to repair is analogous to that imposed upon the lessor with respect to those portions of the premises over which the lessor retains control, as to which see PJI 2:105. If the lease provision is sufficiently ambiguous to permit the admission of parol evidence the charge should be modified accordingly. The failure to use reasonable care must, of course, be a proximate cause of the injury; see PJI 2:70.

A covenant to repair the premises, or a part thereof, exposes the lessor to liability for injury caused by a condition of disrepair existing before or arising after the lessee has taken possession if: (i) the disrepair created an unreasonable risk to persons on the land which risk would have been prevented by performance of the covenant; and (ii) the lessor failed to exercise reasonable care to perform the covenant, *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976) (adopting the rule of Restatement, Second, Torts, § 357); *Nicks v Joseph*, 82 AD2d 768, 440 NYS2d 218 (1st Dept 1981); see *Arthur Richards, Inc. v 79th Fifth Ave. Co.*, 57 NY2d 824, 455 NYS2d 596, 441 NE2d 1114 (1982); *Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 114 NYS3d 21, 137 NE3d 476 (2019). *Putnam v Stout*, *supra*, overrules the holding in *Cullings v Goetz*, 256 NY 287, 176 NE 397 (1931), which held that the covenant to repair alone was not enough to expose the lessor to tort liability to the lessee or others lawfully on the land. The lessor's duty under *Putnam v Stout* is a tort duty, see Restatement, Second, Torts § 357, Comment c. Additionally, even apart from its contractual duties under a lease provision requiring the landlord to maintain and repair the plumbing, heating and ventilation systems, a landlord may be liable in tort for damages caused by breach of a statute such as Multiple Dwelling Law § 78 and Administrative Code of the City of New York §§ 27-966 and -949, at least where the “abrupt nature of the injury and the resulting damages are ‘both typical of tort claims,’” *Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 817 NYS2d 230 (1st Dept 2006); see also *Bellevue South Associates v HRH Const. Corp.*, 78 NY2d 282, 574 NYS2d 165, 579 NE2d 195 (1991) (“hazard bound to produce a catastrophic accident”).

A landlord will not be liable under a covenant to repair where the

defect was caused by the tenant's interior modification of the building, *Davison v Wiggand*, 259 AD2d 799, 686 NYS2d 181 (3d Dept 1999). The lessor's reservation of the right to approve repairs to be undertaken by its tenant and the right to approve the plans, specifications and manner of work, is not the equivalent of a covenant to maintain or repair and does not, by itself, impose liability upon the lessor, *Schlesinger v Rockefeller Center, Inc.*, 119 AD2d 462, 500 NYS2d 510 (1st Dept 1986); see also *Paz v New York*, 157 AD2d 562, 550 NYS2d 304 (1st Dept 1990) (agreement by municipality to provide maintenance funds in its budget for public library not sufficient to impose liability upon municipality); but see *Wright v Olympia & York Companies (U.S.A.) Inc.*, 273 AD2d 24, 709 NYS2d 41 (1st Dept 2000) (lease provision providing that defendant-lessor was to approve all material alterations to premises undertaken by lessee sufficient to raise triable issue of fact as to whether lessor had notice of allegedly hazardous condition and retained sufficient control over leased premises to be held responsible for preventing or remedying of hazard). Likewise, a landlord's contractual reservation of a right of re-entry for general inspection purposes, unrelated to any affirmative obligations to maintain or repair, does not confer control over the premises sufficient to impose liability for a subsequently arising dangerous condition, *Canela v Foodway Supermarket*, 188 AD2d 416, 591 NYS2d 834 (1st Dept 1992). Nor does the retention of a limited right to reenter the leased premises to inspect and to make major structural repairs suffice to give rise to liability for a transitory snow and ice condition, *D'Orlando v Port Authority of New York & New Jersey*, 250 AD2d 805, 674 NYS2d 382 (2d Dept 1998).

(3) VENDOR'S LIABILITY**PJI 2:108. Liability for Condition or Use of Land—To Persons on the Land—Vendor's Liability**

A seller of (land, a building) is liable to a person injured on the property after transfer of possession to the buyer if at the time of transfer (1) a dangerous condition existed (on the land, in the building), (2) the seller either knew about the condition or knew of facts or circumstances from which a reasonable person would conclude that such a condition existed and did not tell the buyer about it, and (3) the condition was not known to or discoverable by the buyer through the use of reasonable care. The seller's responsibility ends, however, when the buyer has had reasonable opportunity to discover the condition and make the necessary repairs.

Comment

[See also Introductory Statement to this division.]

Based on *Bittrolff v Ho's Development Corp.*, 77 NY2d 896, 568 NYS2d 902, 571 NE2d 72 (1991); *McCabe v Cohen*, 294 NY 522, 63 NE2d 88 (1945); *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); *Pavelchak v Finn*, 153 NYS2d 795 (Sup 1956), *aff'd*, 6 AD2d 841, 176 NYS2d 933 (2d Dept 1958); see *Farragher v New York*, 26 AD2d 494, 275 NYS2d 542 (1st Dept 1966), *aff'd*, 21 NY2d 756, 288 NYS2d 232, 235 NE2d 218 (1968); *Rufo v South Brooklyn Sav. Bank*, 268 App Div 1057, 52 NYS2d 469 (2d Dept 1945); Restatement, Second, Torts § 353; Prosser and Keeton, Torts § 64 (5th ed); 2 Harper, James & Gray, *The Law of Torts* § 27.18 (2d ed); 85 NYJur2d, *Premises Liability* §§ 116–118; 2B Warren, *Negligence, Landlord and Tenant* § 14 (4th ed); 2D Warren, *Negligence, Vendor & Purchaser* § 3 (4th ed); Annot: 48 ALR3d 1027. With respect to the seller's knowledge of the condition and realization of the risk, see Comment to PJI 2:100, which by analogy is applicable to the present charge.

The general rule is that after transfer the seller's responsibility for injury resulting from the condition of the premises ceases, *Bittrolff v Ho's Development Corp.*, 77 NY2d 896, 568 NYS2d 902, 571 NE2d 72 (1991); *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); *Edwards v Van Skiver*, 256 AD2d 957, 681 NYS2d 893 (3d Dept 1998); *Romel v Reale*, 155 AD2d 747, 547 NYS2d 691 (3d Dept 1989) (execution of installment contract transferred possession and control over property to contract vendee as equitable owner, and terminated liability of vendors); *Govel v*

Lio, 120 AD2d 840, 502 NYS2d 290 (3d Dept 1986). Exceptions to the general rule impose liability when the seller consciously deceives by failing to disclose or by concealing a known danger or by negligently failing to disclose that such danger exists on the land, or injury occurs before the buyer has had sufficient time to remedy the defect, *Farragher v New York*, 26 AD2d 494, 275 NYS2d 542 (1st Dept 1966), *aff'd*, 21 NY2d 756, 288 NYS2d 232, 235 NE2d 218 (1968); *Marrero v Marsico*, 218 AD2d 226, 639 NYS2d 183 (3d Dept 1996); *Copp v Corning Glass Works*, 114 AD2d 144, 497 NYS2d 970 (4th Dept 1986); *Capasso v Rosenblum*, 50 AD2d 584, 375 NYS2d 143 (2d Dept 1975). The pattern charge concerns the first of these exceptions. Under it, the seller remains responsible to the buyer and others on the premises until the buyer has actual or constructive notice of the defect and a reasonable opportunity to correct it, *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); see *Brown v O'Connor*, 193 AD2d 1088, 598 NYS2d 629 (4th Dept 1993); see also *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976) (abolishing the common law rule that duty owed by owner or possessor of land varied with status of plaintiff as licensee, invitee, or trespasser). The passage of a reasonable period of time since the transfer of title can insulate a former land owner from liability for a dangerous condition that existed at the time of the conveyance, *Gomez by DeJesus v Walton Realty Associates*, 258 AD2d 307, 685 NYS2d 201 (1st Dept 1999) (property in receivership for two years); see *Caldwell v 302 Convent Ave. Housing Development Fund Corp.*, 272 AD2d 112, 707 NYS2d 423 (1st Dept 2000). The buyer is under no duty to inspect the premises before taking possession, *Kilmer v White*, *supra*, *contra*: Restatement, Second, Torts § 353, Comment d.

Whether the buyer has had a reasonable opportunity to discover and repair the condition may be a question of law, see *Smith v Szeliowski*, 278 App Div 832, 104 NYS2d 193 (2d Dept 1951), and cases cited in the next paragraph of this comment. Where there is no evidence that the seller either created a dangerous condition or concealed it from the buyer, the seller is entitled to summary judgment, *Matthews v Tobias*, 260 AD2d 608, 688 NYS2d 677 (2d Dept 1999). In contrast, a jury question was found to exist in *Kilmer v White*, 254 NY 64, 171 NE 908 (1930), where the injury occurred three days after transfer, *McCabe v Cohen*, 294 NY 522, 63 NE2d 88 (1945) (eight days), *Brown v O'Connor*, 193 AD2d 1088, 598 NYS2d 629 (4th Dept 1993) (52 days), and *Pavelchak v Finn*, 153 NYS2d 795 (Sup 1956), *aff'd*, 6 AD2d 841, 176 NYS2d 933 (2d Dept 1958) (83 days). The nature of the condition, the manner in which the buyer uses the land, and the time elapsed are all to be considered in determining whether the buyer had reasonable opportunity and the seller's responsibility had, therefore, ended, Restatement, Second, Torts § 353, Comment g. Reasonable opportunity is measured from the closing of title, not from the contract date, *Farragher v New York*, 26 AD2d 494, 275 NYS2d 542 (1st Dept 1966), *aff'd*, 21 NY2d 756, 288 NYS2d 232, 235 NE2d 218 (1968). To be distinguished is the situation in which the seller by act or assurance actively conceals the condition, rather than simply failing to disclose it. The *Kilmer* and *Pavelchak* cases and *Rufo v South Brooklyn Sav. Bank*, 268 App Div

1057, 52 NYS2d 469 (2d Dept 1945), all contain dicta, with which the Restatement is in accord, that in such a situation the seller's responsibility continues until the buyer has in fact discovered the condition and had time to remedy it. In such a case, the pattern charge must be modified accordingly.

A further exception, not dealt with by the pattern charge, arises "where a nuisance exists on the premises," *Pharm v Lituchy*, 283 NY 130, 27 NE2d 811 (1940). It has been stated that use of the term "nuisance" to describe a condition threatening injury to persons upon, rather than outside of, the premises is a misnomer; when so used, the term refers simply to a dangerous condition on the premises, *Miller v Morse*, 9 AD2d 188, 192 NYS2d 571 (4th Dept 1959). *Kilmer v White*, 254 NY 64, 171 NE 908 (1930), dealt with liability to a person on the premises, and its use of the word "nuisance" interchangeably with the phrase "dangerous condition" supports the conclusion of the *Miller* case. This may explain the absence from the decision in *Pharm v Lituchy*, *supra*, of any reference to limitations on transferor liability usually applied in true nuisance cases, but see Comment to PJI 2:118. In the *Pharm* case, the Court of Appeals distinguished the common-law exception in "nuisance" cases from the conscious deception exception and, based on a jury finding that a ceiling was in a dangerous condition and on the definition of a nuisance in Multiple Dwelling Law § 4(30) (now section 309(1)(a)), held the seller responsible for injury to a tenant that occurred one day after transfer. Such liability, the Court noted, continues "at least until the new owner has had reasonable opportunity to discover the condition on prompt inspection and to make necessary repairs." Other cases have held that responsibility of the seller ends when that of the new owner begins, *Rufo v South Brooklyn Sav. Bank*, 268 App Div 1057, 52 NYS2d 469 (2d Dept 1945), and have dismissed complaints alleging injuries occurring six months, *Zeledon v Bowery Sav. Bank*, 195 Misc 933, 85 NYS2d 414 (Sup 1948); four years, *Tri-Boro Bowling Center v Roosevelt Eighty-Fifth Estates*, 77 NYS2d 74 (Sup 1947), and four and one-half months, *Slavitz v Morris Park Estates*, 98 Misc 314, 162 NYS 888 (Sup 1917), after transfer. The liability of an owner who passively continues a nuisance created by the previous owner depends upon actual or constructive notice of the existence of the nuisance, *Kuenzler v South Nyack*, 133 AD2d 100, 518 NYS2d 638 (2d Dept 1987).

Such "nuisance" cases may involve statutory definitions other than that set forth in the Multiple Dwelling Law, see *McCabe v Cohen*, 294 NY 522, 63 NE2d 88 (1945). The charge should submit the issues of whether a dangerous condition or a condition within the applicable statutory definition existed at the time of transfer and whether the new owner had a reasonable opportunity to discover the condition and make necessary repairs.

An additional, narrow exception applies when a former owner acted as a construction contractor on the premises and the owner-contractor affirmatively created a dangerous condition in the course of the project,

Scheffield v Vestal Parkway Plaza, LLC, 139 AD3d 1161, 31 NYS3d 628 (3d Dept 2016); see *Marrero v Marsico*, 218 AD2d 226, 639 NYS2d 183 (3d Dept 1996).

Liability may run to the buyer, *Pavelchak v Finn*, 153 NYS2d 795 (Sup 1956), *aff'd*, 6 AD2d 841, 176 NYS2d 933 (2d Dept 1958); to tenants, *Pharm v Lituchy*, 283 NY 130, 27 NE2d 811 (1940); *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); and all others whose presence on the premises can reasonably be foreseen, *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *McCabe v Cohen*, 294 NY 522, 63 NE2d 88 (1945).

The principle stated in the pattern charge is akin to that dealing with the lessor's liability for concealed defects, see PJI 2:100. That charge and the instant charge should also be compared with PJI 2:116 and PJI 2:118, concerning the responsibility of a lessor and seller, respectively, for injury to persons outside the premises.

b. To PERSONS OUTSIDE THE LAND**(1) POSSESSOR'S LIABILITY****PJI 2:110. Liability for Condition or Use of Land—To Persons Outside the Land—Possessor's Liability—Generally**

An (owner, person in possession) of (land, a building) is liable for injury to a person on (adjoining property, the street) if (1) the (land, building) was in a condition dangerous to persons on (adjoining property, the street), (2) the (owner, person in possession) either knew about or in the use of reasonable care should have discovered the condition and had a reasonable opportunity to correct it, and (3) the condition was a substantial factor in causing plaintiff's injury.

Comment

Based on *Appel v Muller*, 262 NY 278, 186 NE 785 (1933); *Hynes v New York Cent. R. Co.*, 231 NY 229, 131 NE 898 (1921); *Mullen v St. John*, 57 NY 567 (1874); *Smart v Wozniak*, 58 AD2d 993, 397 NYS2d 489 (4th Dept 1977); *Meil v Syracuse Constructors, Inc.*, 19 AD2d 10, 240 NYS2d 403 (4th Dept 1963); *Pearson v Ehrich*, 148 App Div 680, 133 NYS 273 (1st Dept 1912); *Kaiser v Washburn*, 55 App Div 159, 66 NYS 764 (3d Dept 1900); the cases cited in Comment to PJI 2:116; see *Prosser and Keeton, Torts* § 57 [5th ed]; 5 *Harper, James & Gray, The Law of Torts* § 27.19 [2d ed]; 4A *Warren, Negligence, Adjoining Property* §§ 2.02, 2.05 [4th ed]; 4B *Warren, Negligence, Highways* §§ 67.03, 67.10 [4th ed]; 85 *NYJur2d, Premises Liability* §§ 65–72; *Restatement, Second, Torts* §§ 364, 365, 368, 370, 371. The term “substantial factor” is used in the pattern charge to incorporate the element of proximate cause and should be defined and expanded upon as indicated in PJI 2:70 and Comment. As to the effect of a lease of all or part of premises upon the liability of the owner or a lessee for a dangerous condition existing at the commencement of the lease, see PJI 2:116.

The principle of the pattern charge applies not only to the condition of the premises but also to activities conducted on the premises, *Wright v Tudor City Twelfth Unit*, 276 NY 303, 12 NE2d 307 (1938); *Rohlf v Weil*, 271 NY 444, 3 NE2d 588 (1936); *Weitzmann v A.L. Barber Asphalt Co.*, 190 NY 452, 83 NE 477 (1908); *Althorf v Wolfe*, 22 NY 355 (1860); *Simmons v Radio Printing Corp.*, 254 App Div 521, 5 NYS2d 345 (1st Dept 1938), *aff'd*, 279 NY 783, 18 NE2d 866 (1939); see PJI 2:112, PJI 2:113, PJI 2:114; *Restatement, Second, Torts* § 371. It is applicable to decayed trees, *Harris v East Hills*, 41 NY2d 446, 393 NYS2d 691, 362

NE2d 243 (1977); *Diamond v State*, 53 AD2d 958, 385 NYS2d 827 (3d Dept 1976); *Gibson v Denton*, 4 App Div 198, 38 NYS 554 (3d Dept 1896); see *Sleezer v Zap*, 90 AD3d 1121, 933 NYS2d 764 (3d Dept 2011); *Newman v Glens Falls*, 256 AD2d 1012, 682 NYS2d 314 (3d Dept 1998); *Rinaldi v State*, 49 AD2d 361, 374 NYS2d 788 (3d Dept 1975); *Edgett v State*, 7 AD2d 570, 184 NYS2d 952 (3d Dept 1959); Restatement, Second, Torts § 363; Annot: 94 ALR3d 1160, except that either actual notice or constructive notice must be shown, i.e., decay must be readily observable, *Ivancic v Olmstead*, 66 NY2d 349, 497 NYS2d 326, 488 NE2d 72 (1985); *Sleezer v Zap*, supra; *Lahowin v Ganley*, 265 AD2d 530, 696 NYS2d 241 (2d Dept 1999); see *Priore v New York City Dept. of Parks and Recreation*, 124 AD3d 749, 2 NYS3d 170 (2d Dept 2015) (defendant failed to establish, prima facie, that it conducted reasonable inspection of subject tree). When both plaintiff and defendant believe the trees to be located on plaintiff's land, there is no duty on defendant, *Riegger v Valhalla Mortgage & Finance Corp.*, 273 App Div 763, 75 NYS2d 149 (1st Dept 1947). Liability does not attach where the proximity of a tree stump to a highway did not create an unreasonable danger to travelers, *Alberti v Rydill*, 152 AD2d 520, 543 NYS2d 463 (2d Dept 1989); see *McKenna v Garcia*, 189 AD2d 756, 592 NYS2d 414 (2d Dept 1993). Further, absent a statute or local ordinance, neither the owner nor the tenant of property adjacent to a sidewalk owes a duty to the public to repair a tree root protruding from a sidewalk tree well, where neither created the root or caused the protrusion as a result of some special use of the sidewalk, *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 851 NYS2d 512 (1st Dept 2008).

Owners of land abutting public property are not liable for keeping the public property in safe condition merely by virtue of the proximity of their property, *Fitzgerald v Adirondack Transit Lines, Inc.*, 23 AD3d 907, 804 NYS2d 126 (3d Dept 2005). The exceptions to this general rule include situations in which the abutting landowner negligently created a dangerous or defective condition on the public property, id; see *Gianne-lis v BorgWarner Morse TEC Inc.*, 167 AD3d 1185, 89 NYS3d 475 (3d Dept 2018); *Hausser v Giunta*, 88 NY2d 449, 646 NYS2d 490, 669 NE2d 470 (1996). This exception applies where the defendant negligently causes percolating water to flow out onto a public highway creating a hazardous icy condition, *Sellnow v O'Donnell*, 84 AD2d 589, 444 NYS2d 484 (3d Dept 1981). An abutting owner is liable if water, snow, or ice is diverted from the abutting premises to the sidewalk by artificial means, *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969); *Fitzgerald v Adirondack Transit Lines, Inc.*, supra. However, the principle does not apply if snow and ice naturally accumulates upon the sidewalk in front of the owner's property, *Verdino v Alexandrou*, 253 AD2d 553, 677 NYS2d 368 (2d Dept 1998), or if the natural flow of surface water is changed by improvement made to put the defendant's property to some rational use, provided that the water is not drained onto the adjacent property by means of pipes or ditches, *Kossoff v Rathgeb-Walsh, Inc.*, 3 NY2d 583, 170 NYS2d 789, 148 NE2d 132 (1958); *Marrero v Marsico*, 218 AD2d 226, 639 NYS2d 183 (3d Dept 1996); *Betancourt v New York*, 194 AD2d 759, 599 NYS2d 615 (2d Dept 1993);

Bozydaj v Plattekill, 70 AD2d 690, 416 NYS2d 409 (3d Dept 1979); Friedland v State, 35 AD2d 755, 314 NYS2d 935 (3d Dept 1970); see Baker v Plattsburgh, 46 AD3d 1075, 847 NYS2d 300 (3d Dept 2007) (no liability where landowner made land improvements in good faith effort to enhance its usefulness and did not use artificial means to divert water); Restatement, Second, Torts § 363 (no liability for harm caused to those outside the land by a natural condition of the land). The mere act of creating a ditch or channel discharging water onto another's land is actionable, even though there was no negligence in construction or maintenance, Lytwyn v Wawarsing, 43 AD2d 618, 349 NYS2d 35 (3d Dept 1973); but see Winney v Bundy, 184 AD2d 813, 584 NYS2d 664 (3d Dept 1992) (plaintiffs not entitled to relief where evidence showed that berm constructed by defendants was necessary to deflect excess water flow created by plaintiffs' tree cutting and landscaping activity). To hold defendant landowner strictly liable for the discharge of surface water by artificial means upon plaintiff's land, plaintiff must establish that the discharge was materially different from the prior drainage, Batavia Turf Farms, Inc. v Genesee, 239 AD2d 903, 659 NYS2d 681 (4th Dept 1997). A private landowner cannot be held liable for an icy condition caused by water dripping from a defective roof on its building unless the landowner had actual or constructive notice of the danger to the public, Fitzgerald v Adirondack Transit Lines, Inc., supra.

Owners of real property adjoining a public highway have a duty to maintain their premises so as not to impair the free and safe passage of the adjoining highway, Robertson v Greater Buffalo Auto Auction, Inc., 283 AD2d 1015, 724 NYS2d 249 (4th Dept 2001) (ice on driveway caused vehicle to skid into public highway); see Sleezer v Zap, 90 AD3d 1121, 933 NYS2d 764 (3d Dept 2011). A property owner may be held liable for the creation of a dangerous condition where it controls the traffic flow of its employees' vehicles from its private parking lot onto a public roadway, Giannelis v BorgWarner Morse TEC Inc., 167 AD3d 1185, 89 NYS3d 475 (3d Dept 2018). Further, a property owner has a nondelegable duty to see that the maintenance of its building poses no hazard to pedestrians lawfully walking on the adjacent sidewalk, Kopinska v Metal Bright Maintenance Co., Inc., 309 AD2d 633, 766 NYS2d 21 (1st Dept 2003). Thus, a property owner could be held accountable for injuries sustained by a passerby as a result of a contractor's use of a fluid containing bleach to clean the building, *id.* However, a landlord's duties in relation to vicious dogs kept by a tenant does not extend to individuals not on defendant's property, such as a person who was attacked by a tenant's dogs while on the public sidewalk across the street, Walker v Gold, 70 AD3d 1349, 894 NYS2d 809 (4th Dept 2010).

An owner of property has no common law duty to control vegetation on its property for the benefit of users of the adjacent public highway, Lubitz v Scarsdale, 31 AD3d 618, 819 NYS2d 92 (2d Dept 2006); Cain v Pappalardo, 225 AD2d 1005, 639 NYS2d 570 (3d Dept 1996); McSweeney v Rogan, 209 AD2d 386, 618 NYS2d 430 (2d Dept 1994); see Echorst ex rel. Echorst v Kaim, 288 AD2d 595, 732 NYS2d 285 (3d Dept 2001). Likewise, an owner of property abutting a private road that intersects

with a railroad crossing has no duty to control vegetation to prevent the obstruction of a road user's view of oncoming trains, *Clementoni v Consolidated Rail Corp.*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 (2007). Additionally, an owner of property has no duty to control the vegetation of adjoining landowners which allegedly creates a dangerous condition, *Ingenito v Robert M. Rosen, P.C.*, 187 AD2d 487, 589 NYS2d 574 (2d Dept 1992). However, an ordinance prohibiting vegetation that may cause danger to traffic may give rise to tort liability, even if the ordinance does not expressly provide for such liability, *Lubitz v Scarsdale*, *supra*; *McSweeney v Rogan*, *supra*.

In some circumstances, the owner-possessor may have the duty to maintain the abutting sidewalk in proper condition, see PJI 2:111. The duty of reasonable care extends to areas on land that appear to be part of a public way and to conditions created on that land but so near adjoining land or the street as to constitute an unreasonable risk for persons on the adjoining land or on the street, *Beck v Carter*, 68 NY 283 (1877); see *Lacanfora v Goldapel*, 37 AD2d 721, 323 NYS2d 990 (2d Dept 1971) (owner held liable for foreseeable risk that door in wall abutting sidewalk would open under weight of plaintiff who leaned on door while talking to friends and fell through doorway to basement floor 12 feet below); Restatement, Second, Torts § 368; 4C Warren, Negligence, Property on Highway § 88.01 (4th ed). Liability has been imposed where the excavation was within one foot of a highway, *Murphy v Perlstein*, 73 App Div 256, 76 NYS 657 (1st Dept 1902), or was within 20 inches of a sidewalk, *Healy v Vorndrain*, 65 App Div 353, 72 NYS 877 (1st Dept 1901). An excavation 75 feet from a highway, however, has been held not so close as to impose liability, *Bennett v Mount Vernon*, 243 App Div 119, 276 NYS 205 (2d Dept 1934). Note that both the municipality and the abutting owner may be liable for the condition of the sidewalk, see PJI 2:111 (special use by abutting owner) and comment, PJI 2:225 (municipal liability). In such case, there is a right of contribution between the municipality and the abutting owner, *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982); see *Santorelli v New York*, 77 AD2d 825, 430 NYS2d 618 (1st Dept 1980); PJI 2:275. However, where the municipality has, pursuant to local law, given notice to the abutting owner to cure the defect and then defers its repairs by reason of the owner's promise to repair and maintain the sidewalk, the municipality is entitled to full indemnification from the abutting owner for a judgment obtained against the municipality by a pedestrian injured by the defect, *New York v Kalikow Realty Co.*, 71 NY2d 957, 529 NYS2d 62, 524 NE2d 416 (1988).

Res ipsa loquitur may apply, *Mullen v St. John*, 57 NY 567 (1874) (fall of building); *Pearson v Ehrich*, 148 App Div 680, 133 NYS 273 (1st Dept 1912) (fall of chimney); *Kaiser v Washburn*, 55 App Div 159, 66 NYS 764 (3d Dept 1900) (fall of show window); see *Veltri v Stahl*, 155 AD2d 287, 547 NYS2d 49 (1st Dept 1989). For a charge on *res ipsa loquitur*, see PJI 2:65.

The pattern charge concerns an action for negligence. However,

where the condition alleged to constitute a nuisance has its origin in negligence, the nuisance claim must be supported by evidence of the property owner's negligence, *Placide v Yadid, LLC*, 24 AD3d 529, 808 NYS2d 279 (2d Dept 2005); see also Introductory Statement to PJI 3:16. There may also be a right of action for nuisance per se, *Tremblay v Harmony Mills*, 171 NY 598, 64 NE 501 (1902); *Davis v Niagara Falls Tower Co.*, 171 NY 336, 64 NE 4 (1902); see *Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 394 NYS2d 169, 362 NE2d 968 (1977); see also 532 Madison Ave. *Gourmet Foods, Inc. v Finlandia Center, Inc.*, 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001) (public nuisance), in which case it is immaterial that defendant exercised care, see Comment to PJI 2:112 and Introductory Statement to 2 NY PJI 3:16.

Although a landowner who engages in activities that may cause injury to persons on adjoining premises owes those persons a duty to take reasonable precautions to avoid injuring them, a landowner does not owe a duty to protect an entire urban neighborhood against purely economic losses in the absence of personal injuries or property damages, 532 Madison Ave. *Gourmet Foods, Inc. v Finlandia Center, Inc.*, 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001); see *Roundabout Theatre Co., Inc. v Tishman Realty & Const. Co., Inc.*, 302 AD2d 272, 756 NYS2d 12 (1st Dept 2003).

**PJI 2:111. Liability for Condition or Use of Land—To
Persons Outside the Land—Possessor's
Liability to Persons on Sidewalk—Special Use**

Ordinarily the municipality and not the (owner, person in possession) of (land, a building) is responsible for maintaining the sidewalk adjacent to the (land, building). However, when the (owner, person in possession) uses the sidewalk for (his, her, its) own special benefit, as defendant did by [*state special use, such as: installing in the sidewalk an iron trapdoor for entry into (his, her, its) basement*], the (owner, person in possession) assumes responsibility for that portion of the sidewalk put to (his, her, its) special use. In order to recover against defendant, plaintiff must show that (1) a dangerous condition existed on the portion of the sidewalk put to defendant's special use, (2) defendant's special use created or contributed to the dangerous condition, (3) defendant either knew about or in the use of reasonable care should have discovered the condition and had a reasonable opportunity to correct it, and (4) the condi-

tion was a substantial factor in causing plaintiff's injury.

Comment

Caveat: As to accidents occurring on or after September 14, 2003, New York City Administrative Code § 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that such owners are liable for personal injury that is proximately caused by that failure, *Xiang Fu He v Troon Management, Inc.*, 34 NY3d 167, 114 NYS3d 14, 137 NE3d 469 (2019); *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016); see *Martinez v Khaimov*, 74 AD3d 1031, 906 NYS2d 274 (2d Dept 2010). Such a landowner may not avoid the liability imposed by Section 7-210 under the theory that he or she is an out-of-possession landowner, *Xiang Fu He v Troon Management, Inc.*, *supra*. The legislation specifically absolves the City of liability for injuries caused by the failure to maintain or clear sidewalks abutting privately owned real property, see *Sangaray v West River Associates, LLC*, *supra*. Section § 7-210 does not limit a landowner's liability to accidents that occur on its own abutting sidewalk where the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff's injuries, *Sangaray v West River Associates, LLC*, *supra*. Thus, a landowner may be liable even though the defect on which the plaintiff tripped abutted a neighboring property owner's sidewalk, *id*.

The liability-shifting provision does not supersede pre-existing regulations such as 34 RCNY 2-07(b), which makes owners of covers or gratings on the street responsible for monitoring the condition of such hardware and the area extending 12 inches outward from its perimeter, *Torres v Sander's Furniture, Inc.*, 134 AD3d 803, 20 NYS3d 630 (2d Dept 2015); *Roman v Bob's Discount Furniture of NY, LLC*, 116 AD3d 940, 983 NYS2d 845 (2d Dept 2014). Nor does it apply to one-, two-, or three-family residential property that is at least partially owner-occupied and used exclusively for residential purposes. *Koronkevich v Dembitzer*, 147 AD3d 916, 48 NYS3d 188 (2d Dept 2017); *Coogan v New York*, 73 AD3d 613, 900 NYS2d 645 (1st Dept 2010). The residential exemption was adopted in recognition of the inappropriateness of exposing small property owners, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair, *Coogan v New York*, *supra*. Consistent with that purpose, the liability imposed by § 7-210 should not be extended to a homeowner who occasionally used his laptop for research at home, did not claim any part of the premises as a "home office" on his tax return and denied that he operated a "home office," *Coogan v New York*, *supra*. Nor should it be extended to a homeowner who used his basement as a home office to conduct a summer camp's business during the off-season where the homeowner did not claim the home office as a tax deduction, the home address was only used to receive the camp's mail during the off-season,

and the office space was not used with any regularity, *Koronkevich v Dembitzer*, *supra*. Further, § 7-210 does not make an abutting property owner responsible for maintaining trees or tree wells set into the sidewalk, *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 860 NYS2d 429, 890 NE2d 191 (2008), sidewalk grates, *Hurley v Related Management Co.*, 74 AD3d 648, 904 NYS2d 41 (1st Dept 2010), a pedestrian ramp connecting the sidewalk to the street, *Ortiz v New York*, 67 AD3d 21, 884 NYS2d 417 (1st Dept 2009), *rev'd* on other grounds, 14 NY3d 779, 898 NYS2d 544, 925 NE2d 582 (2010), or the curb, *Garris v New York*, 65 AD3d 953, 885 NYS2d 491 (1st Dept 2009).

Based on *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982) (water shutoff valve cover); *Lane v Epstein's Edco Process Dry Cleaners Co.*, 11 NY2d 255, 228 NYS2d 811, 183 NE2d 217 (1962) (basement trapdoors); *Mahar v Albany*, 303 NY 825, 104 NE2d 371 (1952) (water shutoff valve); *McCutcheon v National City Bank of New York*, 291 NY 509, 50 NE2d 647 (1943) (vault cover); *Trustees of Village of Canandaigua v Foster*, 156 NY 354, 50 NE 971 (1898) (grate); *Weiser v New York*, 5 AD2d 702, 169 NYS2d 609 (2d Dept 1957), *aff'd*, 7 NY2d 811, 196 NYS2d 693, 164 NE2d 714 (1959) (survey monument); *Clemmons v Cominskey*, 1 AD2d 933, 149 NYS2d 559 (4th Dept 1956), *aff'd*, 2 NY2d 958, 162 NYS2d 360, 142 NE2d 425 (1957) (gas pipe); *Olivia v Gouze*, 285 App Div 762, 140 NYS2d 438 (1st Dept 1955), *aff'd*, 1 NY2d 811, 153 NYS2d 71, 135 NE2d 602 (1956) (iron grating); *Adorno v Carty*, 23 AD3d 590, 804 NYS2d 798 (2d Dept 2005) (defect in portion of sidewalk used as driveway); *Weiskopf v New York*, 5 AD3d 202, 773 NYS2d 389 (1st Dept 2004) (subway entrance substructure); *Ferguson v Mantell*, 216 AD2d 160, 628 NYS2d 286 (1st Dept 1995) (metal sidewalk grate located above basement premises); *Granville v New York*, 211 AD2d 195, 627 NYS2d 4 (1st Dept 1995) (concrete step mounted upon sidewalk); *Giardina v Lee*, 202 AD2d 278, 608 NYS2d 659 (1st Dept 1994) (construction debris); *Gerdowsky v Crain's New York Business*, 188 AD2d 93, 593 NYS2d 514 (1st Dept 1993) (newspaper vending machine on sidewalk); *Curtis v New York*, 179 AD2d 432, 577 NYS2d 855 (1st Dept 1992) (newspaper racks which directed plaintiff to sidewalk defect); *Schechtman v Lappin*, 161 AD2d 118, 554 NYS2d 846 (1st Dept 1990) and *Santorelli v New York*, 77 AD2d 825, 430 NYS2d 618 (1st Dept 1980) (oil filler cap); *Romano v Monroe*, 149 AD2d 952, 540 NYS2d 83 (4th Dept 1989) (water shutoff valves); *Smith v Corning*, 14 AD2d 27, 217 NYS2d 149 (4th Dept 1961) (water shutoff pipe); *Filsno v Rochester*, 10 AD2d 663, 196 NYS2d 311 (4th Dept 1960) (survey monument); see *Kaufman v Silver*, 90 NY2d 204, 659 NYS2d 250, 681 NE2d 417 (1997) (citing PJI); Restatement, Second, Torts § 350; 4A Warren, Negligence, Driveways § 38.01 (9) at 354–356 (4th ed); 4C Warren, Negligence, Sidewalks § 111.04 (3), (9) (4th ed); 65 NYJur2d, Highways, Streets and Bridges § 371 at 153–156. The principle stated in the pattern charge also applies to an abutting owner's special use of a public street, see *Achkhanian v Oyster Bay*, 262 AD2d 510, 692 NYS2d 424 (2d Dept 1999) (driveway did not constitute "special use" of abutting public street). A curb "cut-out" may constitute a special use of the adjacent sidewalk, *Pantaleon v Lorimer Management Corp.*, 270 AD2d 324, 704 NYS2d 311 (2d Dept 2000).

Generally the municipality, not the abutting owner, is responsible for maintenance of the sidewalk, *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982); *Rochester v Campbell*, 123 NY 405, 25 NE 937 (1890); *Zawacki v North Hempstead*, 184 AD2d 697, 585 NYS2d 93 (2d Dept 1992); *Bentley v Amsterdam*, 170 AD2d 725, 565 NYS2d 533 (3d Dept 1991); *Little v Albany*, 169 AD2d 1013, 565 NYS2d 291 (3d Dept 1991) (citing PJI); *Kiernan v Thompson*, 137 AD2d 957, 525 NYS2d 380 (3d Dept 1988); see *Blais v St. Mary's of Assumption Roman Catholic Church of Waterford*, 89 AD2d 653, 453 NYS2d 117 (3d Dept 1982) (even if abutting owner constructed sidewalk, village responsible if it allowed walk to be used by public). This rule applies regardless of whether the abutting owner's deed description actually encompasses the sidewalk, *Castiglione v Ellenville*, 291 AD2d 769, 738 NYS2d 443 (3d Dept 2002).

The special benefit rule that is covered by the pattern charge is an exception to the general rule, see *Reyes v CSX Transp., Inc.*, 19 AD3d 193, 796 NYS2d 606 (1st Dept 2005) (discussing history of rule). The doctrine of special use, or special benefit, is reserved for situations where a landowner, whose property abuts a public street or sidewalk, derives a special benefit from that property unrelated to the public use, *Zarnoch v Williams*, 83 AD3d 1373, 919 NYS2d 694 (4th Dept 2011); *Lobel v Rodco Petroleum Corp.*, 233 AD2d 369, 649 NYS2d 939 (2d Dept 1996); see *Ruffino v New York City Transit Authority*, 55 AD3d 817, 865 NYS2d 667 (2d Dept 2008) (use of public boardwalk by stadium's customers not "special use"). A special use, as illustrated by the cases cited in the first paragraph of this section, typically involves the installation of some object in a sidewalk or street or some variation in the construction thereof, *Zarnoch v Williams*, *supra*; *Weiskopf v New York*, 5 AD3d 202, 773 NYS2d 389 (1st Dept 2004). What is a special benefit is usually a question of law rather than fact. Whether a "special benefit" existed and whether defendant was the beneficiary of a "special use" may be questions of fact, see *Giannelis v BorgWarner Morse TEC Inc.*, 167 AD3d 1185, 89 NYS3d 475 (3d Dept 2018); *Melamed v Rosefsky*, 291 AD2d 602, 737 NYS2d 410 (3d Dept 2002); *Koeppel v New York*, 205 AD2d 402, 613 NYS2d 389 (1st Dept 1994); *Munnich v Bellmore Dog Grooming*, 201 AD2d 631, 608 NYS2d 270 (2d Dept 1994); *Karr v New York*, 161 AD2d 449, 555 NYS2d 734 (1st Dept 1990).

Additionally, the issue concerning the causal connection between the owner's special use of a portion of the public walkway and the defective condition that caused the injury is an issue for the trier of fact and precludes the granting of summary judgment, *Granville v New York*, 211 AD2d 195, 627 NYS2d 4 (1st Dept 1995); see *Weiskopf v New York*, 5 AD3d 202, 773 NYS2d 389 (1st Dept 2004). Therefore, proximate cause must be charged unless the facts are undisputed, see PJI 2:70. As to comparative fault, see PJI 2:36. As to the liability of the municipality for the condition of the sidewalk, see PJI 2:225.

A landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless the land-

owner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon the landowner and imposed liability to injured third parties for failure to do so, *Capretto v Buffalo*, 124 AD3d 1304, 1 NYS3d 615 (4th Dept 2015); *Jeanty v Benin*, 1 AD3d 566, 767 NYS2d 447 (2d Dept 2003); *Bloch v Potter*, 204 AD2d 672, 612 NYS2d 236 (2d Dept 1994); *Surowiec v New York*, 139 AD2d 727, 527 NYS2d 478 (2d Dept 1988); see *Pardi v Barone*, 257 AD2d 42, 690 NYS2d 315 (3d Dept 1999) (terms “abutting” and “adjoining” include property separated by a strip owned by municipality). Further, a lease provision requiring the lessor to maintain the sidewalk and landscaping does not create a duty to the public that would not otherwise exist, *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 851 NYS2d 512 (1st Dept 2008). A statute that makes landowners responsible for maintaining the adjacent sidewalk does not create liability unless it expressly imposes liability to injured third parties for the failure to do so, *Romano v Leger*, 72 AD3d 1059, 900 NYS2d 346 (2d Dept 2010); *Taubenfeld v Starbucks Corp.*, *supra*. Section 19-119 of the New York City Administrative Code, which regulates the opening of vaults “under any street,” applies to openings leading to cellar vaults under sidewalks and, thus, may provide a basis for imposing liability for injuries sustained by a person who fell through an open sidewalk door maintained by defendant as she exited defendant’s restaurant, *Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 859 NYS2d 29 (1st Dept 2008).

An abutting landowner’s duty to repair a defect arising from a special use runs with the land and liability is not dependent upon a finding that the defect arose during defendant’s ownership, *Katz v New York*, 18 AD3d 818, 796 NYS2d 639 (2d Dept 2005). A landowner who negligently repairs a sidewalk is liable to a person injured thereon, *Fraser v Fertig*, 251 AD2d 621, 676 NYS2d 201 (2d Dept 1998). Plaintiff must submit evidence as to when the repair was made, or that the defendant landowner made it, *Ritts v Teslenko*, 276 AD2d 768, 715 NYS2d 418 (2d Dept 2000). An abutting landowner is not responsible for damage caused to a sidewalk by the roots of a tree, *Gomez v New York*, 238 AD2d 472, 657 NYS2d 920 (2d Dept 1997); *Darringer v Furtsch*, 225 AD2d 577, 639 NYS2d 98 (2d Dept 1996).

A driveway constructed across the sidewalk is an example of a special benefit use of the sidewalk, see *Capretto v Buffalo*, 124 AD3d 1304, 1 NYS3d 615 (4th Dept 2015); *Torres v New York*, 32 AD3d 347, 820 NYS2d 268 (1st Dept 2006); *Katz v New York*, 18 AD3d 818, 796 NYS2d 639 (2d Dept 2005); *Cole v Albany*, 80 AD2d 656, 436 NYS2d 413 (3d Dept 1981). However, the special use doctrine is inapplicable where there is no alleged defect in the sidewalk or driveway itself, even if the defendant makes continual, heavy use of the sidewalk, *Weston v Martinez*, 149 AD3d 1505, 53 NYS3d 431 (4th Dept 2017). Where the dangerous condition was in the sidewalk adjacent to but not part of the area used as a driveway, plaintiff has the burden on a motion for summary judgment of showing that defendant’s special use of the sidewalk contributed to the dangerous condition, *Capretto v Buffalo*, *supra*; *Tor-*

res v New York, *supra*; Adorno v Carty, 23 AD3d 590, 804 NYS2d 798 (2d Dept 2005); see Katz v New York, *supra*. In contrast, where the defect is in the portion of the sidewalk actually used as a driveway, the abutting landowner seeking summary judgment has the burden of showing that it did nothing to create the dangerous condition or cause that condition through its special use, Capretto v Buffalo, *supra*; Campos v Midway Cabinets, Inc., 51 AD3d 843, 858 NYS2d 742 (2d Dept 2008); Torres v New York, *supra*; Adorno v Carty, *supra*; Katz v New York, *supra*. Where there is evidence that the weight of traffic on the driveway could have been a concurrent cause of the defect, defendant landowner is not entitled to summary judgment, Adorno v Carty, *supra*; Katz v New York, *supra*.

A special use may also be found where there has been a modification to the adjacent roadway for the defendant's unique benefit. In Giannelis v BorgWarner Morse TEC Inc., 167 AD3d 1185, 89 NYS3d 475 (3d Dept 2018), where the decedent bicyclist was struck by the defendant's employee's vehicle in the merge lane exiting the defendant's property, the court held that a special use could be found based upon evidence that the public roadway had been altered for the benefit of the defendant's property. In that case, there was evidence that the merge lane was designed for vehicles exiting the defendant's property and merge onto the roadway, *id*.

Because they are of equal benefit to the public and the abutting owner, trees generally are not considered a special use, Allen v Weiss, 279 App Div 91, 108 NYS2d 404 (3d Dept 1951), nor is the removal of a tree stump, Kiernan v Thompson, 137 AD2d 957, 525 NYS2d 380 (3d Dept 1988); see Grant v Schwartz, 276 AD2d 526, 713 NYS2d 769 (2d Dept 2000) (bushes encroaching on sidewalk). Likewise, an owner is not liable for damage to an abutting sidewalk caused by the growth of underground tree roots on the owner's property, Romano v Leger, 72 AD3d 1059, 900 NYS2d 346 (2d Dept 2010). A drain covered by a metal grating, the purpose of which is to carry off water collected from the roof of a building is a special benefit, De Sessa v White Plains, 30 Misc2d 817, 219 NYS2d 190 (Sup 1961), as are railroad tracks embedded in the public street, Reyes v CSX Transp., Inc., 19 AD3d 193, 796 NYS2d 606 (1st Dept 2005), and a drainage ditch running underneath defendant's driveway, where the driveway made the use of a sluice pipe necessary, Du Pont v Horseheads, 163 AD2d 643, 558 NYS2d 275 (3d Dept 1990). A concrete step mounted upon a sidewalk immediately beneath an elevated doorway to a restaurant, which step protrudes from the doorway a short distance beyond the building's boundary and runs the entire width of the entranceway of the restaurant, constitutes a special benefit for the landlord that facilitates access to the restaurant premises, Granville v New York, 211 AD2d 195, 627 NYS2d 4 (1st Dept 1995). However, a step facilitating entrance to a landowner's store is not a special use where the step does not protrude past the building's boundary onto the public sidewalk, Devine v New York, 300 AD2d 532, 751 NYS2d 605 (2d Dept 2002). Similarly, an abutting landowner's use of brick rather than cement to construct the sidewalk is insufficient to

establish a special use where there is no evidence that the bricks were installed in contemplation of any use other than by the general public, *Patterson v New York*, 1 AD3d 139, 767 NYS2d 14 (1st Dept 2003). A triable issue of fact existed with respect to whether a 6' x 8' apron in a sidewalk that sloped down to the street, which provided vehicles with access to the defendant's driveway and parking lot, constituted a special use benefit to defendant, *Melamed v Rosefsky*, 291 AD2d 602, 737 NYS2d 410 (3d Dept 2002). The occasional use of a side of a store for deliveries does not constitute a special use, *Sampino v Crescent Associates, LLC*, 34 AD3d 779, 825 NYS2d 135 (2d Dept 2006); *Kaminer v Dan's Supreme Supermarket/Key Food*, 253 AD2d 657, 677 NYS2d 553 (1st Dept 1998). Likewise, a store's use of the curb area for putting out trash for collection is not a "special use," *Klein v Sujin Food Corp.*, 30 AD3d 331, 818 NYS2d 66 (1st Dept 2006). Where, however, delivery trucks mounted the sidewalk adjacent to defendant's store with sufficient regularity, a special use was established, *Peretich v New York*, 263 AD2d 410, 693 NYS2d 576 (1st Dept 1999). The maintenance of an ATM machine adjacent to a sidewalk is not a special use, *Thomas v Triangle Realty Co.*, 255 AD2d 153, 679 NYS2d 394 (1st Dept 1998). Nor does a single utility line running from a utility pole in front of defendant's house make the pole a "special use," absent evidence that the pole was installed for defendant's accommodation or at defendant's request or that defendant had a special relationship with the utility that installed the pole, *Montalvo v Heege*, 301 AD2d 427, 753 NYS2d 491 (1st Dept 2003); see *Roselli v New York*, 201 AD2d 417, 607 NYS2d 672 (1st Dept 1994). In contrast, a "special use" could be found to exist where a metal plate in the sidewalk and two utility boxes at the accident site had been installed for the exclusive benefit of defendant's building, *Karr v New York*, 161 AD2d 449, 555 NYS2d 734 (1st Dept 1990).

The special use of a sidewalk by an outdoor cafe does not extend beyond the cafe's guardrail to include the public sidewalk area simply because of the existence of a crowd outside the guardrail or the fact that one of the owner's employees was on the sidewalk outside the rail, *MacLeod v Pete's Tavern, Inc.*, 87 NY2d 912, 640 NYS2d 864, 663 NE2d 905 (1996); see *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 851 NYS2d 512 (1st Dept 2008) (coffee shop's special use of sidewalk consisting of placement of two tables and four chairs did not extend beyond tables and chairs; consequently, landowner not liable for injuries sustained by pedestrian when she tripped on root protruding from tree well while attempting to negotiate crowded sidewalk in vicinity of tables). A curb "cut-out" may, however, constitute a special use of the sidewalk, *Pantaleon v Lorimer Management Corp.*, 270 AD2d 324, 704 NYS2d 311 (2d Dept 2000). In *Lobel v Rodco Petroleum Corp.*, 233 AD2d 369, 649 NYS2d 939 (2d Dept 1996), defendants were not held liable under the "special use" doctrine because plaintiff failed to demonstrate that the curb cut at issue was specially constructed for a benefit unrelated to the general public use or that defendant made a special use of or derived a benefit from the curb cut.

The duty relates only to that portion of the sidewalk in which the

special benefit use is installed, *McCutcheon v National City Bank of New York*, 291 NY 509, 50 NE2d 647 (1943); *Weiser v New York*, 5 AD2d 702, 169 NYS2d 609 (2d Dept 1957), *aff'd*, 7 NY2d 811, 196 NYS2d 693, 164 NE2d 714 (1959); *Noto v Mermaid Restaurant*, 156 AD2d 435, 548 NYS2d 553 (2d Dept 1989); *Friedman v Gearrity*, 33 AD2d 1044, 308 NYS2d 800 (2d Dept 1970). Although the duty to repair runs with the land as long as the appurtenance is maintained for the benefit of the land, it is the express or implied access to, and control of, the special use that gives rise to the duty, *Kaufman v Silver*, 90 NY2d 204, 659 NYS2d 250, 681 NE2d 417 (1997) (citing PJI); see *Capretto v Buffalo*, 124 AD3d 1304, 1 NYS3d 615 (4th Dept 2015). Therefore, an abutting owner will not be held responsible for the condition that caused the accident merely because repairs to other unrelated areas of the walk were undertaken, *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969); *Yass v Deepdale Gardens*, 187 AD2d 506, 589 NYS2d 593 (2d Dept 1992). Thus, if unevenness in the sidewalk is caused by the sinking of the flagstones adjoining the area in which the special benefit is installed, the special benefit user has no duty and, therefore, no liability, *McCutcheon v National City Bank of New York*, *supra*; *Darringer v Furtsch*, 225 AD2d 577, 639 NYS2d 98 (2d Dept 1996); but see *Curtis v New York*, 179 AD2d 432, 577 NYS2d 855 (1st Dept 1992); *Smith v Barbaro*, 63 AD2d 804, 405 NYS2d 326 (3d Dept 1978). Although the cases usually refer to an “abutting owner,” in order to impose liability, it is sufficient that the property of the defendant derives a special benefit and is proximate to the situs of the specially constructed sidewalk, *Rooney v Long Beach*, 42 AD2d 34, 345 NYS2d 66 (2d Dept 1973); see also *Friedman v Gearrity*, *supra*. Thus, a public utility that makes special use of a public way, such as maintaining shutoff valves imbedded in the roadway, owes a duty to use reasonable care to prevent its use from adversely affecting the public road, *Romano v Monroe*, 149 AD2d 952, 540 NYS2d 83 (4th Dept 1989). The common thread in special use cases is the installation of some object in the sidewalk or street or some variance in the construction thereof, *Kaminer v Dan’s Supreme Supermarket/Key Food*, 253 AD2d 657, 677 NYS2d 553 (1st Dept 1998); *Balsam v Delma Engineering Corp.*, 139 AD2d 292, 532 NYS2d 105 (1st Dept 1988), see *Little v Albany*, 169 AD2d 1013, 565 NYS2d 291 (3d Dept 1991) (citing PJI); compare *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976) (garage owner not liable to a pedestrian injured by a patron driving out of the facility and across the sidewalk). Liability has been found, however, in cases where the defendant has damaged a sidewalk through a special use even when the sidewalk has not been constructed to accommodate defendant’s use, *Peretich v New York*, 263 AD2d 410, 693 NYS2d 576 (1st Dept 1999); *Curtis v New York*, *supra*.

The duty to maintain the area of a special use runs with the land and is not dependent on defendant’s having actually installed or repaired it, *Torres v New York*, 32 AD3d 347, 820 NYS2d 268 (1st Dept 2006). It is not important that the special benefit use was created by a prior owner if the present owner benefits from its use, *Olivia v Gouze*, 285 App Div 762, 140 NYS2d 438 (1st Dept 1955), *aff’d*, 1 NY2d 811,

153 NYS2d 71, 135 NE2d 602 (1956); *Santorelli v New York*, 77 AD2d 825, 430 NYS2d 618 (1st Dept 1980); *Granville v New York*, 211 AD2d 195, 627 NYS2d 4 (1st Dept 1995); *Nickelsburg v New York*, 263 App Div 625, 34 NYS2d 1 (1st Dept 1942); see *Weiskopf v New York*, 5 AD3d 202, 773 NYS2d 389 (1st Dept 2004); *Noto v Mermaid Restaurant*, 156 AD2d 435, 548 NYS2d 553 (2d Dept 1989), and the “use” is an obvious one, *Allen v Weiss*, 279 App Div 91, 108 NYS2d 404 (3d Dept 1951). Even if the present owner does not benefit from the use, but is capable of doing so, liability will be imposed, *Beplat v New York*, 246 AD2d 471, 668 NYS2d 382 (1st Dept 1998). One who did not install the use has no duty, however, when the use is not apparent if not brought to his or her notice, see *Allan v Weiss*, supra, or capable of providing a benefit, see *Langfelder v New York*, 271 App Div 309, 65 NYS2d 104 (1st Dept 1946). Even if a lessor creates a dangerous condition through a special use, once it relinquishes control of the special use area to a lessee and no longer benefits from the special use during the tenancy, it is relieved of any duty to maintain or repair the special use area, *Beda v New York*, 4 AD3d 317, 772 NYS2d 339 (2d Dept 2004); *Pantaleon v Lorimer Management Corp.*, 270 AD2d 324, 704 NYS2d 311 (2d Dept 2000).

Ordinarily, liability for a dangerous special use does not extend to the prior owner of the benefited property, *Gramazio v 370 Lexington Avenue, L.L.C.*, 40 AD3d 303, 836 NYS2d 84 (1st Dept 2007) (citing *Bittrolff v Ho’s Development Corp.*, 77 NY2d 896, 568 NYS2d 902, 571 NE2d 72 (1991)). A narrow exception exists, however, where the condition existed at the time the property was conveyed and the new owner has not had a reasonable time to discover the condition or, if the condition was known, to remedy it, *Gramazio v 370 Lexington Avenue, L.L.C.*, supra. Where the prior owner has not disclosed the condition, it remains liable until the new owner has had a reasonable time to remedy it, *id* (citing *Farragher v New York*, 26 AD2d 494, 275 NYS2d 542 (1st Dept 1966), *aff’d*, 21 NY2d 756, 288 NYS2d 232, 235 NE2d 218 (1968)). Thus, a fact question existed as to the prior owner’s potential liability for injuries resulting from a failure to maintain an oil fill cap and box embedded in the sidewalk where the new owner acquired the property only two days before the accident and there was evidence that the defect was latent and undiscoverable during the new owner’s pre-closing inspections, *Gramazio v 370 Lexington Avenue, L.L.C.*, supra.

Notice of the defective condition, as distinct from notice of the use, is required, *Liwer v Roxy Cleaners & Dyers Co.*, 6 AD2d 931, 175 NYS2d 724 (3d Dept 1958); *De Sessa v White Plains*, 30 Misc2d 817, 219 NYS2d 190 (Sup 1961); see *Thorsen v Metzgar*, 278 App Div 421, 105 NYS2d 947 (3d Dept 1951); *Becker v Slingerland*, 282 App Div 1106, 126 NYS2d 425 (3d Dept 1953); see also *Clemmons v Cominskey*, 1 AD2d 933, 149 NYS2d 559 (4th Dept 1956), *aff’d*, 2 NY2d 958, 162 NYS2d 360, 142 NE2d 425 (1957). When the defect is patent, a jury question of constructive notice is presented, *Liwer v Roxy Cleaners & Dyers Co., Inc.*, supra.

The municipality may itself make special use of the sidewalk, as for a survey monument, *Weiser v New York*, 5 AD2d 702, 169 NYS2d 609

(2d Dept 1957), *aff'd*, 7 NY2d 811, 196 NYS2d 693, 164 NE2d 714 (1959); *Filsno v Rochester*, 10 AD2d 663, 196 NYS2d 311 (4th Dept 1960), or a water shutoff valve, *Smith v Corning*, 14 AD2d 27, 217 NYS2d 149 (4th Dept 1961). In such a case, a statute or ordinance requiring prior notice of defect to the municipality has no application because it created the use, *Smith v Corning*, *supra*; *Filsno v Rochester*, *supra*; see *Siddon v M. H. Fishman Co., Inc.*, 65 AD2d 832, 409 NYS2d 830 (3d Dept 1978) (written notice not required under Village Law § 6-628 if condition was created by village); see also *Posman v Lansing*, 87 AD2d 667, 448 NYS2d 837 (3d Dept 1982) (written notice not required under ordinance if condition created by town).

“When a sidewalk appurtenance negligently falls into disrepair, both the municipality and the landowner have breached their respective duties to members of the public, and both may be made to respond in damages to those injured by the defective condition,” *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 (1982). Therefore, there is a right of contribution, *id*; see *Santorelli v New York*, 77 AD2d 825, 430 NYS2d 618 (1st Dept 1980); PJI 2:275 (re: contribution generally). However, where the municipality has, pursuant to local law, given notice to the abutting owner to cure the defect and then defers its repairs by reason of the owner's promise to repair and maintain the sidewalk, the municipality is entitled to full indemnification from the abutting owner for a judgment obtained against the municipality by a pedestrian injured by the defect, *New York v Kalikow Realty Co.*, 71 NY2d 957, 529 NYS2d 62, 524 NE2d 416 (1988). When the abutting owner leases a portion of the property and both the owner and the tenant jointly control the special use, both may be liable, *Olivia v Gouze*, 285 App Div 762, 140 NYS2d 438 (1st Dept 1955), *aff'd*, 1 NY2d 811, 153 NYS2d 71, 135 NE2d 602 (1956); *Liwer v Roxy Cleaners & Dyers Co.*, 6 AD2d 931, 175 NYS2d 724 (3d Dept 1958), but the owner will be relieved of the obligation in the case of a lease of the entire premises, *Trustees of Village of Canandaigua v Foster*, 156 NY 354, 50 NE 971 (1898); compare *Smith v Corning*, 14 AD2d 27, 217 NYS2d 149 (4th Dept 1961).

Imposition of the duty to repair or maintain a use located on adjacent property is necessarily premised upon the existence of the abutting land occupier's access to and ability to exercise control over the special use structure or installation, *Kaufman v Silver*, 90 NY2d 204, 659 NYS2d 250, 681 NE2d 417 (1997) (citing PJI). When the special use doctrine is invoked against owners or occupiers of land abutting public streets or sidewalks, the requirement of access and control is usually satisfied because of the adjoining land owner's or occupier's freedom of access, along with the general public, to that portion of the property so used, *id*. The special use doctrine does not apply, however, where the special use structure or instrumentality is located on adjoining private property over which defendants exercised no control or right of access to make any necessary repairs, *Kaufman v Silver*, *supra*. The right to use a parking lot does not establish control or give rise to a duty to warn of dangerous conditions existing thereon, *Bridgham v Fairview Plaza Inc.*,

257 AD2d 914, 684 NYS2d 317 (3d Dept 1999) (defendant bank located in shopping center neither exercised control over parking lot nor had right to possession of it and, therefore, owed no duty of care with respect to unsafe condition existing on lot); *Masterson v Knox*, 233 AD2d 549, 649 NYS2d 108 (3d Dept 1996). Without possession or a right to maintain or control a common parking area, a tenant owes no duty of care with respect to any unsafe condition existing thereon, *Bridgham v Fairview Plaza, Inc.*, *supra*; *Masterson v Knox*, *supra*. However, a duty will be imposed where the tenant undertakes snow removal efforts and such efforts create or increase the natural dangerous condition, *Vander Veer v Henderson*, 267 AD2d 584, 699 NYS2d 223 (3d Dept 1999).

The preceding discussion assumes that the use is installed in the sidewalk with permission. If it is installed without permission, it constitutes a public nuisance, and liability exists without regard to the principles of negligence, *Delaney v Philhern Realty Holding Corporation*, 280 NY 461, 21 NE2d 507 (1939); *Congreve v Smith*, 18 NY 79 (1858); see *Ostermeier v Victorian House, Inc.*, 121 AD2d 611, 503 NYS2d 644 (2d Dept 1986); *Driscoll v New York City Transit Authority*, 53 AD2d 391, 385 NYS2d 540 (1st Dept 1976); PJI 3:18. Permission, however, will be presumed from long continued use without objection from the municipality, *Trustees of Village of Canandaigua v Foster*, 156 NY 354, 50 NE 971 (1898); see *McCutcheon v National City Bank of New York*, 291 NY 509, 50 NE2d 647 (1943).

The special benefit rule is but one exception to the general rule that the abutting owner is not liable for injuries resulting from defects in the condition of the sidewalk. Exception also exists when the abutting owner creates the condition, *Davenport v Apostol*, 26 AD2d 874, 273 NYS2d 991 (3d Dept 1966), *aff'd*, 22 NY2d 943, 295 NYS2d 68, 242 NE2d 99 (1968); see *Mandel v New York*, 44 NY2d 1004, 408 NYS2d 342, 380 NE2d 173 (1978); *Warren v Wilmorite Inc.*, 211 AD2d 904, 621 NYS2d 184 (3d Dept 1995); see also *Blum v New York*, 267 AD2d 341, 700 NYS2d 65 (2d Dept 1999), as by taking up and negligently replacing the sidewalk, *Smith v Ryan*, 8 NYS 853 (NY City Ct 1890), *aff'd*, 130 NY 653, 29 NE 1033 (1891), by the manner in which the abutting owner uses the sidewalk, *Mullins v Siegel-Cooper Co.*, 183 NY 129, 75 NE 1112 (1905); *Giardina v Lee*, 202 AD2d 278, 608 NYS2d 659 (1st Dept 1994), or by voluntarily but negligently making repairs, *Mendoza v New York*, 205 AD2d 741, 613 NYS2d 695 (2d Dept 1994); *Tambaro v New York*, 140 AD2d 331, 527 NYS2d 558 (2d Dept 1988).

The special use doctrine has been applied only in slip and fall cases, *McAndrew v Pierre Hotel*, 262 AD2d 193, 693 NYS2d 20 (1st Dept 1999). In *McAndrew v Pierre Hotel*, *supra*, the court declined to extend the doctrine to impose a duty on abutting landowners to keep a public sidewalk near a building entrance secure against criminal activity, even though defendant made a special use of the sidewalk, *id.*

Finally, liability will be imposed upon the abutting owner if a statute or local law requires maintenance of the sidewalk and provides for

the imposition of liability upon a failure to do so, *Willis v Parker*, 225 NY 159, 121 NE 810 (1919); *Pardi v Barone*, 257 AD2d 42, 690 NYS2d 315 (3d Dept 1999) (terms “abutting” and “adjoining” include property separated by a strip owned by municipality); *Karom v Altarac*, 3 AD2d 925, 162 NYS2d 968 (2d Dept 1957); see *Capretto v Buffalo*, 124 AD3d 1304, 1 NYS3d 615 (4th Dept 2015); *Holcomb v Wincuinias*, 22 AD2d 715, 253 NYS2d 190 (3d Dept 1964). However, a municipality is prohibited by statute from adopting a local law transferring to abutting property owners its liability for failure to maintain its sidewalks and gutters if such an enactment would supersede a state statute, *Hausser v Giunta*, 88 NY2d 449, 646 NYS2d 490, 669 NE2d 470 (1996). In order for liability to be imposed, the statute or local law must not only charge the landowner with a duty but must also specifically state that in the event of a breach of such duty, the landowner will be liable to those who are injured for any defects in the sidewalk, *Rochester v Campbell*, 123 NY 405, 25 NE 937 (1890); *Dalder v Rockville Centre*, 116 AD3d 908, 983 NYS2d 835 (2d Dept 2014); *Romano v Leger*, 72 AD3d 1059, 900 NYS2d 346 (2d Dept 2010); *Norcott v Central Iron Metal Scraps*, 214 AD2d 660, 625 NYS2d 260 (2d Dept 1995); *Bloch v Potter*, 204 AD2d 672, 612 NYS2d 236 (2d Dept 1994); *Forelli v Rugino*, 139 AD2d 489, 526 NYS2d 847 (2d Dept 1988); *Kiernan v Thompson*, 137 AD2d 957, 525 NYS2d 380 (3d Dept 1988); *Lodato v Oyster Bay*, 68 AD2d 904, 414 NYS2d 214 (2d Dept 1979); *Jacques v Maratskey*, 41 AD2d 883, 342 NYS2d 871 (3d Dept 1973). Thus, the abutting landowners were not liable even though they had been issued a notice of violation by the Department of Transportation demanding that they remedy the sidewalk defect, *Freimor v New York*, 44 AD3d 514, 843 NYS2d 609 (1st Dept 2007).

To be actionable a defect in a sidewalk must be of such a nature that a reasonably careful person should foresee the probability of injury to a user, *Clemmons v Cominskey*, 1 AD2d 933, 149 NYS2d 559 (4th Dept 1956), *aff'd*, 2 NY2d 958, 162 NYS2d 360, 142 NE2d 425 (1957), and if not, the complaint should be dismissed; *Fox v Brown*, 15 NY2d 597, 255 NYS2d 263, 203 NE2d 650 (1964); *Lynch v Beacon*, 295 NY 872, 67 NE2d 515 (1946). In a case involving minor defects in the pavement, there is no rule that municipal liability turns upon whether the hole or depression causing the pedestrian to fall is at any particular depth, *Trincere v Suffolk*, 90 NY2d 976, 665 NYS2d 615, 688 NE2d 489 (1997); see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802, 41 NE3d 766 (2015); *Schechtman v Lappin*, 161 AD2d 118, 554 NYS2d 846 (1st Dept 1990); *Smith v New York*, 38 AD2d 965, 331 NYS2d 707 (2d Dept 1972); *Caldicott v New York*, 32 AD2d 832, 302 NYS2d 285 (2d Dept 1969); *Monllas v New York*, 27 AD2d 722, 277 NYS2d 461 (1st Dept 1967); *Thorsen v Metzgar*, 278 App Div 421, 105 NYS2d 947 (3d Dept 1951); see also *Loughran v New York*, 298 NY 320, 83 NE2d 136 (1948). In determining whether a defect is trivial, the court must consider all of the relevant facts, including the defect’s width, depth, elevation, irregularity and appearance, as well as the time, place and circumstances of the accident, *Hutchinson v Sheridan Hill House Corp.*, *supra*; *Brumm v St. Paul’s Evangelical Lutheran*

Church, 143 AD3d 1224, 41 NYS3d 559 (3d Dept 2016); *Friedman v Beth David Cemetery*, 19 AD3d 365, 796 NYS2d 167 (2d Dept 2005); see *McCabe v Avalon Bay Communities, Inc.*, 177 AD3d 487, 114 NYS3d 51 (1st Dept 2019); *Schechtman v Lappin*, *supra*. Factors that may render a physically small defect actionable include a jagged edge; a rough, irregular surface; the presence of other defects in the vicinity; poor lighting; or a location where pedestrians are naturally distracted from looking down at their feet, *Hutchinson v Sheridan Hill House Corp.*, *supra*. A defendant cannot obtain summary judgment under the trivial defect doctrine solely on the basis of the dimensions of the alleged defect, and the court is obligated to consider all of the facts and circumstances presented when deciding such a motion, *id*. In determining whether the defect is trivial, the jury is entitled to consider the fact that, prior to the accident, the defendant considered the condition to be a hazard, *McCabe v Avalon Bay Communities, Inc.*, *supra*.

Not every noticeable difference in elevation in a sidewalk will create a question of fact, *Lopez v New York City Housing Authority*, 245 AD2d 273, 666 NYS2d 21 (2d Dept 1997); *Julian v Sementelli*, 234 AD2d 866, 651 NYS2d 678 (3d Dept 1996); *Hecht v New York*, 89 AD2d 524, 452 NYS2d 443 (1st Dept 1982), *mod* on other grounds, 60 NY2d 57, 467 NYS2d 187, 454 NE2d 527 (1983). Whether a particular height difference between sidewalk slabs constitutes a dangerous or defective condition depends upon the peculiar facts and circumstances of each case, including the width, depth, elevation, irregularity, and appearance of the defect as well as the time, place, and circumstances of the injury, *McKenzie v Crossroads Arena, LLC*, 291 AD2d 860, 738 NYS2d 779 (4th Dept 2002); see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802, 41 NE3d 766 (2015); *Scholar v Citadel Estates, LLC*, 177 AD3d 440, 113 NYS3d 38 (1st Dept 2019) (“squiggly crack” less than one quarter-inch wide along side of step non-actionable); *Schiller v St. Francis Hosp.*, 108 AD3d 758, 970 NYS2d 241 (2d Dept 2013) (one-half inch differential non-actionable); *Nigro v Cervinara, LLC*, 106 AD3d 428, 963 NYS2d 871 (1st Dept 2013) (two-inch differential non-actionable); *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 716 NYS2d 657 (1st Dept 2000). A trivial defect on a walkway, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip on a raised projection, is not actionable, *Sullivan v State*, 276 AD2d 989, 715 NYS2d 87 (3d Dept 2000); *Riser v New York City Housing Authority*, 260 AD2d 564, 688 NYS2d 645 (2d Dept 1999); *Schiller v St. Francis Hosp.*, *supra*. A physically small defect is actionable, however, when its surrounding circumstances or intrinsic characteristics make it difficult for a pedestrian to see or to identify as hazardous, or difficult to traverse safely on foot, *Hutchinson v Sheridan Hill House Corp.*, *supra*; see *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 716 NYS2d 657 (1st Dept 2000); *Slate v Fredonia Cent. School Dist.*, 256 AD2d 1210, 682 NYS2d 507 (4th Dept 1998). The mere fact that a sidewalk was wet is not sufficient to establish a dangerous condition and something more than a slippery sidewalk is required to be shown to enable plaintiff to recover, *Wessels v Service Merchandise Inc.*, 187 AD2d 837, 589 NYS2d 971 (3d Dept 1992). On a motion for summary judg-

ment, where defendant establishes that the sidewalk and curb where plaintiff fell conformed to all applicable building codes and zoning ordinances and was in good repair, free of visible defects and constructed according to accepted industry standards, the burden shifts to the plaintiff to establish a defect in the area of the fall, *Guldy v Pyramid Corp.*, 222 AD2d 815, 634 NYS2d 788 (3d Dept 1995). Photographs alone will generally be insufficient to establish a *prima facie* case concerning the hazardous nature of the defect or concerning notice, *Mooney v Turner*, 35 AD2d 674, 314 NYS2d 878 (2d Dept 1970); see *Adsmond v Poughkeepsie*, 283 AD2d 598, 725 NYS2d 80 (2d Dept 2001).

Factors that make a defect difficult to detect normally present a question of fact to be resolved by the jury, *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 716 NYS2d 657 (1st Dept 2000); see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802, 41 NE3d 766 (2015). The location of a depression in a heavily traveled pedestrian walkway renders observation of the defect less likely, *Argenio v Metropolitan Transp. Auth.*, *supra*; see *Hutchinson v Sheridan Hill House Corp.*, *supra*; *Slate v Fredonia Cent. School Dist.*, 256 AD2d 1210, 682 NYS2d 507 (4th Dept 1998) (defect “not readily observable under normal conditions”); *Tesak v Marine Midland Bank, N.A.*, 254 AD2d 717, 678 NYS2d 226 (4th Dept 1998) (“attention would be drawn to the door, not to the sidewalk”). In *McKenzie v Crossroads Arena, LLC*, 291 AD2d 860, 738 NYS2d 779 (4th Dept 2002), plaintiff established the existence of a question of fact by alleging that the height between the adjacent concrete slabs where she fell was abrupt and that the accident occurred in a dimly lit area on a misty night, rendering the alleged defect difficult to detect.

Pursuant to Labor Law § 241(8), the Commissioner of Labor, as deemed necessary, shall promulgate rules, applicable outside cities having a population of one million or more, to protect persons passing by all areas, buildings, or structures in which construction, excavation, or demolition work is being performed. Owners and contractors and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, are required to comply. As to liability under Labor Law § 241 and related statutes, see PJI 2:215–2:217; see also introductory statement preceding PJI 2:25.

PJI 2:111A. Liability for Condition or Use of Land—To Persons Outside the Land—Possessor’s Liability to Persons on Sidewalk—Snow and Ice

Ordinarily the (owner, person in possession) of (land, a building) is not responsible for removing snow and ice from a public sidewalk adjacent to the (land, building). However, when the (owner, person in possession) undertakes to remove snow or ice from such sidewalk, (he, she, it) must do so

with reasonable care. In order to recover against defendant, plaintiff must show that (1) defendant attempted to clear the sidewalk, (2) the effort of the defendant to remove the snow or ice made the sidewalk more dangerous and, (3) the increased danger was a substantial factor in causing plaintiff's injury.

Comment

[See also Introductory Statement to this division.]

Based on *Glick v New York*, 139 AD2d 402, 526 NYS2d 464 (1st Dept 1988); *Mills v Farwin Realty Corp.*, 30 AD2d 537, 291 NYS2d 130 (2d Dept 1968); *Parke v New York*, 28 AD2d 985, 283 NYS2d 448 (1st Dept 1967); *Green v Murray M. Rosenberg, Inc.*, 186 Misc 79, 50 NYS2d 868 (Sup 1944), *aff'd*, 269 App Div 819, 56 NYS2d 205 (1st Dept 1945), *aff'd*, 295 NY 584, 64 NE2d 286 (1945); *Golub v New York*, 201 Misc 866, 112 NYS2d 161 (Sup 1952), *aff'd*, 282 App Div 666, 122 NYS2d 793 (1st Dept 1953), see *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969); *Auletta v New York*, 22 NY2d 738, 292 NYS2d 118, 239 NE2d 212 (1968); see generally 65 NYJur2d, Highways, Streets and Bridges §§ 493–496, 506–508; 5C Warren, Negligence, Snow § 75.02 (4th ed); Annot: 49 ALR3d 387. On the facts of a given case it may be necessary to supplement the charge on the issue of proximate cause, see PJI 2:70. The jury must also be charged on comparative negligence; for the law on comparative negligence in snow and ice cases, see Comment to PJI 2:225C; for a charge on comparative negligence, see PJI 2:36. The pattern charge covers but one basis of liability; others are discussed later in this Comment.

Public sidewalks are the responsibility of the municipality, see Comment to PJI 2:225C. An abutting owner owes no duty to pedestrians to remove natural accumulations of snow and ice from the sidewalk, *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969); *Hendley v Daw Drug Co.*, 293 NY 790, 59 NE2d 31 (1944); *Lee v Ortiz*, 249 NY 613, 164 NE 604 (1928); *Caracciolo v Allstate Ins. Co.*, 40 AD3d 798, 835 NYS2d 740 (2d Dept 2007); see *Verdino v Alexandrou*, 253 AD2d 553, 677 NYS2d 368 (2d Dept 1998) (owner of property is under no duty to pedestrians to remove ice and snow that naturally accumulates upon sidewalk in front of property); *Palmer v Prescott*, 208 AD2d 1065, 617 NYS2d 411 (3d Dept 1994), and a charge to that effect should be given on request, *Horowitz v Bandler*, 268 App Div 1054, 52 NYS2d 464 (2d Dept 1945). That rule applies even though the abutting owner fails to comply with a statute or ordinance requiring removal by the abutting owner, *Roark v Hunting*, *supra*; *Moore v Gadsden*, 93 NY 12 (1883), *Moore v Gadsden*, 87 NY 84 (1881); *Norcott v Central Iron Metal Scraps*, 214 AD2d 660, 625 NYS2d 260 (2d Dept 1995); *Haney v First Nat. Stores, Inc.*, 31 AD2d 547, 295 NYS2d 517 (2d Dept 1968); *Van Slyke v New York Cent. R. Co.*, 21 AD2d 147, 249 NYS2d 462 (3d

Dept 1964), unless the statute or ordinance clearly imposes civil liability upon the owner and in favor of the pedestrian, *Smalley v Bembien*, 12 NY3d 751, 880 NYS2d 878, 908 NE2d 868 (2009); *Palka v Ossining*, 120 AD3d 641, 992 NYS2d 273 (2d Dept 2014); *Sacco v Buffalo*, 78 AD2d 1000, 433 NYS2d 915 (4th Dept 1980); see *Roark v Hunting*, *supra*. Thus, an abutting landowner was not liable for failing to remove snow and ice from the sidewalk where a city ordinance imposed two duties, i.e., the duty to remove snow and ice from the sidewalk and the duty to repair and maintain the sidewalk, but clearly imposed civil liability only for a breach of the latter, *Smalley v Bembien*, *supra* (citing Buffalo City Code § 413-50(A)); see *Davison v Buffalo*, 96 AD3d 1516, 947 NYS2d 702 (4th Dept 2012). If there is a statute or ordinance imposing civil liability, a charge patterned on PJI 2:28 or PJI 2:29 should be used. It is, however, error to charge that a violation of a statute or ordinance that does not impose civil liability is evidence of negligence, *Haney v First Nat. Stores, Inc.*, *supra*; *Van Slyke v New York Cent. R. Co.*, *supra*, and if mention of such a provision is made before the jury, it should be told that the provision is a matter between the municipality and the abutting owner and may not be considered on the question of the owner's liability to plaintiff.

Removal of snow and ice by the abutting owner will not impose liability simply because it is incomplete or because it exposes a dangerous condition not created by the abutting owner, *Bonfrisco v Marlbin Corp.*, 24 NY2d 817, 300 NYS2d 593, 248 NE2d 448 (1969); *Kelly v Rose*, 291 NY 611, 50 NE2d 1013 (1943); *Glassman v New York*, 284 App Div 1045, 135 NYS2d 597 (2d Dept 1954), *aff'd*, 1 NY2d 712, 151 NYS2d 382, 134 NE2d 208 (1956); *Nevins v Great Atlantic and Pacific Tea Co.*, 164 AD2d 807, 559 NYS2d 539 (1st Dept 1990); *Bricca v New York Tel. Co.*, 37 AD2d 564, 322 NYS2d 585 (2d Dept 1971); *Connolly v Bursch*, 149 App Div 772, 134 NYS 141 (2d Dept 1912); *Golub v New York*, 201 Misc 866, 112 NYS2d 161 (Sup 1952), *aff'd*, 282 App Div 666, 122 NYS2d 793 (1st Dept 1953). The abutting owner is liable for resulting injuries, however, when removal is so performed as to create a dangerous condition, increasing the natural hazard, *Zahn v New York*, 299 NY 581, 86 NE2d 105 (1949); *Green v Murray M. Rosenberg, Inc.*, 186 Misc 79, 50 NYS2d 868 (Sup 1944), *aff'd*, 269 App Div 819, 56 NYS2d 205 (1st Dept 1945), *aff'd*, 295 NY 584, 64 NE2d 286 (1945); *Rugova v 2199 Holland Ave. Apartment Corp.*, 272 AD2d 261, 708 NYS2d 390 (1st Dept 2000); *Rector v New York*, 259 AD2d 319, 686 NYS2d 426 (1st Dept 1999); *Schlausky v New York*, 41 AD2d 156, 341 NYS2d 548 (1st Dept 1973); *Horan v Molberger*, 38 AD2d 587, 328 NYS2d 218 (2d Dept 1971); *Mills v Farwin Realty Corp.*, 30 AD2d 537, 291 NYS2d 130 (2d Dept 1968); *Greenberg v F.W. Woolworth Co.*, 18 Misc2d 141, 186 NYS2d 303 (Sup 1959), *aff'd*, 10 AD2d 567, 197 NYS2d 403 (1st Dept 1960); see *D'Imperio v Sidney*, 14 AD2d 647, 218 NYS2d 165 (3d Dept 1961), *aff'd*, 12 NY2d 927, 238 NYS2d 314, 188 NE2d 526 (1963); *Glick v New York*, 139 AD2d 402, 526 NYS2d 464 (1st Dept 1988); *Caro v Skyline Terrace Coop., Inc.*, 132 AD2d 512, 517 NYS2d 531 (2d Dept 1987); *Herrick v Grand Union Co.*, 1 AD2d 911, 149 NYS2d 682 (3d Dept 1956), but that principle does not apply where the danger-

ous condition was created by an independent contractor employed by the owner, *Caracciolo v Allstate Ins. Co.*, 40 AD3d 798, 835 NYS2d 740 (2d Dept 2007). The duty in removing or piling snow is to exercise reasonable care not to create a dangerous condition, *Calderon v New York City Housing Authority*, 37 AD2d 837, 326 NYS2d 18 (2d Dept 1971); *Haney v First Nat. Stores, Inc.*, 31 AD2d 547, 295 NYS2d 517 (2d Dept 1968); see *Brownell v New York*, 277 AD2d 31, 715 NYS2d 405 (1st Dept 2000), and the charge should make “pointedly clear” that liability exists only from creating a dangerous condition, *Horowitz v Bandler*, 268 App Div 1054, 52 NYS2d 464 (2d Dept 1945). A condition is not dangerous unless the risk of injury to pedestrians from it is reasonably foreseeable, *Auletta v New York*, 22 NY2d 738, 292 NYS2d 118, 239 NE2d 212 (1968); *Epner v Rhulen*, 8 AD2d 646, 184 NYS2d 910 (3d Dept 1959). On the facts of a particular case, it may be necessary to modify the pattern charge to submit the issue of foreseeability to the jury, see PJI 2:12.

§ 16-123 of the Administrative Code of the City of New York, which makes sidewalk snow removal the responsibility of, among others, abutting landowners, does not render landlords vicariously liable for the negligent snow removal efforts of their tenants, *Feiler v Greystone Bldg. Co.*, 302 AD2d 221, 754 NYS2d 634 (1st Dept 2003).

Liability of the abutting owner to pedestrians injured on the public sidewalk also exists when:

1. Snow and ice are transferred by artificial means from the abutting premises to the sidewalk, or water from the property is permitted to flow, by artificial means, onto the sidewalk where it freezes, *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969) (melted snow dripping from sign); *Wragge v Lizza Asphalt Const. Co.*, 17 NY2d 313, 270 NYS2d 616, 217 NE2d 666 (1966) (allowing water from broken sump to run out onto road); *Klepper v Seymour House Corporation of Ogdensburg*, 246 NY 85, 158 NE 29 (1927); *Tremblay v Harmony Mills*, 171 NY 598, 64 NE 501 (1902) (leader discharging water from roof onto sidewalk); *Kammerman v 170 St. Pharmacy, Inc.*, 269 App Div 430, 55 NYS2d 673 (1st Dept 1945), *aff'd*, 295 NY 631, 64 NE2d 655 (1945) (water from window washing freezing on sidewalk); *Feinblum v New York*, 252 App Div 330, 299 NYS 320 (2d Dept 1937), *aff'd*, 277 NY 708, 14 NE2d 637 (1938) (water dripping from eaves of greenhouse); *Venable v Consolidated Dry Goods Co.*, 225 App Div 202, 232 NYS 404 (2d Dept 1929), *aff'd*, 251 NY 585, 168 NE 436 (1929) (melted snow dripping from stone projection); *Fitzgerald v Adirondack Transit Lines, Inc.*, 23 AD3d 907, 804 NYS2d 126 (3d Dept 2005); *Selig v Mastoloni*, 283 App Div 741, 127 NYS2d 724 (2d Dept 1954) (water flowing from defective house leader); *McKay v New York*, 269 App Div 760, 54 NYS2d 794 (2d Dept 1945) (melted snow dripping from sign); *Maucieri v Ware*, 263 App Div 721, 30 NYS2d 672 (2d Dept 1941) (installation of driveway changing natural contour of land causing water to flow onto sidewalk); see *Cannon v Pfeider*, 19 AD2d 625, 241 NYS2d 85 (2d Dept 1963); 85 NYJur2d, Premises Liability § 272; Annot. 18 ALR3d 428.

However, when the abutting owner neither changes the grade nor otherwise permits water to flow artificially onto the sidewalk, the abutting owner is not liable for injuries resulting from ice on the sidewalk formed by water flowing from the property, *Scales v Nyack*, 290 NY 689, 49 NE2d 631 (1943); *Quinlan v St. Joseph's Church, Troy*, 249 App Div 674, 291 NYS 384 (3d Dept 1936); see *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969); *Kossoff v Rathgeb-Walsh, Inc.*, 3 NY2d 583, 170 NYS2d 789, 148 NE2d 132 (1958); *Bennett v Cupina*, 253 NY 436, 171 NE 698 (1930). Plaintiff has the burden of establishing that the snow or ice upon which he or she slipped resulted from water or snow and ice artificially diverted, *Minton v Richmond Bennett Corp.*, 24 AD2d 604, 262 NYS2d 411 (2d Dept 1965), *aff'd*, 17 NY2d 879, 271 NYS2d 306, 218 NE2d 340 (1966); see *Roark v Hunting*, *supra*. Further, a private landowner cannot be held liable for an icy condition caused by water dripping from a defective roof on its building unless the landowner had actual or constructive notice of the danger to the public, *Fitzgerald v Adirondack Transit Lines, Inc.*, 23 AD3d 907, 804 NYS2d 126 (3d Dept 2005).

2. Sidewalk repairs voluntarily undertaken have been negligently done, see *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969); *Epner v Rhulen*, 8 AD2d 646, 184 NYS2d 910 (3d Dept 1959), or the abutting owner's special use of the sidewalk has produced a defective condition, *Blum v New York*, 267 AD2d 341, 700 NYS2d 65 (2d Dept 1999); *Braithwaite v Grand Union Co.*, 22 AD2d 941, 255 NYS2d 924 (2d Dept 1964); see PJI 2:111 and Comment, and ice forms as a result of the defect thus created causing injury to a pedestrian.

Liability may also be imposed upon a landowner whose unreasonable obstruction of the sidewalk caused a pedestrian to sustain injury while walking on the icy street, *Fleischer v White Rose Food Corp.*, 152 AD2d 489, 543 NYS2d 456 (1st Dept 1989).

A landlord out of possession is not responsible for injuries resulting from a sign maintained by a tenant, *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969), but when the landlord retains control over part of the building, the landlord is liable for injuries resulting from snow falling from or ice formed by water dripping from that part of the building, *Klepper v Seymour House Corporation of Ogdensburg*, 246 NY 85, 158 NE 29 (1927) (exterior repairs by landlord, snow slid from roof); see Annot: 49 ALR3d 387; PJI 2:100 and 2:105 and Comments, and the tenant may also be liable, *Farrell v Prentice*, 206 AD2d 799, 615 NYS2d 127 (3d Dept 1994); *Golden v New York*, 101 NYS2d 588 (Sup 1950).

Snow and ice cases involving municipal liability are dealt with in PJI 2:225C. Concerning the liability of a property owner or possessor for on-premises snow and ice injuries, see 86 NYJur2d, Premises Liability §§ 298–301; 5C Warren, Negligence, Snow § 75.01 (4th ed); Annot: 95 ALR3d 15; 54 ALR3d 558.

The general duty to use reasonable care to maintain the premises

in a reasonably safe condition applies in snow and ice cases, *Bell v H.M.C. Corp.*, 18 AD2d 1038, 238 NYS2d 592 (3d Dept 1963); *Donahue v Prinzivalli*, 272 App Div 957, 71 NYS2d 644 (4th Dept 1947); *Hunter v Fitz-Roy Development Corp.*, 261 App Div 270, 25 NYS2d 324 (2d Dept 1941); see *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 (1976); *Gentile v Rotterdam Square*, 226 AD2d 973, 640 NYS2d 696 (3d Dept 1996); Introductory Statement preceding this Division. It has been suggested that a private landowner's duty is similar to and no greater than that of a municipality to remove snow and ice from its sidewalks, *Mazanti v Wright's Underwear Co.*, 266 App Div 18, 41 NYS2d 685 (3d Dept 1943); *Dack v Trustees of Peekskill Military Academy*, 247 App Div 797, 286 NYS 48 (2d Dept 1936); *Dwyer v Woollard*, 205 App Div 546, 199 NYS 840 (3d Dept 1923), and therefore, to subject the private owner to liability the condition on the premises must be more hazardous than that prevailing in the locality, *Schwabl v St. Augustine's Church, of Rochester*, 288 NY 554, 42 NE2d 16 (1942); *Mazanti v Wright's Underwear Co.*, *supra*; see *Bonfrisco v Marlib Corp.*, 30 AD2d 655, 291 NYS2d 375 (1st Dept 1968), *aff'd*, 24 NY2d 817, 300 NYS2d 593, 248 NE2d 448 (1969); see also Comment to PJI 2:225C. The Second Department, however, in *De Coufle v Frederick Benedict, Inc.*, 93 AD2d 805, 460 NYS2d 604 (2d Dept 1983), has held that the standard of "exceptional" danger properly applies only to municipal liability.

Where a third party's contractual undertaking to remove snow from the subject premises was not a comprehensive and exclusive property maintenance obligation that could reasonably be expected to displace the landowner's duty to maintain the property safely, the third party does not assume a responsibility to a plaintiff walking on the premises, *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002); see *Karac v Elmira*, 14 AD3d 842, 788 NYS2d 456 (3d Dept 2005) (duty owed to third-party where private, day-to-day operator of municipal parking garage had comprehensive contractual maintenance obligation; operator coordinated and supervised staff, accounted for revenues and was responsible for physical, mechanical and electrical maintenance of premises). Likewise, a commercial tenant's undertaking in a lease to clear the sidewalk abutting its premises of snow and ice does not give rise to a duty to third parties, *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 761 NYS2d 181 (1st Dept 2003). The fact that someone other than the snow plow removal company engaged in snow removal, sanding and salting on the same premises or that the property owner retained the right to request additional services and monitored the contract's performance indicates that there was not a comprehensive and exclusive property maintenance obligation owed by the snow contractor, *Torella v Benderson Development Co., Inc.*, 307 AD2d 727, 763 NYS2d 876 (4th Dept 2003); *Kozak v Broadway Joe's*, 296 AD2d 683, 745 NYS2d 139 (3d Dept 2002); *Borden v Wilmorite Inc.*, 271 AD2d 864, 706 NYS2d 230 (3d Dept 2000). However, the party agreeing to perform the snow removal work may be required to indemnify the landowner if the plaintiff is successful in an action against the landowner, *Coyle v Long Island Sav. Bank*, 248 AD2d 350, 669 NYS2d 628 (2d Dept 1998). The landowner will not be permitted to

seek contribution from the party retained to remove snow from the subject premises unless the landowner can demonstrate that the party owed a duty of care to it independent of the party's contractual duty or that the party owed the plaintiff, as an injured party, a duty of care, *Malcolm v Kapur*, 278 AD2d 926, 718 NYS2d 562 (4th Dept 2000). In *Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 690 NYS2d 213 (1st Dept 1999), the First Department held that the party agreeing to undertake snow removal is obligated to exercise reasonable care in doing so and can be held liable to a plaintiff in negligence where its acts create or increase the snow-related hazard. For a discussion of issues related to an owner's claim for indemnification against a snow removal contractor, see *Salisbury v Wal-Mart Stores Inc.*, 255 AD2d 95, 690 NYS2d 156 (3d Dept 1999).

In *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 (2002), the Court held that defendant, who had contracted to remove snow from the subject premises, did not "launch a force or instrument of harm". The Court held that by merely plowing snow, defendant did not create or exacerbate a dangerous condition. The Court did note, however, that a snow removal contractor or one in a similar line of work who creates or exacerbates a harmful condition may generally be liable for any resulting injury. For a further discussion of a snow removal contractor's liability to third persons, see the Comment to PJI 2:12.

In any event, notice, actual or constructive, of the condition and a reasonable time thereafter to correct it are essential to liability, *Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 622 NYS2d 496, 646 NE2d 798 (1994); *Fitzgerald v Adirondack Transit Lines, Inc.*, 23 AD3d 907, 804 NYS2d 126 (3d Dept 2005); *Arcuri v Vitolo*, 196 AD2d 519, 601 NYS2d 173 (2d Dept 1993); *Mennes v Syfeld Management, Inc.*, 75 AD2d 936, 428 NYS2d 87 (3d Dept 1980); *Moorhead v Hummel*, 36 AD2d 682, 319 NYS2d 672 (4th Dept 1971); *Caligurie v Schreck's Iron & Metal Corp.*, 8 AD2d 991, 188 NYS2d 697 (4th Dept 1959); see Comment to PJI 2:225C. A property owner's general awareness that water can turn into ice is legally insufficient to establish constructive notice of the icy condition that caused the plaintiff to fall, *Carricato v Jefferson Valley Mall Ltd. Partnership*, 299 AD2d 444, 749 NYS2d 575 (2d Dept 2002). A party in possession or control of real property has a reasonable period of time after the cessation of a storm in which to take protective measures to correct storm-created hazardous ice and snow conditions, see *Boucher v Watervliet Shores Associates*, 24 AD3d 855, 804 NYS2d 511 (3d Dept 2005) (landlord not required to discover ice within two to three hours after its formation, which occurred late on weekend evening where there has been no precipitation and ice not visible to people walking upon it); *Russo v 40 Garden Street Partners*, 6 AD3d 420, 775 NYS2d 327 (2d Dept 2004) (50 minutes between cessation of storm and accident did not afford defendant reasonable opportunity to act); *Whitt v St. John's Episcopal Hosp.*, 258 AD2d 648, 685 NYS2d 789 (2d Dept 1999) (citing PJI); *Jensen v Roohan*, 233 AD2d 587, 649 NYS2d 100 (3d Dept 1996). The question whether the owner-possessor acted reasonably

both as to time and as to measures taken usually presents issues of fact, *Matthiesen v Adrian*, 306 NY 694, 117 NE2d 639 (1954); *Bordonaro v Bank of Blasdell*, 285 NY 606, 33 NE2d 541 (1941); *Bushman v Kiamesha-Concord, Inc.*, 58 AD2d 638, 396 NYS2d 44 (2d Dept 1977). However, the court may find that the lapse in time in removing the snow was not unreasonable as a matter of law, *Drake v Prudential Ins. Co., Inc.*, 153 AD2d 924, 545 NYS2d 731 (2d Dept 1989) (failure to clear a parking lot of an overnight snowfall of up to two inches by 7:30 A.M. was not unreasonable). Thus, a landowner has no responsibility for snow and ice removal while a storm is in progress, *Baum v Knoll Farm*, 259 AD2d 456, 686 NYS2d 83 (2d Dept 1999); *Amazon v British American Development Corp.*, 216 AD2d 702, 628 NYS2d 204 (3d Dept 1995) (citing PJI); *Cerra v Perk Development*, 197 AD2d 851, 602 NYS2d 277 (4th Dept 1993), or during a lull in the storm, *Ioele v Wal-Mart Stores, Inc.*, 290 AD2d 614, 736 NYS2d 130 (3d Dept 2002); see *Dowden v Long Island Rail Road*, 305 AD2d 631, 759 NYS2d 544 (2d Dept 2003). A landowner cannot be held liable for an injury caused by a storm that was in progress at the time of the injury, *Taylor v New York City Transit Authority*, 266 AD2d 384, 698 NYS2d 52 (2d Dept 1999). If, however, a landowner does clear snow and ice while a storm is in progress, it can be liable for creating or exacerbating a dangerous condition, *Rugova v 2199 Holland Ave. Apartment Corp.*, 272 AD2d 261, 708 NYS2d 390 (1st Dept 2000). Evidence establishing that it had snowed a week prior to the accident is insufficient to establish notice where no evidence is introduced that the ice upon which plaintiff allegedly fell was a result of that particular snow accumulation, *Simmons v Metropolitan Life Ins. Co.*, supra; see *Baum v Knoll Farm*, supra; *DeCurtis v T.H. Associates*, 241 AD2d 536, 661 NYS2d 642 (2d Dept 1997). As to causal relationship where there have been successive snowfalls, see *Cruz v New York*, 23 AD2d 491, 255 NYS2d 973 (1st Dept 1965), *aff'd*, 17 NY2d 717, 269 NYS2d 722, 216 NE2d 713 (1966); *Drake v Prudential Ins. Co., Inc.*, supra; *Moorhead v Hummel*, supra; *Pfeffer v New York*, 25 AD2d 889, 270 NYS2d 564 (2d Dept 1966); Comment PJI 2:225C.

PJI 2:111A.1

As you have heard, the plaintiff, AB, has sued the defendant, CD, claiming that CD negligently maintained the sidewalk abutting, which means next to, the property that CD owned. Under the New York City Administrative Code, the owner of property has a duty to use reasonable care to maintain the sidewalk abutting (his, her, its) property in a reasonably safe condition [insert where appropriate; including a duty to keep the property clear of snow and ice].

[Where applicable, the supplemental charge regarding the one-, two- and three-family residential exemption

should be inserted here, see Comment to this section and supplemental charge, infra]

In order to recover, the plaintiff, AB, must prove: (1) that the sidewalk was not reasonably safe *[insert where appropriate: as a result of the accumulation or presence of snow or ice]*; **(2) that the defendant, CD, was negligent in not keeping the sidewalk in a reasonably safe condition; and (3) that CD's negligence in allowing the unsafe condition to exist was a substantial factor in causing AB's [trip, slip, fall].**

You must first decide whether the sidewalk was reasonably safe. AB claims that the sidewalk was not in a reasonably safe condition because *[state plaintiff's contentions, e.g., CD failed to install, construct, reconstruct, repave, repair or replace defective sidewalk flags, or failed to remove snow, ice, dirt or other material from the sidewalk]*. **CD contends** *[state defendant's contentions]*. **If you decide that the sidewalk was reasonably safe, you will find for CD and proceed no further on this claim. If you decide that the sidewalk was not reasonably safe, you will proceed to decide whether CD was negligent in permitting the unsafe condition to exist.**

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent owner would use under the same circumstances, taking into account the foreseeable risk of injury. In deciding whether CD was negligent, you must decide whether CD created the *[state claimed condition]* **or either knew or, in the use of reasonable care, should have known, that the** *[state claimed condition]* **existed. If CD did not create the** *[state claimed condition]* **but knew or should have known about the** *[state claimed condition]*, **you must decide whether CD had sufficient time before AB's [trip, slip, fall] to correct the** *[state claimed condition]* **or take suitable precautions, such as providing a reasonable safeguard or providing a reasonable warning.**

You will find that CD was negligent if you

decide that CD created the *[state claimed condition]* or either knew, or in the use of reasonable care should have known, about the *[state claimed condition]* long enough before AB's *[trip, slip, fall]* to have allowed (him, her, it), in the use of reasonable care, to correct it or take other suitable precautions and you further find that (he, she, it) failed to do so. On the other hand, if you find that CD did not create the *[state claimed condition]* and, further, that CD did not know about or, in the use of reasonable care, would not have been able to discover and correct the *[state claimed condition]* before AB's *[trip, slip, fall]* occurred, or if you find that CD corrected the *[state claimed condition]* or took other suitable precautions, then you will find that CD was not negligent.

[Where the case involves a claim that the alleged sidewalk defect is open and obvious, see PJI 2:90]

[Where the case involves an accident stemming from a slip and fall on snow or ice, insert: In deciding whether CD was negligent, you should consider the length of time between the end of the snowfall and the time that AB [tripped, slipped, fell], how much snow fell during the storm, and the temperature and weather conditions between the end of the snowfall and when AB [tripped, slipped, fell].]

If you find that CD was negligent you must next consider whether that negligence was a substantial factor in causing AB's (trip, slip, fall). An act or failure to act is a substantial factor in bringing about AB's (trip, slip, fall) if a reasonable person would regard it as a cause of the (trip, slip, fall). If you find that CD's negligence was not a substantial factor in causing the (trip, slip, fall), then AB may not recover. If you find that CD's negligence was a substantial factor in causing AB's (trip, slip, fall), you will proceed to consider *[state next appropriate step, e.g., comparative fault, damages, verdict]*.

Comment

Caveat 1: New York City Administrative Code § 7-210 imposes the

duty to maintain sidewalks on the “owner” of real property abutting the sidewalks, see *Xiang Fu He v Troon Management, Inc.*, 34 NY3d 167, 114 NYS3d 14, 137 NE3d 469 (2019); *Montalbano v 136 W. 80 St. CP*, 84 AD3d 600, 923 NYS2d 489 (1st Dept 2011); see also *Araujo v Mercer Square Owners Corp.*, 95 AD3d 624, 944 NYS2d 126 (1st Dept 2012) (owner of individual unit in condominium building not an “owner” under § 7-210); *Locario v State*, 90 AD3d 547, 935 NYS2d 20 (1st Dept 2011) (State of New York qualifies as “owner” under § 7-210). Such a landowner may not avoid the liability imposed by Section 7-210 under the theory that he or she is an out-of-possession landowner, *Xiang Fu He v Troon Management, Inc.*, *supra*. The requirements of the provision do not apply to non-owners who have some interest in the land, such as lessees and licensees see *O’Brien v Prestige Bay Plaza Development Corp.*, 103 AD3d 428, 959 NYS2d 193 (1st Dept 2013); *Leary v Dallas BBQ*, 91 AD3d 519, 936 NYS2d 541 (1st Dept 2012); *Collado v Cruz*, 81 AD3d 542, 917 NYS2d 178 (1st Dept 2011).

Caveat 2: The liability-shifting provision of Administrative Code § 7-210 does not apply to one-, two-, or three-family residential property that is at least partially owner-occupied and used exclusively for residential purposes, and the liability of an owner of qualifying residential property is measured under common law principles, see *Gilmartin v New York*, 81 AD3d 411, 915 NYS2d 556 (1st Dept 2011); Comment to this section and supplemental charge, *infra*.

Caveat 3: The charge is based on Administrative Code § 7-210, which imposes on abutting property owners not only a duty to maintain adjoining sidewalks, but also liability for their negligent failure to do so, *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016). Because the charge is designed for cases arising under Administrative Code § 7-210, it may need to be modified to accommodate a case involving a duty-shifting ordinance of another municipality.

Caveat 4: Care must be taken when determining whether an accident occurred on a “sidewalk” as that word is used in Administrative Code § 7-210, see Comment to this section, *infra*.

Caveat 5: A plaintiff may assert numerous theories of recovery for a sidewalk accident. For example, a plaintiff who slipped on snow or ice on a sidewalk may claim that the abutting property owner failed to maintain the sidewalk as required by Administrative Code § 7-210 and also that the owner gratuitously undertook snow and ice removal efforts that made the naturally occurring conditions more hazardous, see PJI 2:111A; see also *Martinez v Khaimov*, 74 AD3d 1031, 906 NYS2d 274 (2d Dept 2010). Where the plaintiff pursues multiple theories of recovery at trial, the court must ensure that the jury is instructed as to each of the theories on which sufficient evidence has been adduced.

Caveat 6: In a case involving a slip and fall on ice, snow or dirt, the plaintiff may claim that the defendant violated Administrative Code

§ 16-123, which imposes certain duties on an abutting property owner with respect to the removal of those substances. If the plaintiff claims that § 16-123 was violated and there is evidence of such a violation, the above charge should be modified to instruct the jury, in accordance with PJI 2:29, that a violation of § 16-123 is some evidence of negligence.

Caveat 7: A defendant in a sidewalk defect case may assert that the defect was open and obvious, a defense which, if established, obviates a defendant's duty to provide a warning regarding the defect, see Comment to PJI 2:90. The defense does not, however, obviate a defendant's duty to keep its property in a reasonably safe condition, see *id.* Where an issue of fact is present in a case concerning whether a defect was open and obvious, the above charge should incorporate the open and obvious elements of the PJI 2:90 charge.

Based on New York City Administrative Code § 7-210; PJI 2:90 and PJI 2:225C.

In 2003, the New York City Administrative Code was amended to transfer tort liability for accidents arising from defective or dangerous conditions on City sidewalks from the City to the property owners abutting the sidewalks, New York City Administrative Code § 7-210; *Xiang Fu He v Troon Management, Inc.*, 34 NY3d 167, 114 NYS3d 14, 137 NE3d 469 (2019); *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016); *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 860 NYS2d 429, 890 NE2d 191 (2008). Thus, as to accidents occurring on or after September 14, 2003, New York City Administrative Code § 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that such owners are liable for personal injury that is proximately caused by that failure, *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016); see Administrative Code § 7-210; *Martinez v Khaimov*, 74 AD3d 1031, 906 NYS2d 274 (2d Dept 2010). In *Xiang Fu He v Troon Management, Inc.*, *supra*, the Court of Appeals clarified that a landowner may not insulate itself from the liability imposed by Section 7-210 under the theory that it is an out-of-possession landowner. Administrative Code § 7-210(b) defines the failure to maintain a sidewalk in a reasonably safe condition as, among other things, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. Section 7-210(b) does not supersede pre-existing regulations such as 34 RCNY 2-07(b), which makes owners of covers or gratings on the street responsible for monitoring the condition of such hardware and the area extending 12 inches outward from its perimeter, *Torres v Sander's Furniture, Inc.*, 134 AD3d 803, 20 NYS3d 630 (2d Dept 2015); *Roman v Bob's Discount Furniture of NY, LLC*, 116 AD3d 940, 983 NYS2d 845 (2d Dept 2014).

Critically, the liability-shifting provision of § 7-210 does not apply to one-, two-, or three-family residential property that is at least

partially owner-occupied and used exclusively for residential purposes, see Comment to this section, *infra*. The legislation absolves the City of liability for injuries caused by the failure to maintain or clear sidewalks abutting privately owned real property, *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016). However, the City remains liable where an abutting property owner qualifies for the limited residential exemption, and, in any event, where the City has created the injury-producing condition or made special use of the portion of the sidewalk on which the accident occurred.

Administrative Code § 7-210 does not impose absolute or strict liability on an abutting property owner for the failure to maintain the sidewalk. Rather, a plaintiff must establish the elements of negligence to demonstrate that an abutting owner is liable under § 7-210, *Gyokchyan v New York*, 106 AD3d 780, 965 NYS2d 521 (2d Dept 2013); *Khaimova v New York*, 95 AD3d 1280, 945 NYS2d 710 (2d Dept 2012); *Harakidas v New York*, 86 AD3d 624, 927 NYS2d 673 (2d Dept 2011); *Martinez v Khaimov*, 74 AD3d 1031, 906 NYS2d 274 (2d Dept 2010); see *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016); *Early v Hilton Hotels Corp.*, 73 AD3d 559, 904 NYS2d 367 (1st Dept 2010). In effect, § 7-210 places a legal duty on an abutting property owner to maintain the sidewalk, opening the door to tort liability on the part of the owner under traditional negligence principles. Thus, a property owner discharges the duty to keep the abutting sidewalk in “reasonably safe condition” within the meaning of § 7-210 by sufficiently clearing snow and ice so that a snow-free path is created between the street and the sidewalk within a reasonable walking distance of the property, *McKenzie v New York*, 116 AD3d 526, 984 NYS2d 32 (1st Dept 2014); see *Quintana v New York City Housing Authority*, 91 AD3d 578, 937 NYS2d 581 (1st Dept 2012) (abutting property owner not liable where it cleared snow from public walkway but plaintiff unforeseeably walked over snow mound that owner left piled on curb).

Section § 7-210 does not limit a landowner’s liability to accidents that occur on its own abutting sidewalk where the landowner’s failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff’s injuries, *Sangaray v West River Associates, LLC*, 26 NY3d 793, 28 NYS3d 652, 48 NE3d 933 (2016). Thus, a landowner may be liable even though the defect on which the plaintiff tripped abutted a neighboring property owner’s sidewalk, *id*. In *Sangaray*, the Court rejected the principle, supported by some Appellate Division decisions, that only the landowner whose property abuts the defect on which the plaintiff tripped may be held liable, *id*.

Care must be taken when determining whether an accident occurred on a “sidewalk” as that word is used in Administrative Code § 7-210. The Code provision specifies that, “It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in

a reasonably safe condition,” see *James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 962 NYS2d 4 (1st Dept 2013) (portion of sidewalk where accident occurred, portion of sidewalk immediately abutting defendant’s property and grassy area separating the two, constituted “sidewalk” under § 7-210); *Khaimova v New York*, 95 AD3d 1280, 945 NYS2d 710 (2d Dept 2012) (brick walkway between curb line and property line constitutes “sidewalk”); *Harakidas v New York*, 86 AD3d 624, 927 NYS2d 673 (2d Dept 2011) (irregular asphalt surface approximately the size of a sidewalk flag, situated between curb line and property line, constitutes “sidewalk”). However, the Code provision does not make an abutting property owner responsible for maintaining (1) trees or tree wells set into the sidewalk, *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 860 NYS2d 429, 890 NE2d 191 (2008); *Fernandez v 707, Inc.*, 85 AD3d 539, 926 NYS2d 408 (1st Dept 2011); see also *Kleckner v Meushar 34th Street, LLC*, 80 AD3d 478, 914 NYS2d 164 (1st Dept 2011), (2) sidewalk covers and grates, see *Storper v Kobe Club*, 76 AD3d 426, 906 NYS2d 543 (1st Dept 2010); *Hurley v Related Management Co.*, 74 AD3d 648, 904 NYS2d 41 (1st Dept 2010); see also *Torres v Sander’s Furniture, Inc.*, 134 AD3d 803, 20 NYS3d 630 (2d Dept 2015) (hydrant gate valve box); *Flynn v New York*, 84 AD3d 1018, 923 NYS2d 635 (2d Dept 2011) (indentation containing gate box housing fire hydrant valve), (3) a pedestrian ramp connecting the sidewalk to the street, *Ortiz v New York*, 67 AD3d 21, 884 NYS2d 417 (1st Dept 2009), rev’d, 14 NY3d 779, 898 NYS2d 544, 925 NE2d 582 (2010), (4) the curb, *Ascencio v New York City Housing Authority*, 77 AD3d 592, 910 NYS2d 61 (1st Dept 2010); *Garris v New York*, 65 AD3d 953, 885 NYS2d 491 (1st Dept 2009), (5) a stairway owned by the City running between two avenues, *Fernandez v Highbridge Realty Associates*, 49 AD3d 318, 853 NYS2d 71 (1st Dept 2008), (6) a City sign or sign post, *Smith v 125th Street Gateway Ventures, LLC*, 75 AD3d 425, 903 NYS2d 231 (1st Dept 2010), or (7) boards covering a subway grate affixed to the sidewalk by the New York City Transit Authority, *Smirnova v New York*, 64 AD3d 641, 882 NYS2d 513 (2d Dept 2009). Notably, when ascertaining whether a given area constitutes a “sidewalk,” the courts frequently consult Administrative Code § 19-101(d) (“‘Sidewalk’ shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians”), see *James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 962 NYS2d 4 (1st Dept 2013); *Khaimova v New York*, supra; *Harakidas v New York*, supra; *Ascencio v New York City Housing Authority*, supra; *Garris v New York*, supra.

The liability-shifting provision of the legislation does not apply to one-, two-, or three-family residential property that is at least partially owner-occupied and used exclusively for residential purposes, *Coogan v New York*, 73 AD3d 613, 900 NYS2d 645 (1st Dept 2010). The residential exemption was adopted in recognition of the inappropriateness of exposing small property owners, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair, *id.* Consistent with that purpose, the liability imposed by Administrative Code § 7-210 should not be extended to a homeowner who occasionally

used his laptop for research at home, did not claim any part of the premises as a “home office” on his tax return and denied that he operated a “home office,” id; see *Sisler v New York*, 84 AD3d 638, 924 NYS2d 329 (1st Dept 2011) (triable issue of fact regarding whether defendant used property exclusively for residential purposes; defendant, among other things, regularly performed tasks relating to her shoe business at the property). A corporate entity that owns property abutting a sidewalk is not precluded from asserting the exemption solely by virtue of its corporate status, see *Boorstein v 1261 48th Street Condominium*, 96 AD3d 703, 946 NYS2d 200 (2d Dept 2012); see also *Gordy v New York*, 67 AD3d 523, 887 NYS2d 847 (1st Dept 2009). Where an abutting property owner qualifies for the exemption, the City of New York is liable, subject to the traditional rules governing municipal sidewalk liability, see Comment to PJI 2:225, PJI 2:225A.

Generally, a duty to maintain an area in a reasonably safe condition is independent of a duty not to create a defective condition. Thus, under a strict construction of Administrative Code § 7-210, it expressly shifts tort liability to the abutting property owner for injuries proximately caused by the owner’s failure to maintain the sidewalk in a reasonably safe condition, but it does not shift tort liability for injuries proximately caused by the City’s affirmative acts of negligence, *Harakidas v New York*, 86 AD3d 624, 927 NYS2d 673 (2d Dept 2011).

That an abutting property owner qualifies for the residential property exemption does not preclude liability from being imposed on the owner. While the exemption insulates the property owner from a negligence claim premised on a breach of the duty imposed by Administrative Code § 7-210, it does not insulate the owner from negligence claims based on the owner’s breach of a common law duty. Thus, an abutting owner remains liable if the owner creates an unsafe condition on the sidewalk or is subject to the special benefit rule, see *Gilmartin v New York*, 81 AD3d 411, 915 NYS2d 556 (1st Dept 2011).

In cases where a defendant claims the exemption for qualified residential property and there are issues of fact on the applicability of the exemption, the following charge should be inserted after the first paragraph of the charge above:

PJI 2:111A.2

However, under the Administrative Code not all owners of residential property are liable for failing to maintain the sidewalk abutting their property. An owner of one-, two- or three-family residential property that is (1) occupied by the owner, in whole or in part, and (2) used exclusively for residential purposes is not liable for (his, her, its) failure to maintain the sidewalk abutting (his,

her, its) property in a reasonably safe condition. The defendant, CD, claims that (he, she, it) is not liable because *[state defendant's contentions: e.g., the property abutting the sidewalk is a two-family residence that CD occupies exclusively for residential purposes]*. AB *[or other party raising the issue]* claims that CD is liable because *[state plaintiff's contentions: e.g., the property abutting the sidewalk is not used exclusively for residential purposes]*.

CD has the burden of proving, by a preponderance of the evidence, that the property was, at the time the accident occurred, (1) a one-, two- or three-family residential property, (2) occupied by the owner, in whole or in part, and (3) used exclusively for residential purposes.

If you decide that CD has proved, by a preponderance of the evidence, that the property was, at the time the accident occurred, (1) a one-, two- or three-family residential property, (2) occupied by the owner, in whole or in part, and (3) used exclusively for residential purposes, then you will find that CD is not liable for the (trip, slip, fall). If you decide that CD has not proved by a preponderance of the evidence, that the property was, at the time the accident occurred, (1) a one-, two- or three-family residential property, (2) occupied by the owner, in whole or in part, or (3) used exclusively for residential purposes, then you will determine whether CD is liable in accordance with the instructions I will now give you.

Caveat 1: New York City Administrative Code § 7-210 is silent as to which party bears the burden of proof on the issue of the applicability of the exemption. However, because it is an exemption and is analogous to the one- and two-family dwelling exemption under Labor Law §§ 240(1) and 241(6), the supplemental charge casts the burden of proof on the party asserting the exemption, see generally *Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55, 604 NE2d 117 (1992).

Caveat 2: The supplemental charge assumes that issues of fact exist as to each of the elements of the exemption (property is one-, two- or three-family residential; property is, in whole or in part, owner occupied; property used exclusively for residential purposes). If factual issues exist on some but not all of these elements, the charge should be modified accordingly.

Based on New York City Administrative Code § 7-210; PJI 2:216A.1 and 2:217.1.

The following verdict sheet may be used in an action involving a claim under Administrative Code § 7-210 where the one-, two-, or three-family residential property exemption has been asserted. If the exemption has not been asserted in a case, the verdict sheet must be modified to delete the first three questions and the remaining questions must be renumbered.

PJI 2:111A.1 & 2-SV

1. Was CD's property one-, two- or three- family residential property?

Yes _____ No _____

(If your answer is "no" go to Question 4. If your answer is "yes" go to Question 2.)

2. Was CD's property occupied, in whole or in part, by CD?

Yes _____ No _____

(If your answer is "no" go to Question 4. If your answer is "yes" go to Question 3.)

3. Was CD's property used exclusively for residential purposes?

Yes _____ No _____

(If your answer is "no" go to Question 4. If your answer is "yes" go no further on this claim and *[state next appropriate action: report to the court, go to Question — [identify next appropriate question, e.g., question regarding next claim.]]*).

4. Was the sidewalk abutting CD's property in a reasonably safe condition?

Yes _____ No _____

(If your answer is "no" go to Question 5. If your answer is "yes" go no further on this claim and *[state next appropriate action: report to the court, go to Question — [concerning plaintiff's claim for ____].]*)

5. Was CD negligent in failing to keep the sidewalk in a reasonably safe condition?

Yes _____

No _____

(If your answer is “no” go no further on this claim and [*state next appropriate action*: report to the court, go to Question — [*concerning plaintiff’s claim for* ____].). If your answer is “yes” go to Question 6.)

6. Was CD’s negligence a substantial factor in causing AB’s (trip, slip, fall)?

Yes _____

No _____

(If your answer is “no” [*state next appropriate action*: report to the court, go to Question — [*concerning plaintiff’s claim for* ____].). If your answer is “yes” go to Question — [*identify next appropriate question, e.g., question on comparative fault, damages.*] The instructions should be modified in a bifurcated trial.

The following instruction may be used in a snow and ice case arising from an accident on private premises:

PJI 2:111A.3

The (owner, lessor) of (land, a building) has the duty to use reasonable care to keep the property clear of snow and ice in areas where use by pedestrians is foreseeable. In order to recover against defendant, plaintiff must show that (1) use of the (sidewalk, parking lot) by pedestrians was reasonably foreseeable; (2) the condition of the (sidewalk, parking lot) at the place where plaintiff was injured was dangerous as the result of an accumulation of snow or ice; (3) defendant either knew about the dangerous condition or of facts or circumstances from which a reasonable person would conclude that such a condition existed; (4) defendant either failed to use reasonable care in removing the snow or ice or had a reasonable time to remove the snow or ice but failed to do so; and (5) the dangerous condition was a substantial factor in causing plaintiff’s injury. In determining

whether defendant was negligent in failing to correct a dangerous condition caused by an accumulation of snow or ice, you should consider the amount of snow or ice to be removed, the length of time between the end of the snowfall and plaintiff's injury, the temperature and weather conditions during that period, and the actions defendant took or reasonably could have taken to correct the condition.

Caveat: Because of the several separate factual issues to be decided, a special verdict appears best suited in these cases, see PJI 1:97.

PJI 2:112. Liability for Condition or Use of Land—To Persons Outside the Land—Possessor's Liability—Abnormally Dangerous Conduct

As a you have heard, plaintiff AB claims that defendant CD engaged in *[specify activity, such as:]* (blasting), an abnormally dangerous activity. Because *[state activity, such as:]* (blasting) involves a risk of harm to others, an (owner, possessor, contractor) who engages in *[state activity, such as:]* (blasting) is responsible, without regard to fault, for any injury to person or property caused by that activity.

You must consider *[add where appropriate:]* (whether CD engaged in *[state activity, such as:]* [blasting] and) whether CD's *[state activity, such as:]* (blasting) was a substantial factor in bringing about AB's injury. *[Add where appropriate:]* (If you find that CD did not engage in *[state activity, such as:]* [blasting], you will find for defendant CD and proceed no further *[add where appropriate:]* [on this claim]. If you find that CD did engage in *[state activity, such as:]* [blasting], you must next consider whether CD's *[state activity, such as:]* [blasting] was a substantial factor in bringing about AB's injury.)

An activity is regarded as a cause of injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it

as a cause of the injury. If you find that CD's [specify activity, such as:] (blasting) was not a substantial factor in causing AB's injury, you will find for defendant CD and proceed no further [state where appropriate:] (on this claim). If you find that CD's [specify activity, such as:] (blasting) was a substantial factor in causing AB's injury, you will find CD liable [state where appropriate:] (on this claim) and you will proceed to consider [state next appropriate step, such as comparative fault, damages, verdict].

Comment

Based on *Doundoulakis v Hempstead*, 42 NY2d 440, 398 NYS2d 401, 368 NE2d 24 (1977); *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969).

I. In General

Abnormally dangerous conduct is an independent basis for the imposition of strict liability, *Doundoulakis v Hempstead*, 42 NY2d 440, 398 NYS2d 401, 368 NE2d 24 (1977); Restatement, Second, Torts §§ 519–520 (expressly adopted in *Doundoulakis*). Although strict liability causes of action are often predicated on statutes, see Environmental Conservation Law § 23-1717(8) (accidental discharge of liquified natural or petroleum gas); Navigation Law § 181 (oil spills) (discussed in PJI 10:1 et seq.), strict liability based on abnormally dangerous conduct is rooted in common-law principles. For a discussion of strict liability arising from statutory violations, see Introductory Statement to PJI 2:25.

Actual injury to property or person as distinguished from general economic loss is a material element of a cause of action for strict liability based on an abnormally dangerous activity, see *Goldberg Weprin & Ustin, LLP v Tishman Const. Corp.*, 275 AD2d 614, 713 NYS2d 57 (1st Dept 2000), *aff'd*, 96 NY2d 280, 727 NYS2d 49, 750 NE2d 1097 (2001). Proximate cause or causal connection is also a necessary element of plaintiff's case, *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969); *Iannone v Cayuga Const. Corp.*, 66 AD2d 745, 411 NYS2d 599 (1st Dept 1978); 3 E. 52nd St. Corp. v *Uris Fifth Ave. Corp.*, 38 AD2d 917, 329 NYS2d 943 (1st Dept 1972); 35 Estates, Inc. v *Central Park Garden, Inc.*, 35 AD2d 915, 316 NYS2d 3 (1st Dept 1970).

In *Doundoulakis v Hempstead*, 42 NY2d 440, 398 NYS2d 401, 368 NE2d 24 (1977), plaintiffs' property damage claims were based upon negligence, but the trial court determined that the activity was abnormally dangerous. The Court of Appeals held that hydraulic dredging and land filling could constitute not only negligent conduct but also abnormally dangerous activity giving rise to strict liability. In so holding, the Court expressly relied upon *Prosser* and the Restatement,

Second, Torts. The Court further held that determining whether an activity is abnormally dangerous involves multiple factors with no one factor determinative. Moreover, an activity abnormally dangerous under one set of circumstances may not be abnormally dangerous under other circumstances, *Doundoulakis v Hempstead*, supra; see *Mikula v Duliba*, 94 AD2d 503, 464 NYS2d 910 (4th Dept 1983) (firearms are dangerous instrumentalities, but use during hunting not abnormally dangerous activity). Abnormally dangerous activities generally include uncommon or unnatural uses of land and activities that are uncommon or inappropriate to the locale and that pose a risk which cannot be eliminated by the exercise of reasonable care, *Mikula v Duliba*, supra.

Particularly useful in making the determination are the six criteria listed in Restatement of Torts, Second, § 520: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes, *Doundoulakis v Hempstead*, 42 NY2d 440, 398 NYS2d 401, 368 NE2d 24 (1977); *Searle v Suburban Propane Div. of Quantum Chemical Corp.*, 263 AD2d 335, 700 NYS2d 588 (3d Dept 2000). A pattern charge defining abnormally dangerous conduct is not included because whether an activity is abnormally dangerous is a matter for the court, Restatement, Second, Torts, § 520 comment 1.

The installation and maintenance of a propane gas storage tank, transmission system and related fixtures does not constitute an abnormally dangerous activity, since the commercial and household use of propane is widespread and reasonable precautions can be taken to prevent explosion, *Searle v Suburban Propane Div. of Quantum Chemical Corp.*, 263 AD2d 335, 700 NYS2d 588 (3d Dept 2000). Similarly, the maintenance of a chemical “scrubber” which emitted considerable quantities of sodium hydroxide when it malfunctioned, was not an abnormally dangerous activity, since there was no showing that there was great danger of invasion of others’ property or that the risk of harm could not be eliminated through the use of reasonable care, *DeFoe Corp. v Semi-Alloys, Inc.*, 156 AD2d 634, 549 NYS2d 133 (2d Dept 1989); see *June v Laris*, 205 AD2d 166, 618 NYS2d 138 (3d Dept 1994) (farmer’s application of federally-approved pesticide not abnormally dangerous activity); *Farina v Niagara Mohawk Power Corp.*, 81 AD2d 700, 438 NYS2d 645 (3d Dept 1981) (injury resulting from contact with electrical power line not actionable under “abnormally dangerous activity” theory).

II. Strict Liability for Blasting Activities

Strict liability for blasting resulting in a physical invasion of the property of another, as by earth or stones, has long been the rule, *Hay v Cohoes Co.*, 2 NY 159 (1849). Formerly, a distinction was made where damage was caused by vibration and concussion, in which case

negligence was an element of recovery, *Booth v Rome, W. & O.T.R. Co.*, 140 NY 267, 35 NE 592 (1893). However, *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969), expressly overruled *Booth v Rome, W. & O.T.R. Co.*, supra, holding that one who engages in blasting must assume responsibility, and be liable without fault, for any injury caused to neighboring property, including damage caused by vibration or concussion alone. Thus, recovery is no longer conditioned upon trespass, *Spano v Perini Corp.*, supra, or negligence, *Schlansky v Augustus V. Riegel, Inc.*, 9 NY2d 493, 215 NYS2d 52, 174 NE2d 730 (1961), or nuisance, *Dixon v New York Trap Rock Corporation*, 293 NY 509, 58 NE2d 517 (1944); *Heeg v Licht*, 80 NY 579 (1880); see *Prosser and Keeton, Torts* § 78 (5th ed).

Because blasting operations are inherently dangerous, an owner, *Wright v Tudor City Twelfth Unit*, 276 NY 303, 12 NE2d 307 (1938), or general contractor, *Carmel Associates Inc. v Turner Const. Co.*, 35 AD2d 157, 314 NYS2d 941 (1st Dept 1970), cannot escape liability by delegating the task to an independent contractor. Vicarious liability is imposed for the protection of the public and, consequently, a landowner cannot be held strictly liable for injury to employees of an independent contractor hired to do the blasting, even where work is inherently dangerous, *Whitaker v Norman*, 75 NY2d 779, 552 NYS2d 86, 551 NE2d 579 (1989). However, liability may be imposed on the owner under the Labor Law, see *Allen v Cloutier Const. Corp.*, 44 NY2d 290, 405 NYS2d 630, 376 NE2d 1276 (1978).

Notwithstanding that they may be vicariously liable to adjoining landowners, owners who do not exercise control or supervision over the blasting operation may recover for damage to their property resulting from blasting done by a contractor on the landowner's property, *Guido v New York Telephone Co.*, 145 AD2d 203, 538 NYS2d 87 (3d Dept 1989). Further, owners and other employers of independent contractors who are held vicariously liable for blasting damages may seek contribution from the actual tortfeasor, *id.*

One who conducts blasting operations is responsible for any injury that such blasting may cause. Generally, damages include the diminution in value of property or the cost of restoration, whichever is less, *Shemin v New York*, 6 AD2d 668, 180 NYS2d 360 (1st Dept 1958); *Henry Hall Sons Co. v Sundstrom & Stratton Co.*, 138 App Div 548, 123 NYS 390 (2d Dept 1910), *aff'd*, 204 NY 660, 97 NE 1106 (1912); *Victor A. Harder Realty & Const. Co. v New York*, 64 NYS2d 310 (Sup 1946). Once actual physical injury to person or property has been proven, damages may also include lost profits, *Henry Hall Sons Co. v Sundstrom & Stratton Co.*, supra, or damage to occupancy, *Tremain v Cohoes Co.*, 2 NY 163 (1849). Additionally, the *Spano* rule applies to personal injury, including anxiety if reasonably foreseeable.

III. Injury Caused by Vibration from Pile Driving or Use of Heavy Machinery

Although damage caused by vibration through either pile driving or

use of heavy machinery traditionally resulted in liability only upon proof of negligence, *Fagan v Pathe Industries*, 274 App Div 703, 86 NYS2d 859 (1st Dept 1949); *Petillo v Kennedy & Smith*, 263 App Div 821, 31 NYS2d 481 (2d Dept 1941); see *Victor A. Harder Realty & Const. Co. v New York*, 64 NYS2d 310 (Sup 1946); see also *Holdorf v Oneonta Urban Renewal Agency*, 99 AD2d 865, 472 NYS2d 741 (3d Dept 1984), the particular activity must be scrutinized by the court to determine whether it constitutes abnormally dangerous activity resulting in the imposition of liability without fault, see *Doundoulakis v Hempstead*, 42 NY2d 440, 398 NYS2d 401, 368 NE2d 24 (1977). If it does not, liability will be imposed only upon proof of negligence and the following pattern charge may be used:

PJI 2:112.1

An (owner, possessor) of land who engages in [state activity such as:] (pile driving operations) on (his, her, its) land is responsible for (personal injury, property damage) resulting from concussion or vibration caused by the operation unless (he, she, it) uses reasonable care in carrying out the operation. Reasonable care means that degree of care that a reasonably prudent (owner, possessor) would use under the same circumstances. In making the determination whether reasonable care was used by the defendant in this case, you will take into consideration such part or all of the testimony as you believe concerning [here list relevant factors on which evidence has been presented, such as:] (the distance from the pile driving to the plaintiff's building; the nature of the work being done by the defendant and the nature of the soil on the land; what, if any, method other than pile driving could have been used to accomplish the work and whether such method would produce any less concussion or vibration; the size of the piles and hammer used in relation to the job to be done, and the frequency of the hammer blows; the precautions, if any, which you find the defendant took before operations began in order to prevent injury; when, if at all, the defendant became aware that damage was being done to the plaintiff's property and what, if anything, the defendant did thereafter.)

PJI 2:113. Liability for Condition or Use of Land—To Persons Outside the Land—Possessor's Liability—Lateral Support

An (owner, possessor) of land excavates on (his, her, its) property is under a duty to use reasonable care not to endanger a (building, structure) on the adjoining land. Reasonable care means that degree of care that a reasonably prudent person would use under the same circumstances. In deciding whether reasonable care was used by the defendant in this case, you will consider such part or all of the testimony as you believe concerning [*Here list relevant factors on which evidence has been presented, such as:—*] whether the defendant undermined the plaintiff's (building, structure); whether the defendant discovered while excavating that the support of the plaintiff's (building, structure) was not sufficient in view of the digging and failed to warn the plaintiff of that fact; whether there was any custom in the construction industry in the locality with respect to shoring up such excavations and, if so, whether the defendant conformed to such custom.

Comment

Caveat: The foregoing charge is based on common-law negligence. A number of statutes and ordinances have been enacted imposing duties broader than the common law, see Labor Law § 28-a; General Business L. § 764; NYC Admin Code §§ 27-1031, 27-1032; see also *Coronet Properties Co. v L/M Second Ave., Inc.*, 166 AD2d 242, 560 NYS2d 444 (1st Dept 1990). Such statutes and ordinances often impose an absolute duty, without regard to "the presence or absence of negligence," provided the adjoining structure is within the natural zone of support, *Kimberly-Clark Corp. v Power Authority*, 35 AD2d 330, 316 NYS2d 68 (4th Dept 1970). When it is claimed that a statute or ordinance has been violated, see the introductory statement to PJI 2:25 for a discussion concerning the legal effect of such a violation, see also 2:28 (violation of a statute imposing absolute liability); 2:29 (violation of an ordinance or regulation).

Based on *Milbaur v Larkin*, 188 NY 453, 81 NE 321 (1907); *Dorrity v Rapp*, 72 NY 307 (1878); *Austin v Hudson River R. Co.*, 25 NY 334 (1862); see *Booth v Rome, W. & O.T.R. Co.*, 140 NY 267, 35 NE 592 (1893) (ovrld in part, *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969)); *Bergen v Morton Amusement Co.*, 178 App

Div 400, 165 NYS 348 (4th Dept 1917), *aff'd*, 226 NY 665, 123 NE 855 (1919); see generally Restatement, Second, Torts § 819; 1 NYJur2d, Adjoining Landowners §§ 7–22; 4A Warren, Negligence, Adjoining Property § 2.01 (4th ed). Liability extends not only to an owner or possessor of land but to any other person by whom that injury was caused, *Kimberly-Clark Corp. v Power Authority*, 35 AD2d 330, 316 NYS2d 68 (4th Dept 1970). Proximate cause must be charged unless the facts are undisputed, see PJI 2:70.

Under common law, the right of lateral support is absolute and involves no issue of negligence, but that right relates only to support of land in its natural state, *White v Nassau Trust Co.*, 168 NY 149, 61 NE 169 (1901); *Booth v Rome, W. & O.T.R. Co.*, 140 NY 267, 35 NE 592 (1893) (*ovrld* in part, *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969)); *Bergen v Morton Amusement Co.*, 178 App Div 400, 165 NYS 348 (4th Dept 1917), *aff'd*, 226 NY 665, 123 NE 855 (1919); *Riley v Continuous Rail Joint Co. of America*, 110 App Div 787, 97 NYS 283 (3d Dept 1906), *aff'd*, 193 NY 643, 86 NE 1132 (1908); *Sanders v Schiffer*, 46 AD2d 536, 363 NYS2d 676 (3d Dept 1975), *mod*, 39 NY2d 727, 384 NYS2d 769, 349 NE2d 869 (1976). The common-law rule does not protect buildings or structures on the land, where the natural pressure of the land is increased by the weight of buildings or structures on it, *Sanders v Schiffer*, *supra*, except that ownership of land abutting a public highway includes an easement of support for buildings and structures upon the land, *Evelyn Bldg. Corporation v New York*, 257 NY 501, 178 NE 771 (1931); *Matter of Board of Rapid Transit R. Com'rs of City of New York*, 197 NY 81, 90 NE 456 (1909); *Susswein v Bradley Contracting Co.*, 184 App Div 852, 172 NYS 652 (1st Dept 1918). There may be a recovery notwithstanding the presence of buildings or structures, but the plaintiff must overcome the presumption that the buildings or structures increased the pressure on the soil by showing that the damage is unrelated to the presence of the buildings or structures, *White v Nassau Trust Co.*, *supra*; *Riley v Continuous Rail Joint Co.*, *supra*; *Miller v State*, 199 Misc 237, 98 NYS2d 643 (Ct Cl 1950), *mod*, 279 App Div 1139, 113 NYS2d 220 (4th Dept 1952).

The common-law rule that relieves a landowner who excavates on his or her property from liability for injuries to the adjoining land because of the added weight of buildings or structures does not excuse the failure to use reasonable care in making the excavation, *Booth v Rome, W. & O.T.R. Co.*, 140 NY 267, 35 NE 592 (1893) (*ovrld* in part, *Spano v Perini Corp.*, 25 NY2d 11, 302 NYS2d 527, 250 NE2d 31 (1969)). Notwithstanding the freedom thus given to excavate upon one's own land, the common law imposes liability if the excavation is negligently performed. It is this principle that is covered by the pattern charge. The common law does not require the giving of notice to the adjoining landowner of an intention to excavate, *Dorrity v Rapp*, 72 NY 307 (1878), but the excavator is negligent if during the excavation the excavator discovers that the adjacent building support is insufficient in view of the digging and fails to warn the adjoining landowner, *Milbaur v Larkin*, 188 NY 453, 81 NE 321 (1907). One excavating on his or her property

may also be found negligent if the excavation is left open for so long that the soil supporting the adjoining landowner's building is undermined through erosion caused by exposure to the elements, *Austin v Hudson River R. Co.*, 25 NY 334 (1862), see also *White v Nassau Trust Co.*, 168 NY 149, 61 NE 169 (1901); or if there is a failure to conform to a local custom to shore up the sides of the excavation, *Bergen v Morton Amusement Co.*, 178 App Div 400, 165 NYS 348 (4th Dept 1917), *aff'd*, 226 NY 665, 123 NE 855 (1919).

The principle of the pattern charge also applies to one who knows or should know of the danger in draining water from the subsoil supporting an adjoining building and who negligently does so, causing the building to settle, *A. L. Russell, Inc. v New York*, 4 AD2d 943, 168 NYS2d 159 (1st Dept 1957), *aff'd*, 5 NY2d 794, 180 NYS2d 323, 154 NE2d 575 (1958); *Colmet Realty Corp. v Atwell-Gustin-Morris*, 253 App Div 842, 1 NYS2d 685 (2d Dept 1938); see *Victor A. Harder Realty & Const. Co. v New York*, 64 NYS2d 310 (Sup 1946); Annot: 5 ALR4th 614.

The proper measure of damages for loss of or interference with lateral support is the diminution in value of plaintiff's property or the cost to restore it, whichever is less, *Riley v Continuous Rail Joint Co. of America*, 110 App Div 787, 97 NYS 283 (3d Dept 1906), *aff'd*, 193 NY 643, 86 NE 1132 (1908); *Levine v New York*, 249 App Div 625, 290 NYS 953 (2d Dept 1936); *Hamilton Bldg. Co. v Rapid Transit Subway Const. Co.*, 190 App Div 363, 180 NYS 70 (1st Dept 1920).

**PJI 2:114. Liability for Condition or Use of Land—To
Persons Outside the Land—Possessor's
Liability for Conduct of Others**

An (owner, person in possession) of (land, a building) is liable for injury to a person on (adjoining property, the street) if (1) third persons were engaged in an activity (on the land, in the building) that unreasonably endangered persons on (adjoining property, the street), (2) the (owner, person in possession) either knew about or through the use of reasonable care should have known about the dangerous activity and had a reasonable opportunity to prevent or control it, and (3) the dangerous activity was a substantial factor in causing plaintiff's injury. By reasonable care is meant that degree of care that a reasonably prudent (owner, possessor) of (land, a building) would use under the same circumstances.

Comment

Based on *De Ryss v New York Cent. R. Co.*, 275 NY 85, 9 NE2d 788

(1937); *Ford v Grand Union Co.*, 268 NY 243, 197 NE 266 (1935); *Hogle v H.H. Franklin Mfg. Co.*, 199 NY 388, 92 NE 794 (1910); *De Rosa v Fordham University*, 18 AD2d 1056, 238 NYS2d 778 (1st Dept 1963); *Gleason v Hillcrest Golf Course*, 148 Misc 246, 265 NYS 886 (Mun Ct 1933); see *Burgundy Basin Inn, Ltd. v Watkins Glen Grand Prix Corp.*, 51 AD2d 140, 379 NYS2d 873 (4th Dept 1976); *Young v New York, N.H. & H.R. Co.*, 136 App Div 730, 121 NYS 517 (2d Dept 1910); but see *Steenbar v Charles Buerman & Co.*, 2 AD2d 780, 154 NYS2d 481 (2d Dept 1956), *aff'd*, 2 NY2d 903, 161 NYS2d 152, 141 NE2d 634 (1957). The principle of the charge is also considered in *Prosser and Keaton, Torts* § 57 (5th Ed.); 5 *Harper, James & Gray, The Law of Torts* § 27.19 (2nd Ed.); 85 *NYJur2d, Premises Liability* §§ 193–195; *Restatement, Second, Torts* § 318; *Annot*: 74 *ALR2d* 1241; 97 *ALR2d* 1431.

An owner/possessor who directs his or her employee to engage in activity dangerous to persons outside the premises is responsible under the principle of *respondeat superior*, *Althorf v Wolfe*, 22 NY 355 (1860); see *Ford v Grand Union Co.*, 268 NY 243, 197 NE 266 (1935); see also PJI 2:235. Where the activity is not inherently dangerous, the owner (or general contractor) is not liable for the negligent performance of work by subcontractors, unless the owner (or general contractor) actually controls, supervises or directs the subcontractors' work, *Old Oaks Country Club v State University Const. Fund*, 66 AD2d 815, 411 NYS2d 369 (2d Dept 1978). As to the term "inherently dangerous," see generally *Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 584 NYS2d 765, 595 NE2d 840 (1992). As to the liability of an owner/possessor for the acts of an independent contractor, see PJI 2:256.

The pattern charge includes activities of employees outside the scope of employment, *Ford v Grand Union Co.*, 268 NY 243, 197 NE 266 (1935); *Hogle v H.H. Franklin Mfg. Co.*, 199 NY 388, 92 NE 794 (1910), and other instances where the owner/possessor's "possession and control of the land may give him a power of control over the conduct of those whom he allows to enter it, which he is required to exercise for the protection of those outside," *Prosser and Keaton, Torts* § 57 (5th Ed.), including the conduct of golfers, *Gleason v Hillcrest Golf Course*, 148 Misc 246, 265 NYS 886 (Mun Ct 1933); ballplayers, *Young v New York, N.H. & H.R. Co.*, 136 App Div 730, 121 NYS 517 (2d Dept 1910); teenage boys using a sledge hammer on rocks, *De Rosa v Fordham University*, 18 AD2d 1056, 238 NYS2d 778 (1st Dept 1963); children starting a fire, see *Meizlik v Benderson Development Co., Inc.*, 51 AD2d 676, 378 NYS2d 533 (4th Dept 1976); and duck hunters shooting on the property, *De Ryss v New York Cent. R. Co.*, 275 NY 85, 9 NE2d 788 (1937); *Restatement, Second, Torts* § 318, *Comment a*; but see *Steenbar v Charles Buerman & Co.*, 2 AD2d 780, 154 NYS2d 481 (2d Dept 1956), *aff'd*, 2 NY2d 903, 161 NYS2d 152, 141 NE2d 634 (1957).

The duty is not absolute, *Ford v Grand Union Co.*, 268 NY 243, 197 NE 266 (1935), and a landowner who adequately secures his or her building against access and makes reasonable inspections, *Raylite Elec. Corp. v New York*, 30 AD2d 38, 289 NYS2d 673 (1st Dept 1968), *aff'd*,

24 NY2d 785, 300 NYS2d 574, 248 NE2d 433 (1969), or exercises sufficient control over those permitted to use the premises, *Nussbaum v Lacopo*, 27 NY2d 311, 317 NYS2d 347, 265 NE2d 762 (1970) (golf course), is not liable. But the owner/possessor does not satisfy his or her obligation by taking precautions known to be ineffective, *Hogle v H.H. Franklin Mfg. Co.*, 199 NY 388, 92 NE 794 (1910). The owner/possessor may also incur liability for a dangerous activity conducted on his or her premises under the law of nuisance and without proof of negligence, *Hogle v H.H. Franklin Mfg. Co.*, *supra*, and as to nuisance, see PJI 3:16.

The temporary blocking of a sidewalk for the purpose of making a truck delivery is not negligence, a nuisance or otherwise illegal, and a pedestrian injured as a result of walking in the roadway may not recover against the owner of the premises for injuries sustained from contact with a vehicle in the roadway, *Labriola v Langone*, 34 AD2d 809, 311 NYS2d 640 (2d Dept 1970); see *Souffrant v Quality Wholesale Veal Center, Inc.*, 135 AD2d 398, 521 NYS2d 696 (1st Dept 1987). A finding of liability may not be sustained against an owner of premises who could not reasonably foresee that a trucker would park his truck on the property without setting the brakes or putting the truck into gear, thereby causing the truck to roll down an inclined driveway and strike the plaintiff's passing automobile, *O'Keefe v Staples*, 39 AD2d 605, 331 NYS2d 885 (2d Dept 1972), *aff'd*, 31 NY2d 742, 338 NYS2d 114, 290 NE2d 151 (1972).

A garage owner owes no duty to control the conduct of its patrons for the protection of off-premises pedestrians, *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (1976); see *Roy v Vilardo*, 197 AD2d 893, 602 NYS2d 293 (4th Dept 1993); see also *Matter of New York City Asbestos Litigation [Holdampf v A.C. & S., Inc.]*, 5 NY3d 486, 806 NYS2d 146, 840 NE2d 115 (landowner/employer has no duty to protect employee's spouse from risk of harm from asbestos dust carried off premises in employee's clothes). There is no common law duty imposed upon owners or occupiers of land to control vegetation on their property for the benefit of users of a public highway, *Preux v Dennis*, 116 AD3d 942, 983 NYS2d 843 (2d Dept 2014); *Cain v Pappalardo*, 225 AD2d 1005, 639 NYS2d 570 (3d Dept 1996); *McSweeney v Rogan*, 209 AD2d 386, 618 NYS2d 430 (2d Dept 1994); *Barnes v Stone-Quinn*, 195 AD2d 12, 606 NYS2d 485 (4th Dept 1993); see also *Clementoni v Consolidated Rail Corp.*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 (2007) (owner of property abutting private road had no duty to control vegetation to prevent obstruction of road user's view of oncoming trains at intersecting railroad crossing). However, an ordinance that prohibits vegetation that may cause danger to traffic may give rise to tort liability, even if the ordinance does not expressly provide for such liability, *McSweeney v Rogan*, *supra*; but see *Preux v Dennis*, *supra* (property owner not liable where ordinances not intended to protect motorists from hazards of vegetation obstructing views at intersections and driveways). As to the liability of a landowner for a dangerous condition on adjoining property, see *McKeever v New York Tel. Co.*, 254 App Div 872, 5 NYS2d 6 (2d Dept 1938), *aff'd*, 279 NY 651, 18 NE2d 44

(1938); *Ingenito v Robert M. Rosen, P.C.*, 187 AD2d 487, 589 NYS2d 574 (2d Dept 1992) (no duty to control the vegetation of adjoining landowner); *Licato v Eastgate*, 118 AD2d 904, 499 NYS2d 472 (3d Dept 1986); Annot: 39 ALR3d 579.

(2) LESSOR'S LIABILITY

PJI 2:116. Liability for Condition or Use of Land—To Persons Outside the Land—Lessor's Liability

An (owner, possessor) of (land, a building) who leases (part of) the premises to a tenant for a purpose that the (owner, possessor) at the time of the lease knows or has reason to know will involve danger to persons outside the premises has a duty to persons on (adjoining land, the street) to use reasonable care to prevent injury to such persons. By reasonable care is meant that degree of care that a reasonably prudent (owner, possessor) of (land, a building) would use under the same circumstances.

Comment

The general rule is that an owner (or a lessee of the entire premises who stands in the same position as an owner, *Rohlf v Weil*, 271 NY 444, 3 NE2d 588 (1936)) who grants exclusive possession of the entire premises to a tenant (or sub-tenant) is not responsible for injuries resulting to persons outside the premises from the condition of the premises or from activities conducted on the premises, *Appel v Muller*, 262 NY 278, 186 NE 785 (1933); *Klepper v Seymour House Corporation of Ogdensburg*, 246 NY 85, 158 NE 29 (1927); *Trustees of Village of Canandaigua v Foster*, 156 NY 354, 50 NE 971 (1898). The rule is based upon the fact that, after granting exclusive possession of the premises, the lessor has neither control over activities conducted on the premises nor the power to enter to make repairs, *Appel v Muller*, supra.

An exception to the general rule, covered by the pattern charge, exists when the lessor has actual or constructive knowledge of a danger to persons outside the property prior to the letting, at a time when he or she has control over the premises. The pattern charge is supported by *Rohlf v Weil*, 271 NY 444, 3 NE2d 588 (1936); *Simmons v Radio Printing Corp.*, 254 App Div 521, 5 NYS2d 345 (1st Dept 1938), *aff'd*, 279 NY 783, 18 NE2d 866 (1939); *Godnick v Cohen*, 241 App Div 244, 271 NYS 669 (1st Dept 1934), *aff'd*, 266 NY 474, 195 NE 160 (1934); see *Restatement, Second, Torts* § 379A; *Prosser and Keeton, Torts* § 57 (5th Ed.); 5 *Harper, James & Gray, The Law of Torts* § 27.20 (2nd ed.); see also *Tauraso v Texas Co.*, 300 NY 567, 89 NE2d 526 (1949); *Leonard v Hornellsville*, 41 App Div 106, 58 NYS 266 (4th Dept 1899).

The lessor's duty to persons outside the premises for the condition of the premises arises from ownership of the property, but is suspended during the exclusive occupancy of the tenant because the lessor is then

without power to enter to make repairs, *Appel v Muller*, 262 NY 278, 186 NE 785 (1933). When the lessor has not in fact lost the power to repair, liability continues. Thus, the lessor remains responsible to persons outside the land in the case (1) of a demise of less than the entire property, *Rohlfs v Weil*, 271 NY 444, 3 NE2d 588 (1936); *Appel v Muller*, supra; *Trustees of Village of Canandaigua v Foster*, 156 NY 354, 50 NE 971 (1898); *Simmons v Radio Printing Corp.*, 254 App Div 521, 5 NYS2d 345 (1st Dept 1938), *aff'd*, 279 NY 783, 18 NE2d 866 (1939); *Gildea v Harris Fine Realty & Construction Co.*, 249 App Div 775, 292 NYS 55 (2d Dept 1936); (2) where the lessor has covenanted to repair or reserved the right to enter and repair, *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976); *Appel v Muller*, supra; *Suarez v Skateland Presents Laces, Inc.*, 187 AD2d 500, 589 NYS2d 608 (2d Dept 1992), but only to the extent that the covenant actually permits control, *Roark v Hunting*, 24 NY2d 470, 301 NYS2d 59, 248 NE2d 896 (1969) (right to remove sign for purpose of repairs to or painting of building imposed no liability on landlord for water dripping from sign); *Zolezzi v Bruce-Brown*, 243 NY 490, 154 NE 535 (1926) (right to repair exterior walls imposed no liability for sign defectively attached to such wall); (3) where a statute, such as the Multiple Dwelling Law, imposes on the lessor the duty of repair (and thus impliedly grants the correlative right of entry), *Gildea v Harris Fine Realty & Construction Co.*, supra; *Smith v Earl Douglas Hanson, Inc.*, 9 Misc2d 244, 170 NYS2d 866 (Sup 1957); see *Weiner v Leroco Realty Corporation*, 279 NY 127, 17 NE2d 796 (1938); see generally *Buckowski v Smith*, 185 AD2d 556, 586 NYS2d 386 (3d Dept 1992); *Del Giacco v Noteworthy Co.*, 175 AD2d 516, 572 NYS2d 784 (3d Dept 1991) (generally an out of possession owner/lessor is not liable in negligence for conditions upon the land after transfer of possession and control).

As to the validity of agreements exempting lessors from liability for negligence, see GOL § 5-321; Comment to PJI 2:101. As to the validity of other agreements limiting liability, see GOL § 5-323 (building service or maintenance contractors); GOL § 5-325 (garages and parking places); GOL § 5-326 (places of public amusement and similar establishments); Comment to PJI 2:101.

The fact that the tenant has covenanted to repair will not relieve the lessor of liability, *Gelof v Morgenroth*, 130 App Div 17, 114 NYS 293 (1st Dept 1909); see *Junkermann v Tilyou Realty Co.*, 213 NY 404, 108 NE 190 (1915). Liability is not absolute, however, and it must, therefore, be shown that the lessor had notice, actual or constructive, of the condition from which the injury results, *Putnam v Stout*, 38 NY2d 607, 381 NYS2d 848, 345 NE2d 319 (1976); *Nicks v Joseph*, 82 AD2d 768, 440 NYS2d 218 (1st Dept 1981); *Gildea v Harris Fine Realty & Construction Co.*, 249 App Div 775, 292 NYS 55 (2d Dept 1936).

Exception to the general rule may also exist in the case where, although alienating the entire property, the lessor makes repairs voluntarily. On familiar principles, the lessor is liable for injury to persons outside the premises resulting from negligence in making

repairs, even though there was no obligation to make them, *Zelzer v Cook*, 62 Misc 471, 115 NYS 173 (AppT 1909); see Comment to PJI 2:100.

Finally, there is an exception to the general rule when (1) there is a dangerous condition on the premises, (2) the lessor knows or, in the exercise of reasonable care, should know about the dangerous condition, and (3) the lessor leases or re-lets the premises under circumstances from which it can be inferred that he or she either authorized a continuance of the nuisance or profited therefrom, *Zolezzi v Bruce-Brown*, 243 NY 490, 154 NE 535 (1926); *Wilks v New York Tel. Co.*, 243 NY 351, 153 NE 444 (1926); *Timlin v Standard Oil Co.*, 126 NY 514, 27 NE 786 (1891); *Swords v Edgar*, 59 NY 28 (1874); *Clancy v Byrne*, 56 NY 129 (1874); *Irvine v Wood*, 51 NY 224 (1872); *Davenport v Ruckman*, 37 NY 568 (1868); *Albany v Cunliff*, 2 NY 165 (1849); *Waggoner v Jermaine*, 3 Denio 306 (NY Sup 1846); see *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); Annot: 31 ALR2d 1334; 39 ALR2d 973; Restatement, Second, Torts § 379; Prosser and Keeton, Torts § 57 (5th Ed.); 5 Harper, James & Gray, *The Law of Torts* § 27.20 (2nd ed.). Almost all of the decisions speak in nuisance terms, but most deal not with nuisance in law, but nuisance in fact, that is “a dangerous condition due to negligence,” *Kilmer v White*, *supra*, “and so the action has taken the form indifferently of one for nuisance or for negligence,” *Junkermann v Tilyou Realty Co.*, 213 NY 404, 108 NE 190 (1915); see *Swords v Edgar*, *supra*; *Ugla v Brokaw*, 117 App Div 586, 102 NYS 857 (1st Dept 1907). Generally, whether the lessor authorized continuance of the nuisance or profited therefrom will be a question of law.

An involuntary transfer does not impose liability, *Wilks v New York Tel. Co.*, 243 NY 351, 153 NE 444 (1926). Nor is responsibility imposed by the owner's execution of a lease of the reversion at a time when there exists a nuisance on the premises of one of the tenant's subtenants, for no inference arises when the owner parts only with a right to future control of a nuisance for which he or she is not then responsible, *Zolezzi v Bruce-Brown*, 243 NY 490, 154 NE 535 (1926).

The owner (or lessee of the entire premises, who, as above noted, is in the same position as an owner) is responsible if he or she leases (or sub-leases) with knowledge, actual or constructive, of the dangerous condition, *Timlin v Standard Oil Co.*, 126 NY 514, 27 NE 786 (1891); *Irvine v Wood*, 51 NY 224 (1872), although if the dangerous condition is a nuisance per se, such as an excavation in the sidewalk made without a permit, neither notice nor negligence is an element, *Irvine v Wood*, *supra*; *Congreve v Smith*, 18 NY 79 (1858); see PJI 3:18. The lessor is likewise responsible if he or she participated in the creation of the dangerous condition during the term of the lease, *Ugla v Brokaw*, 117 App Div 586, 102 NYS 857 (1st Dept 1907), or if it exists at the time the lease is renewed, *Clancy v Byrne*, 56 NY 129 (1874); *Lusk v Peck*, 132 App Div 426, 116 NYS 1051 (4th Dept 1909), *affd*, 199 NY 546, 93 NE 377 (1910). When the tenancy is by the month, the lessor is responsible if the condition existed at the last monthly letting, *Moody v Green*, 265

App Div 940, 38 NYS2d 398 (2d Dept 1942); see *Curran v Flammer*, 49 App Div 293, 62 NYS 1061 (1st Dept 1900); Annot: 39 ALR2d 973.

Both the lessor and the lessee may be liable, *Swords v Edgar*, 59 NY 28 (1874); *Irvine v Wood*, 51 NY 224 (1872); *Davenport v Ruckman*, 37 NY 568 (1868); *Moody v Green*, 265 App Div 940, 38 NYS2d 398 (2d Dept 1942); *Saphir v Childs Co.*, 243 App Div 636, 276 NYS 1010 (2d Dept 1935). However, liability of the lessee “does not arise upon the mere execution of the lease. There must be notice of the existence of the nuisance, or time enough must have elapsed in which knowledge of its existence would be obtained by the exercise of reasonable diligence,” *Timlin v Standard Oil Co.*, 126 NY 514, 27 NE 786 (1891). Nor does liability arise until the lessee has had reasonable time to abate the nuisance, *Beauchamp v Excelsior Brick Co. of Haverstraw*, 143 App Div 48, 127 NYS 686 (2d Dept 1911); Restatement, Second, Torts § 366.

The liability of a lessor for a dangerous condition existing at the time of leasing or re-letting is essentially similar to that of a vendor for such a condition existing at the time of transfer, *Prosser and Keaton*, Torts § 57 (5th ed.). The pattern charge in PJI 2:118 may be adapted accordingly.

(3) VENDOR'S LIABILITY**PJI 2:118. Liability for Condition or Use of Land—To Persons Outside the Land—Vendor's Liability**

A seller of (land, a building) is responsible to persons on (adjoining property, the street) for injuries occurring after transfer of possession to the buyer if at the time of transfer (1) a dangerous condition existed (on the land, in the building) that unreasonably endangered persons on (adjoining property, the street), (2) the seller either knew about or through the use of reasonable care should have known about the dangerous condition and had a reasonable opportunity to make the necessary repairs, and (3) the dangerous condition was a substantial factor in causing plaintiff's injury. The seller's responsibility ends, however, when the buyer has had a reasonable opportunity to discover the condition and to make the necessary repairs.

Comment

Based on *Wilks v New York Tel. Co.*, 243 NY 351, 153 NE 444 (1926); *Fetter v DeCamp*, 195 AD2d 771, 600 NYS2d 340 (3d Dept 1993); *Waggoner v Jermaine*, 3 Denio 306 (NY Sup 1846); see *Timlin v Standard Oil Co.*, 126 NY 514, 27 NE 786 (1891). The principle of the charge is also supported by cases holding a lessor liable for injuries to persons outside the premises, discussed in the Comment to PJI 2:116, and cases holding a seller liable for injuries to persons on the land, set forth in the Comment to PJI 2:108. It is also supported by Restatement, Second, Torts § 373; Prosser and Keeton, Torts §§ 57, 64 (5th Ed.); 5 Harper, James & Gray, *The Law of Torts* § 27.21 (2nd Ed.); and 2D Warren, *Negligence, Vendor & Purchaser* § 3 (4th Ed.).

The principle is one of nuisance but, as noted in the Comment to PJI 2:116, no meaningful distinction is drawn between actions based upon nuisance and those based upon negligence. Under nuisance law, a transferor is liable only if he or she parts with control of the premises under circumstances from which an inference may be drawn that continuance of the nuisance was authorized, *Zolezzi v Bruce-Brown*, 243 NY 490, 154 NE 535 (1926). No such inference arises, however, from the act of transfer of title and possession in itself, *Kilmer v White*, 254 NY 64, 171 NE 908 (1930). When the transfer is involuntary, there is no such inference, *Wilks v New York Tel. Co.*, 243 NY 351, 153 NE 444 (1926), but the necessary inference arises from a voluntary conveyance with an express covenant for the continued enjoyment of the nuisance,

Waggoner v Jermaine, 3 Denio 306 (NY Sup 1846); *Board of Ed., Union Free School Dist. No. 6 of Town of North Hempstead v North Hempstead*, 259 App Div 733, 18 NYS2d 433 (2d Dept 1940); see *Albany v Cunliff*, 2 NY 165 (1849), or other warranties implying authorization to continue the condition, *Wilks v New York Tel. Co.*, supra. Generally, whether the seller authorized continuance of the nuisance will be a question for the court rather than for the jury.

The last sentence of the charge applies the rule of *Pharm v Lituchy*, 283 NY 130, 27 NE2d 811 (1940), and similar cases discussed in the Comment to PJI 2:108 that, except in the case of conscious deception, the seller's responsibility ends when the buyer has had a reasonable opportunity to discover and correct the condition. Judges should be aware, however, of the implication in the *Wilks* and *Waggoner* cases that the seller's liability will continue indefinitely where he or she has created, or, after notice, maintained a nuisance and then conveyed the premises authorizing a continuance of the nuisance, see 5 Harper, James & Gray, *The Law of Torts* § 27.31 (2nd ed.). The Restatement, Second, Torts § 373, takes the position that a seller who created or actively conceals the condition remains liable until the purchaser has in fact discovered it and had an opportunity to repair, but otherwise is liable only until the purchaser has had a reasonable opportunity to discover and correct the condition. A judge who accepts the *Wilks* and *Waggoner* cases as the more closely applicable precedents should modify the charge accordingly.

As for a seller who has actively concealed the existence of a dangerous condition, the comment adopts the rule pertaining to liability in favor of persons on the land, i.e., that the seller remains liable until the buyer has in fact discovered the condition and had an opportunity to repair it, see *Farragher v New York*, 26 AD2d 494, 275 NYS2d 542 (1st Dept 1966), *aff'd*, 21 NY2d 756, 288 NYS2d 232, 235 NE2d 218 (1968); *Copp v Corning Glass Works*, 114 AD2d 144, 497 NYS2d 970 (4th Dept 1986); Comment to PJI 2:108; Restatement, Second, Torts § 373. In a case where there is evidence of conscious deception, the pattern charge should, therefore, be modified to reflect the seller's actual knowledge of the dangerous condition and the continuation of the seller's liability until the buyer actually discovers the condition and has had a reasonable opportunity to make the necessary repairs, see *Kilmer v White*, 254 NY 64, 171 NE 908 (1930); *Rufo v South Brooklyn Sav. Bank*, 268 App Div 1057, 52 NYS2d 469 (2d Dept 1945); *Pavelchak v Finn*, 153 NYS2d 795 (Sup 1956), *aff'd*, 6 AD2d 841, 176 NYS2d 933 (2d Dept 1958).

As to the buyer's liability, see the Comment to PJI 2:116; see also *Kuenzler v South Nyack*, 133 AD2d 100, 518 NYS2d 638 (2d Dept 1987); Restatement, Second, Torts § 366; Prosser and Keeton, Torts § 57 (5th Ed.); 5 Harper, James & Gray, *The Law of Torts* § 27.21 (2nd ed.).

The fact that a deed conveying property to another is not recorded does not preclude a party from denying ownership of the property,

Woroniecki v Tzitzikalakis, 255 AD2d 509, 680 NYS2d 606 (2d Dept 1998); Riner v Texaco, Inc., 222 AD2d 571, 635 NYS2d 658 (2d Dept 1995).

3. PRODUCTS LIABILITY

Introductory Statement

I. In General

This division deals with the liability of manufacturers, wholesalers, distributors, retailers, makers of component parts, lessors, and processors of materials for product-related injury or damage. A products liability plaintiff may base a suit on one or more of four theories: negligence, breach of express warranty, breach of implied warranty, or strict liability, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975); see *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470, 864 NE2d 600 (2007); *Sprung v MTR Ravensburg Inc.*, 99 NY2d 468, 758 NYS2d 271, 788 NE2d 620 (2003). The strict products liability doctrine, in turn, encompasses actions based on three categories of product defects: manufacturing flaws, design defects and inadequate warnings, *Matter of Eighth Judicial District Asbestos Litigation*, 33 NY3d 488 (2019); *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003); *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998). However, the “strict products liability” label is actually a misnomer when applied to claims based on design defect and inadequate warning, both of which require scrutiny of the manufacturer’s conduct and analysis of factual issues involving the manufacturer’s fault, see *Denny v Ford Motor Co.*, *supra*; *Enright by Enright v Eli Lilly & Co.*, 77 NY2d 377, 568 NYS2d 550, 570 NE2d 198 (1991).

The categories of strict liability grew out of judicial efforts to facilitate recovery for personal injuries caused by defective products. The early efforts relied on the notion of a seller’s implied warranty that its products are fit for the purpose for which they were sold, *Blessington v McCrory Stores Corporation*, 305 NY 140, 111 NE2d 421 (1953); *Rinaldi v Mohican Co.*, 225 NY 70, 121 NE 471 (1918); see *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985). The use of this theory eliminated the need for injured plaintiffs to establish negligence. However, the implied warranty theory of recovery, which was derived from contract law, was problematic because it required a relationship of privity between the seller and the injured consumer—a condition that was not realistic in an economy dominated by mass produced goods and an impersonal marketplace, see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Martin v Julius Dierck Equipment Co.*, 43 NY2d 583, 403 NYS2d 185, 374 NE2d 97 (1978). Although the Court of Appeals recognized certain narrow exceptions to the privity requirement, *Guarino v Mine Safety Appliance*

Co., 25 NY2d 460, 306 NYS2d 942, 255 NE2d 173 (1969); *Goldberg v Kollsman Instrument Corp.*, 12 NY2d 432, 240 NYS2d 592, 191 NE2d 81 (1963); *Greenberg v Lorenz*, 9 NY2d 195, 213 NYS2d 39, 173 NE2d 773 (1961), it continued to struggle with the limitations of the implied warranty remedy, see *Mendel v Pittsburgh Plate Glass Co.*, 25 NY2d 340, 305 NYS2d 490, 253 NE2d 207 (1969).

In *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973), the Court of Appeals broke new ground by recognizing a strict liability cause of action in tort against the manufacturer of a defective product, see also *Micallef v Miehle Co.*, Division of Miehle-Goss Dexter, Inc., 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976); *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975). The earliest strict products liability cases involved manufacturing defects. However, the cause of action evolved to include claims based on defects in design, see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983), and inadequate warnings, see *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992). The development of strict products liability has significantly diminished the importance of the breach-of-implied-warranty remedy. Nonetheless, the latter has not been fully subsumed by the former, and there are differences that may make the breach-of-implied-warranty remedy more useful in a particular case, see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995).

Since the jury in a strict products liability case is often asked to consider several theories of liability with discrete elements, special verdicts with discrete questions as to each theory are imperative, see *DePasquale v Morbark Industries, Inc.*, 221 AD2d 409, 633 NYS2d 543 (2d Dept 1995); see also *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982); *Davis v Caldwell*, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741 (1981). In crafting special verdict inquiries, care should be taken to ensure that individual questions refer to the factual bases for each of plaintiff's legal theories. In *Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470, 864 NE2d 600 (2007), the special verdict sheet questions concerning plaintiff's strict products liability cause of action referred to a specific product defect, i.e., a defective timer, but the questions concerning his breach of warranty cause of action asked only the more general question of whether the product was not fit for its intended purpose. As a result, the Court of Appeals found no inconsistency when the jury returned a verdict for defendant on the strict liability cause of action but held in plaintiff's favor on the breach of warranty claim. For a charge where a special verdict is required, see PJI 1:97. For verdict sheet questions in a strict liability case, see the Comment to PJI 2:120.

II. Distinction Between Tort and Contract Theories—Recovery for Economic Loss

The courts have drawn a sharp distinction between tort theories of liability for defective products and theories based on breach of a seller's contractual obligations, see *Schiavone Const. Co. v Elgood Mayo Corp.*, 56 NY2d 667, 451 NYS2d 720, 436 NE2d 1322 (1982), rev'g for reasons in AD dissenting opinion, 81 AD2d 221, 439 NYS2d 933 (1st Dept 1981). A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated, *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 521 NYS2d 653, 516 NE2d 190 (1987); *Rich v New York Cent. & H.R.R. Co.*, 87 NY 382 (1882); *New York Central Mut. Fire Ins. Co. v Glider Oil Co., Inc.*, 90 AD3d 1638, 936 NYS2d 815 (4th Dept 2011); *Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 920 NYS2d 504 (4th Dept 2011).

As a corollary matter, where plaintiff seeks recovery solely for economic loss resulting from a product's failure to function properly, the terms of the parties' contract should govern, *Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685, 621 NYS2d 497, 645 NE2d 1195 (1995); *Schiavone Const. Co. v Elgood Mayo Corp.*, 56 NY2d 667, 451 NYS2d 720, 436 NE2d 1322 (1982), rev'g for reasons in AD dissenting opinion, 81 AD2d 221, 439 NYS2d 933 (1st Dept 1981). Thus, economic losses, such as damage to the product itself and consequential damages, may not be recovered in an action predicated on strict products liability or negligence, unless personal injury or injury to property other than the product is alleged, *Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, supra; *Bellevue South Associates v HRH Const. Corp.*, 78 NY2d 282, 574 NYS2d 165, 579 NE2d 195 (1991); *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 523 NYS2d 475, 517 NE2d 1360 (1987); *Schiavone Const. Co. v Elgood Mayo Corp.*, supra; 126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc., 121 AD3d 651, 993 NYS2d 558 (2d Dept 2014); *Suffolk Laundry Services, Inc. v Redux Corp.*, 238 AD2d 577, 656 NYS2d 372 (2d Dept 1997); see *Adirondack Combustion Technologies, Inc. v Unicontrol, Inc.*, 17 AD3d 825, 793 NYS2d 576 (3d Dept 2005) (permitting strict liability and negligence claims where defective controller device caused damage to boiler in which it was installed). This rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, regardless of whether the claim is based on product nonperformance or negligent performance of services, *Bristol-Myers Squibb, Indus. Div. v Delta Star, Inc.*, 206 AD2d 177, 620 NYS2d 196 (4th Dept 1994) (denying recovery in tort and limiting plaintiff to contract damages for economic loss where plaintiff's injury, consisting of loss of batch of penicillin, resulted from failure of electrical transformer to perform as intended); see *Suffolk Laundry Services, Inc. v Redux Corp.*, 238 AD2d 577, 656 NYS2d 372 (2d Dept 1997).

The rule precluding recovery for economic loss is applicable where

plaintiff's claims involve only loss of professional reputation and business good will, *Catalano v Heraeus Kulzer, Inc.*, 305 AD2d 356, 759 NYS2d 159 (2d Dept 2003), as well as where the defective product also caused physical injury to a person other than plaintiff, *7 World Trade Co. v Westinghouse Elec. Corp.*, 256 AD2d 263, 682 NYS2d 385 (1st Dept 1998). The Court of Appeals has refused to recognize an exception to the rule where the defect in the product created an unduly dangerous condition or the product was "unduly hazardous," *Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685, 621 NYS2d 497, 645 NE2d 1195 (1995); see *7 World Trade Co. v Westinghouse Elec. Corp.*, *supra*. Further, there is no exception to the rule for consumer purchases in instances where the damage is caused by an abrupt, accident-like event, *Ofsowitz v Georgie Boy Mfg., Inc.*, 231 AD2d 858, 647 NYS2d 887 (4th Dept 1996). The economic-loss rule does not distinguish between the liability of product manufacturers and product installers, *Bristol-Myers Squibb, Indus. Div. v Delta Star, Inc.*, 206 AD2d 177, 620 NYS2d 196 (4th Dept 1994), or of those who sell the product, *Ofsowitz v Georgie Boy Mfg., Inc.*, *supra*.

Application of the rule precluding recovery of economic loss depends on such factors as the nature of the defect, the injury, the manner in which the injury occurred and the damages sought, *Hodgson, Russ, Andrews, Woods & Goodyear, LLP v Isolatek Intern. Corp.*, 300 AD2d 1051, 752 NYS2d 767 (4th Dept 2002) (rule inapplicable where damages sought were not result of failure of fireproofing material to perform its intended purpose, but of presence of contaminating mold and fungus on product). When applicable, the rule bars recovery by both remote "downstream" purchasers, *Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685, 621 NYS2d 497, 645 NE2d 1195 (1995), and those who purchased the product directly from the manufacturer or supplier, *Travelers Ins. Companies v Howard E. Conrad, Inc.*, 233 AD2d 890, 649 NYS2d 586 (4th Dept 1996); *Ofsowitz v Georgie Boy Mfg., Inc.*, 231 AD2d 858, 647 NYS2d 887 (4th Dept 1996); see *7 World Trade Co. v Westinghouse Elec. Corp.*, 256 AD2d 263, 682 NYS2d 385 (1st Dept 1998).

III. Negligence, Strict Liability In Tort And Breach Of Warranty Theories

A. Background

The negligence theory of liability requires the jury to find that the defendant failed to act reasonably in designing, testing, manufacturing, selling, inspecting or marketing the product, *Prosser & Keeton, Torts* (5th Ed.) § 96.

Under the strict products theory of liability, a party injured as a result of a defective product may seek relief against the product manufacturer or others in the distribution chain if the defect was a substantial factor in causing the injury, *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003);

see *Finerty v Abex Corp.*, 27 NY3d 236, 32 NYS3d 44, 51 NE3d 555 (2016) (strict products liability claim lies against manufacturer, distributor and retailer of product; such claim does not lie against parent corporation of wholly-owned subsidiary that manufactured product where parent corporation itself did not manufacture or sell product). As the Court of Appeals has made clear, liability is in tort and is predicated largely on considerations of social policy, see *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975); *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973).

Another potential source of recovery for injuries caused by defective products is implied warranty, which is based on the law of contracts and the relevant provisions of the Uniform Commercial Code, see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). A cause of action for breach of implied warranty of merchantability requires that the jury find that the product was not “fit for the ordinary purposes for which such goods are used,” UCC § 2-314(2)(c). It is not necessary to establish that the conduct of the defendant was negligent or that the product was not reasonably safe, but rather that the product was in fact not “fit for the ordinary purposes for which such goods are used,” *Denny v Ford Motor Co.*, *supra*; see *Mendel v Pittsburgh Plate Glass Co.*, 25 NY2d 340, 305 NYS2d 490, 253 NE2d 207 (1969) (overruled on other grounds, *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975)). While the establishment of the doctrine of strict products liability significantly diminished the need to rely on the contractually based breach of implied warranty remedy as a means of compensating individuals injured because of defective products, the strict products liability cause of action has not completely subsumed the older breach of implied warranty cause of action and the two doctrines are not identical in every respect, *Denny v Ford Motor Co.*, *supra*; see *Victorson v Bock Laundry Mach. Co.*, *supra*. The similarities and differences are discussed *infra*.

For a discussion of the strict products liability theories of recovery, see PJI 2:120. For a discussion of the negligence cause of action, see PJI 2:125 (general rule), 2:125A (negligence of maker of assembled product), 2:125B (negligence of repairer of product), 2:216 (negligent design).

B. Defect

A product may be “defective” because of a flaw in the manufacturing process, inadequate instructions or warnings or a defect in the design, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003); *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998); *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 523 NYS2d 418, 517 NE2d 1304 (1987); *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986); *Perazone v Sears, Roebuck and Co.*, 128 AD2d 15, 515 NYS2d 908 (3d Dept 1987); see Restatement [Third] of Torts, Products Liability § 2.

To establish a strict products liability claim based on a manufacturing defect, plaintiff must prove that the product did not perform as intended due to some flaw and that it was defective when it left the manufacturer's control, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 783 NYS2d 439 (4th Dept 2004); *Nichols v Agway, Inc.*, 280 AD2d 889, 720 NYS2d 691 (4th Dept 2001); see *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973). More particularly, plaintiff must establish that the product was not built to specifications or that the product, as constructed, deviated from any such specifications or design, *Repka v Arctic Cat, Inc.*, 20 AD3d 916, 798 NYS2d 629 (4th Dept 2005); *McArdle v Navistar Intern. Corp.*, 293 AD2d 931, 742 NYS2d 146 (3d Dept 2002).

Strict products liability claims based on inadequate warnings arise from the manufacturer's duty to warn against latent dangers resulting from foreseeable uses of the product of which the manufacturer knew or should have known, *Matter of Eighth Judicial District Asbestos Litigation*, 33 NY3d 488 (2019); *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992). Additionally, a claim may be premised on a breach of the manufacturer's duty to warn of the danger of unintended uses, provided those uses are reasonably foreseeable, *Matter of New York City Asbestos Litigation (Dummitt)*, *supra*; *Liriano v Hobart Corp.*, *supra*; see *Lugo by Lopez v LjN Toys, Ltd.*, 75 NY2d 850, 552 NYS2d 914, 552 NE2d 162 (1990). The emphasis on duty and foreseeability in failure-to-warn cases suggests an analysis akin to traditional negligence principles, see *Enright by Enright v Eli Lilly & Co.*, 77 NY2d 377, 568 NYS2d 550, 570 NE2d 198 (1991) (failure to warn claim "though . . . couched in terms of strict liability, is indistinguishable from a negligence claim"). The manufacturer's duty includes the obligation to issue warnings regarding hazards arising from foreseeable uses of the product about which hazards the manufacturer learns after the sale of the product, *Matter of New York City Asbestos Litigation (Dummitt)*, *supra*. The duty to warn extends to the original or ultimate purchasers of the product, to employees of those purchasers, and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn, *Matter of Eighth Judicial District Asbestos Litigation*, *supra*; *Matter of New York City Asbestos Litigation (Dummitt)*, *supra*.

It has been observed that strict liability causes of action based on design defect also involve a "negligence-inspired" analysis in that they require the factfinder to evaluate design and marketing decisions made by the manufacturer, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); see *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010). In fact, in *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 872 NYS2d 415, 900 NE2d 966 (2008), the Court of Appeals stated that similar requirements apply to negligent-design and design-defect causes of action, in that plaintiff

must prove in both instances that it was feasible to design the product in a safer manner. Further, the Court reiterated in *Adams v Genie Industries, Inc.*, *supra*, that the strict liability concept of design defect is “functionally synonymous with the earlier negligence concept of unreasonable designing” and that the standard set forth in *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983), and repeated in *Denny v Ford Motor Co.*, *supra*, applies to both concepts, see *Reis v Volvo Cars of North America*, 24 NY3d 35, 993 NYS2d 672, 18 NE3d 383 (2014). However, there are important differences between the risk/utility inquiry used in design-defect cases and the foreseeability inquiry used in failure to warn cases. Under New York law, a design defect may be actionable if the product is not reasonably safe, *Adamo v Brown & Williamson Tobacco Corp.*, *supra*. Where the product would not be reasonably safe even if adequate warnings were provided, the court may find as a matter of law that the product was so dangerous and so defectively designed that its misuse was foreseeable, *M.H. v Bed Bath & Beyond Inc.*, 156 AD3d 33, 64 NYS3d 205 (1st Dept 2017).

The New York standard for determining liability for a design defect requires an assessment of whether if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner, *Fasolas v Bobcat of New York, Inc.*, 33 NY3d 421, 104 NYS3d 550, 128 NE3d 627 (2019); *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011); *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010); *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Steckal v Houghton Elevator Co., Inc.*, 59 NY2d 628, 463 NYS2d 186, 449 NE2d 1264 (1983); *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980); *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012); *Restatement, Second, Torts § 402A, Comment g*. Notably, there is no post-sale duty to recall or retrofit a product after a manufacturer discovers risks that were not known when the product was sold, *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010). In such situations, the seller’s obligation is limited to a duty to warn, *id*; see *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984).

The standard in design defect cases demands an inquiry into such factors as (1) the product’s utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product’s potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer’s ability to spread the cost of any safety-related design changes, *Fasolas v Bobcat of New York, Inc.*, 33

NY3d 421, 104 NYS3d 550, 128 NE3d 627 (2019); *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011); *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); see *Scarangella v Thomas Built Buses, Inc.*, 93 NY2d 655, 695 NYS2d 520, 717 NE2d 679 (1999).

The design-defect inquiry is rooted in a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits. In such circumstances, a weighing of the product's benefits against its risks is a necessary component of the liability assessment under the policy-based principles of tort law, *Fasolas v Bobcat of New York, Inc.*, 33 NY3d 421, 104 NYS3d 550, 128 NE3d 627 (2019); *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); see *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011); *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012). However, under that balancing test, the nature of the market transaction that placed the product into the end-user's hands (i.e., whether the end-user purchased or rented the product) is not a consideration, *Fasolas v Bobcat of New York, Inc.*, *supra*.

It is the above-described negligence-like risk/benefit component of the defect element that differentiates strict products liability claims based on design defect from UCC-based breach of implied warranty claims in cases involving design defects, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). While the strict products liability concept of a product that is "not reasonably safe" requires weighing of the product's dangers against its overall advantages, the UCC's concept of a "defective" product requires an inquiry only into whether the product in question was "fit for the ordinary purposes for which such goods are used," UCC § 2-314(2)(c); see *Denny v Ford Motor Co.*, *supra*. Thus, the breach of implied warranty inquiry focuses on the expectations for the performance of the product when used in a customary, usual and reasonably foreseeable manner, *Denny v Ford Motor Co.*, *supra*. Under breach of implied warranty, recovery may be had upon a showing that the product was not minimally safe for its expected purpose, without regard to the feasibility of alternative designs or the manufacturer's "reasonableness" in marketing it in that unsafe condition, *id*.

As a practical matter, the distinction between defect concepts in strict products liability and in breach of implied warranty causes of action may have little or no effect in most cases, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). In *Denny*, however, the nature of the proof submitted to support these causes of action and the way in which the factual issues were litigated demonstrated the differences in the two causes of action. Asserting claims for negligence, strict products liability and breach of implied warranty of merchant-

ability, plaintiffs in *Denny* sued the manufacturer of a down-sized utility vehicle, which was marketed for both off-road use and everyday suburban and city travel. Defendant-manufacturer took the position that the design defects of which plaintiffs complained, i.e., the vehicle's high center of gravity, narrow track width, short wheel base, and specially tailored suspension system, were important to preserving the vehicle's ability to drive over the highly irregular terrain that typifies off-road travel. This argument was relevant to the tort inquiry, which required the jury to weigh the vehicle's value as an off-road utility vehicle against the risk of rollover accidents, which could occur when the vehicle was used for driving on ordinary paved roads. However, the argument did not refute plaintiffs' breach of implied warranty claim, which was based on the premise that routine highway and street driving was the "ordinary purpose" for which the vehicle had been marketed and that it was not "fit" or safe for that purpose.

In light of the risk/utility factor analysis delineated in *Denny*, it was error to dismiss a strict products claim against a cigarette manufacturer solely on the ground that the cigarettes were in a condition reasonably contemplated by the ultimate consumer, *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003), citing Restatement [Third] of Torts, Products Liability § 2, Comment g. The *Miele* court stated that although consumer expectations are a relevant factor in a design-defect case, they do not constitute an independent standard for judging the defectiveness of product designs. A somewhat different approach was taken in *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 872 NYS2d 415, 900 NE2d 966 (2008), in which plaintiff alleged that manufacturers of "high yield" cigarettes should be held liable for "negligent design" because they marketed the product even though a safer "feasible" alternative design was available in the form of low-tar, low nicotine cigarettes. The *Adamo* Court held that the "feasibility" analysis must take into account the function of the product and where, as in the case of cigarettes, the only "function" of the product is to give pleasure to the smoker, plaintiff must show that the safer product, i.e., "light" cigarettes, is as satisfying to consumers. The *Adamo* Court stressed, however, that a showing of consumer acceptability is not required in every design defect case; rather, this element of the "feasibility" analysis comes into play only in the unusual cases in which satisfying the consumer is the only function that the product has.

For a charge to be used in cases where negligent design is asserted as a discrete cause of action, see PJI 2:126.

C. Privity Not Required

The tort remedy of strict liability permits an injured plaintiff to recover from remote parties in the distributive chain regardless of privity, *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985). The liability imposed, whether to purchaser, user or innocent bystander, is predicated upon social policy, not contract, *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d

275 (1975). As to breach of warranty actions, UCC § 2-318 provides that warranties run to “any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty,” see also Annot: 50 ALR5th 327. Thus, an injured person may maintain causes of action in New York to recover against both immediate and remote parties based on express or implied warranty, negligence or strict products liability, *Heller v U.S. Suzuki Motor Corp.*, supra (strict products liability); *MacPherson v Buick Motor Co.*, 217 NY 382, 111 NE 1050 (1916) (negligence); see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995) (breach of warranty); Restatement, Second, Torts, § 402A, comment (f); see also Restatement (Third) of Torts: Products Liability § 1, Comment a.

D. Requirement of a Commercial Seller

1. In General.

Both strict liability and warranty theories affect only persons engaged in the business of selling or leasing products for use or consumption, UCC § 2-314; Restatement, Second, Torts § 402A, Comment f; see *Winckel v Atlantic Rentals & Sales, Inc.*, 159 AD2d 124, 557 NYS2d 951 (2d Dept 1990) (commercial lessor equated with product manufacturer for purposes of strict products liability); see also *Houston v McNeilus Truck and Mfg., Inc.*, 124 AD3d 1205, 997 NYS2d 572 (4th Dept 2015) (strict products liability claim lies against lessor that either actually takes possession of equipment at issue and leases it to public or is financing arm of manufacturer); *Industralease Automated & Scientific Equipment Corp. v R.M.E. Enterprises, Inc.*, 58 AD2d 482, 396 NYS2d 427 (2d Dept 1977) (UCC warranties applicable to lease of equipment intended for future purchase by lessee); Restatement (Third) of Torts: Products Liability § 1, Comment c. The casual seller will be held liable under UCC § 2-314, if it expressly guaranteed the goods, see UCC § 2-314, Comments 3 and 4; *Colopy v Pitman Mfg. Co., Inc.*, 206 AD2d 864, 615 NYS2d 208 (4th Dept 1994). Where distribution of an allegedly defective product is merely incidental to defendant’s regular business, the principles of strict products liability are inapplicable, *Stiles v Batavia Atomic Horseshoes, Inc.*, 81 NY2d 950, 597 NYS2d 666, 613 NE2d 572 (1993); *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986); *McCarthy v Checchin*, 24 AD3d 1080, 806 NYS2d 751 (3d Dept 2005); see *Piper v Kabar Mfg. Corp.*, 251 AD2d 1050, 674 NYS2d 184 (4th Dept 1998) (casual lessor of product held liable only for failure to warn of dangers that would not necessarily come to attention of lessee or its employees). Strict products liability cannot be imposed on a finance lessor that merely offers the use of money to acquire goods and neither markets a product nor places it into the stream of commerce, *Houston v McNeilus Truck and Mfg., Inc.*, 124 AD3d 1205, 997 NYS2d 572 (4th Dept 2015).

A defendant that designed, assembled and installed a modification to a product for its own use, not for market sale, and then sold it is a ca-

sual manufacturer is not subject to strict liability, *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998). In contrast, a manufacturer of specialty sheet metal products that engaged in a one-time custom fabrication of a retractable floor was not a casual manufacturer and was subject to strict liability, even though it had not previously built such a floor, *Sprung v MTR Ravensburg Inc.*, 99 NY2d 468, 758 NYS2d 271, 788 NE2d 620 (2003). The key distinction in *Sprung* was that defendant was in the business of manufacturing specialty sheet metal products, the product in question was such a product and the product was specifically manufactured for market sale to defendant's customer in the regular course of defendant's business.

2. *Used Goods.*

Whether a regular noncasual seller of used goods may be held liable under the strict products liability doctrine is a matter of considerable doubt. The Court of Appeals has not precluded the possibility that such liability may be found, but it has, in several cases, rejected finding liability on the particular facts presented, *Jaramillo v Weyerhaeuser Co.*, 12 NY3d 181, 878 NYS2d 659, 906 NE2d 387 (2009); see also *Stiles v Batavia Atomic Horseshoes, Inc.*, 81 NY2d 950, 597 NYS2d 666, 613 NE2d 572 (1993) (defendant not a regular seller); *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986) (mill sold as surplus); but see *Rooney v S. A. Healy Co.*, 20 NY2d 42, 281 NYS2d 321, 228 NE2d 383 (1967) (seller of allegedly defective used gas mask may be held liable for breach of implied warranty) Restatement (Third) of Torts, Products Liability § 8 (seller of used goods liable). In *Jaramillo v Weyerhaeuser Co.*, *supra*, the Court of Appeals held that a company that had fabricated cardboard boxes and sold some of its fabrication equipment at irregularly scheduled "as is, where is" surplus sales was not liable in strict products liability as a noncasual seller, even though the company maintained a division for marketing its used equipment and had a relationship with the manufacturer that occasionally included recommending design features that would make the equipment safer. The *Jaramillo* Court noted that the company's revenues from used equipment sales were an insignificant percentage of its overall income, that the injury-producing equipment had been purchased second-hand from a party other than the manufacturer and that the company's relationship with the manufacturer was "general" in nature. Under those circumstances, the policy goals underlying strict products liability would not be served by holding the company liable. In resolving the policy question on the facts presented, the Court focused on the absence of a continuing relationship by the seller with the manufacturer as well as the absence of a special responsibility to the public which had come to expect that the seller stands behind the goods. On the other hand, the Court observed that "there may be some imaginable future case in which the facts justify imposition of strict product liability on a seller of used goods."

Prior to *Jaramillo*, the Fourth Department had held in *Stiles v Batavia Atomic Horseshoes, Inc.*, 174 AD2d 287, 579 NYS2d 790 (4th

Dept 1992), rev'd on other grounds, 81 NY2d 950, 597 NYS2d 666, 613 NE2d 572 (1993), that the imposition of strict liability upon regular sellers of used products would promote some of the policies underlying the cause of action. However, the Court of Appeals in *Stiles* did not reach that question, holding that the defendant was not a regular seller. Also prior to *Jaramillo*, the Third Department held that a business which regularly purchased a substantial quantity of new cars for its employees' use and then regularly disposed of those vehicles by auction sales to used car dealers was not a casual seller and was subject to strict liability, *Nutting v Ford Motor Co.*, 180 AD2d 122, 584 NYS2d 653 (3d Dept 1992). The Third Department has also held that a concern that was regularly engaged in the business of retreading tires and selling them constituted a "manufacturer" and owed a duty to potential users to properly inspect the tires and warn of any dangers associated with their use, *Stalker v Goodyear Tire and Rubber Co.*, 35 AD3d 1050, 826 NYS2d 794 (3d Dept 2006).

With respect to causes of action based on negligence, the duty imposed upon the casual or occasional seller or lessor of a used product is limited to warning the person to whom the product is supplied of known defects that are not obvious or readily discernible, *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986); *Duffy v Liberty Mach. Co., Inc.*, 219 AD2d 613, 631 NYS2d 389 (2d Dept 1995); *Marte v W.O. Hickok Mfg. Co., Inc.*, 159 AD2d 316, 552 NYS2d 300 (1st Dept 1990); see *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998); *Stiles v Batavia Atomic Horseshoes, Inc.*, 81 NY2d 950, 597 NYS2d 666, 613 NE2d 572 (1993). Where the known defect is readily discernible, the casual seller or lessor may not be held liable in negligence for failure to warn, *Burns v Haines Equipment, Inc.*, 284 AD2d 922, 726 NYS2d 516 (4th Dept 2001). Further, the casual seller or lessor's duty to warn, to the extent it exists, runs only to the person or entity to which the product was sold or leased and not to downstream users who may have been injured, *Hernandez v Biro Mfg. Co.*, 251 AD2d 375, 674 NYS2d 72 (2d Dept 1998); *Clute v Paquin*, 219 AD2d 783, 631 NYS2d 463 (3d Dept 1995).

3. *Used Vehicles.*

There are special statutory provisions governing sales of used vehicles. Vehicle and Traffic Law § 417 provides that a retail dealer must give the buyer a written certification that the vehicle complies with regulatory requirements promulgated by the Commissioner of the Department of Motor Vehicles, see 15 NYCRR 78.13(b), (c)(1)–(18), and that it "is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery," see *Carter v General Motors Corp.*, 273 AD2d 804, 709 NYS2d 309 (4th Dept 2000) (certification not limited to specific items enumerated in statute); see also Vehicle and Traffic Law § 417-a (prescribing certain mandatory disclosures regarding prior use of vehicle); General Business Law § 617 (prescribing warranty for sale of used parts). The courts have held that this statute creates a "warranty of serviceability,"

Barilla v Gunn Buick-Cadillac-GMC, Inc., 139 Misc2d 496, 528 NYS2d 273 (NY City Ct 1988); Armstrong v Boyce, 135 Misc2d 148, 513 NYS2d 613 (NY City Ct 1987); Rice v R.M. Burritt Motors, Inc., 124 Misc2d 712, 477 NYS2d 278 (NY City Ct 1984); see Rayhn v Martin Nemer Volkswagen Corp., 77 AD2d 394, 434 NYS2d 775 (3d Dept 1980). Any attempted waiver or disclaimer of this warranty is void as contrary to public policy, *id.* It has been held that a violation of the warranty subjects the dealer to liability for personal injury and property damage caused by the defect, *Pierce v International Harvester Co.*, 61 AD2d 255, 402 NYS2d 674 (4th Dept 1978). The statutory warranty does not cover defects that did not exist at the time of delivery, *Barilla v Gunn Buick-Cadillac-GMC, Inc.*, *supra*, and may not protect consumers who lease used vehicles.

In addition to Vehicle and Traffic Law § 417, General Business Law § 198-b, popularly known as the Used Car Lemon Law, provides for a mandatory warranty of certain parts of certain types of vehicles. Unlike Vehicle and Traffic Law § 417, the prescribed warranty under this statute is for a fixed time period, requires the purchaser to give the seller an opportunity to repair, and does not appear to create a remedy for personal injury or property damage. The Used Car Lemon Law does not affect the rights of consumers to rely on the statutory warranty of serviceability, General Business Law § 198-b(d)(2); see *Barilla v Gunn Buick-Cadillac-GMC, Inc.*, 139 Misc2d 496, 528 NYS2d 273 (NY City Ct 1988); *Armstrong v Boyce*, 135 Misc2d 148, 513 NYS2d 613 (NY City Ct 1987).

E. Requirement of a Product

Whether something constitutes a product is a matter of law for the court, *Matter of Eighth Judicial District Asbestos Litigation*, 33 NY3d 488 (2019). Although industrial machines have frequently been assumed to be products, the analysis of whether something constitutes a product is not limited to the physical characteristics common to such machines, *id.* In determining whether something constitutes a product, the focus is on its potential dangers, rather than its physical characteristics, *id.* The fact that an object, due to its size and immobility, is taxable as real property does not render it immune from strict products liability, *id.*

In a duty to warn case, the issue of whether the thing at issue in the case constitutes a “product” is intertwined with the central question of whether the manufacturer owes a duty to warn, *Matter of Eighth Judicial District Asbestos Litigation*, 33 NY3d 488 (2019). The overarching concern in assigning a duty to warn is to settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty, *id.*; *Matter of New York City Asbestos Litigation*

(Dummitt), 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016). Thus, in determining whether something is a “product” such that there was a duty to warn, factors include a defendant’s control over the design of the product, its standardization, and its superior ability to know—and warn about—the dangers inherent in the product’s reasonably foreseeable uses or misuses, *Matter of Eighth Judicial District Asbestos Litigation*, supra; *New York City Asbestos Litigation (Dummitt)*, supra. Applying the foregoing factors, in *Matter of Eighth Judicial District Asbestos Litigation*, supra, the Court of Appeals held that the defendant that designed, manufactured, maintained, and repaired coke ovens installed at the steel plant where plaintiff’s decedent was employed failed to establish, as a matter of law, that the ovens were not products. In so holding, the Court of Appeals found that the defendant exerted full control over the design and construction of the ovens, the defendant sold hundreds of such ovens to plants throughout North America, the defendant marketed the ovens with informational brochures depicting their functionality, and the defendant, as an expert in the design and manufacture of the ovens, had a superior ability to know and warn about the hazards inherent in the ovens’ use, *id.*

F. Requirement of a Sale.

1. Sale-Service Distinction.

A warranty claim under the Uniform Commercial Code generally requires the sale of a product unless some other duty is imposed by contract, see *Verra v Koluksuz*, 74 AD2d 932, 426 NYS2d 151 (3d Dept 1980) (appendectomy); *Sala v Tomlinson*, 73 AD2d 724, 422 NYS2d 506 (3d Dept 1979) (tubal ligation procedure); *Lange v Blake*, 58 AD2d 1034, 397 NYS2d 290 (4th Dept 1977). Thus, defendant is liable only for negligence where it was retained for the predominant purpose of rendering service and the transfer of goods was only incidental to the transaction, see *Milau Associates v North Ave. Development Corp.*, 42 NY2d 482, 398 NYS2d 882, 368 NE2d 1247 (1977) (no implied warranty liability on part of contractors for malfunctioning of sprinkler system); *Perlmutter v Beth David Hospital*, 308 NY 100, 123 NE2d 792 (1954) (blood furnished by hospital); see Annot: 29 ALR3d 1425; 100 ALR3d 1205. There was no warranty liability when the product was provided as an amenity incidental to the service rendered, *Gobhai v KLM Royal Dutch Airlines*, 85 AD2d 566, 445 NYS2d 445 (1st Dept 1981), *aff’d*, 57 NY2d 839, 455 NYS2d 764, 442 NE2d 61 (1982) (slippers for first class airline passengers); when defendant “sold” plaintiff the right to ride on a ferris wheel, *Shaw v Fairyland at Harvey’s Inc.*, 26 AD2d 576, 271 NYS2d 70 (2d Dept 1966); when defendant merely directed use of, used or operated a product such as an elevator, which it neither manufactured nor sold, *Coutu v Otis Elevator Co.*, 58 AD2d 131, 395 NYS2d 754 (3d Dept 1977); or when a medical or dental professional supplied a patient with a drug or appliance in the course of treatment, *Betro v GAC Intern., Inc.*, 158 AD2d 498, 551 NYS2d 72 (2d Dept 1990) (orthodontist prescribing night brace); *Goldfarb v Teitelbaum*, 149 AD2d 566, 540 NYS2d 263 (2d Dept 1989) (dentist furnishing prosthesis); *Osborn v*

Kelley, 61 AD2d 367, 402 NYS2d 463 (3d Dept 1978) (physician furnishing drug). In contrast, in the following cases, defendants were held to have sold goods rather than services and, thus, were deemed subject to warranty liability under the UCC: *Vitolo v Dow Corning Corp.*, 234 AD2d 361, 651 NYS2d 104 (2d Dept 1996) (silicone breast implants and silicone gel used in them; physician-buyer may maintain action under UCC, but not under negligence and strict products liability principles); *Word Management Corp. v AT & T Information Systems, Inc.*, 135 AD2d 317, 525 NYS2d 433 (3d Dept 1988) (computer equipment).

Although the Court of Appeals indicated in *Milau Associates v North Ave. Development Corp.*, 42 NY2d 482, 398 NYS2d 882, 368 NE2d 1247 (1977), that the sale/service analysis might be different where there is personal injury and a strict liability claim has been asserted, it subsequently held that strict liability will not be imposed where the defective product was furnished only as an incident to the rendition of services, *Gobhai v KLM Royal Dutch Airlines*, 85 AD2d 566, 445 NYS2d 445 (1st Dept 1981), *aff'd*, 57 NY2d 839, 455 NYS2d 764, 442 NE2d 61 (1982) (slippers for first class passengers); see *Hart v Moray Homes, Ltd.*, 158 AD2d 890, 551 NYS2d 684 (3d Dept 1990) (fireplace supplied as part of house construction); *Goldfarb v Teitelbaum*, 149 AD2d 566, 540 NYS2d 263 (2d Dept 1989) (prosthesis installed as part of dental procedure), or where it was furnished as an incidental part of defendant's primary undertaking, *Winckel v Atlantic Rentals & Sales, Inc.*, 159 AD2d 124, 557 NYS2d 951 (2d Dept 1990) (promoter of antiques show not strictly liable for defect in rented chair provided to antiques dealer); *Van Iderstine v Lane Pipe Corp.*, 89 AD2d 459, 455 NYS2d 450 (4th Dept 1982); see also *Church ex rel. Smith v Callanan Industries Inc.*, 285 AD2d 16, 729 NYS2d 545 (3d Dept 2001), *aff'd*, 99 NY2d 104, 752 NYS2d 254, 782 NE2d 50 (2002) (defendant that installed defective guiderail system on highway not strictly liable, since it neither produced product for sale nor placed product in stream of commerce). Likewise, the mere presence of a service component in a transaction does not preclude a plaintiff from asserting a strict products liability cause of action, and the apportionment of time between sale and service is not controlling, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016). Relying on the dictum in *Milau*, the Third Department in *Perazone v Sears, Roebuck and Co.*, 128 AD2d 15, 515 NYS2d 908 (3d Dept 1987), distinguished between warranty and strict liability claims. While a repairer of lawn mowers that was also in the business of selling lawn-mower-related products was not liable under a warranty theory for harm arising from its use of a defective replacement gasoline tank cap, a cause of action could be maintained under a strict liability theory because defendant was in the regular business of selling lawn mowers and their parts. The *Perazone* court reasoned that, while the focus in a breach of warranty action is on the transaction between seller and buyer, the focus in a strict liability action is on the nature of the seller's business and the seller's relationship to the manufacturer, see *Retz v Alco Equipment Inc.*, 259 AD2d 898, 686 NYS2d 527 (3d Dept 1999); see also *Furch v General Elec. Co.*, 142 AD2d 8, 535 NYS2d 182 (3d Dept 1988) (distinguishing *Perazone* and declining to permit a strict li-

ability cause of action where, unlike in *Perazone*, there was no evidence that defendant sold products outside the scope of its primarily service-oriented business).

a. Particular Services and Products.

A druggist filling a prescription according to the physician's directives is not liable in strict products or for breach of implied warranty, *Matter of New York County Diet Drug Litigation* [Elliott v A.H. Robins Co., Inc.], 262 AD2d 132, 691 NYS2d 501; *Bichler v Willing*, 58 AD2d 331, 397 NYS2d 57 (1st Dept 1977), although the druggist may be liable in negligence if he or she knew the patient's condition and that the prescription was contraindicated, *Hand v Krakowski*, 89 AD2d 650, 453 NYS2d 121 (3d Dept 1982); see *Brumaghim v Eckel*, 94 AD3d 1391, 944 NYS2d 329 (3d Dept 2012); *Eberle v Hughes*, 77 AD3d 1398, 909 NYS2d 273 (4th Dept 2010). As to the duty of care owed by a pharmacist to an individual for whom the pharmacist fills a prescription, see Comment to PJI 2:150. When a hospital furnishes blood to a patient there is no warranty liability, *Perlmutter v Beth David Hospital*, 308 NY 100, 123 NE2d 792 (1954); *Payton v Brooklyn Hosp.*, 21 AD2d 898, 252 NYS2d 419 (2d Dept 1964), *aff'd*, 19 NY2d 610, 278 NYS2d 398, 224 NE2d 891 (1967); *Iannucci v Yonkers General Hospital*, 59 AD2d 887, 399 NYS2d 39 (2d Dept 1977); see Public Health Law § 580(4) (collection, processing, storage, distribution or use of blood, blood components or blood derivatives for the purpose of diagnosis, prevention or treatment of disease not "a sale" of such blood, blood components or blood derivatives, for any purpose); Annot: 24 ALR4th 508; 20 ALR4th 136.

An electric utility company may not be held liable under warranty and strict products liability theories for damages caused by a surge of abnormally high voltage through its transmission and distribution lines, since the provision of electricity is a service, *Bowen v Niagara Mohawk Power Corp.*, 183 AD2d 293, 590 NYS2d 628 (4th Dept 1992). For a discussion of the liability of electric utility companies for negligence in the supply or use of electricity, see Comment to PJI 2:195.

2. *Injury Prior to Sale.*

A cause of action sounding in strict products liability may be cognizable in New York where a product displayed for sale caused injury to a prospective purchaser using it prior to any sale, *Rivera-Emerling v M. Fortunoff of Westbury Corp.*, 281 AD2d 215, 721 NYS2d 653 (1st Dept 2001) (folding chair).

New York courts have not recently addressed whether an actual sale is required in order to hold defendant liable under a warranty theory. In *Day v Grand Union Co.*, 280 App Div 253, 113 NYS2d 436 (3d Dept 1952), *aff'd* on other grounds, 304 NY 821, 109 NE2d 609 (1952), the Appellate Division held in a pre-UCC case that no warranty cause of action existed in favor of a customer in a self-service retail store who was injured when the beer bottle she was handling exploded,

since the sale had not then been completed. In a later case, *Sanchez-Lopez v Fedco Food Corp.*, 27 Misc2d 131, 211 NYS2d 953 (NY City Ct 1961), the court both distinguished and questioned the authoritative-ness of the Day decision, holding that warranty recovery should be permitted where the product exploded after the consumer brought it to the cashier. Other jurisdictions have held that, in self-service retail situations, the UCC provides for an implied warranty of merchantability which arises as soon as the customer selects the article, regardless of whether payment has been made, *Fender v Colonial Stores, Inc.*, 138 Ga App 31, 225 SE2d 691 (1976); *Giant Food, Inc. v Washington Coca-Cola Bottling Co., Inc.*, 273 Md 592, 332 A2d 1 (1975); *Gillispie v Great Atlantic & Pac. Tea Co.*, 14 NC App 1, 187 SE2d 441 (1972); *Barker v Allied Supermarket*, 1979 OK 79, 596 P2d 870 (Okla 1979); see also *McQuiston v K-Mart Corp.*, 796 F2d 1346 (11th Cir 1986) (under Florida law, customer injured while examining cookie jar in store had no breach of warranty action against store as that cause of action required sale and customer had neither purchased product nor formed intent to do so).

G. Requirement of Notice.

With respect to warranty, UCC § 2-607(3) requires notice of breach of warranty to the seller within a reasonable time after the buyer discovers or ought to have discovered the breach, see *Mount Vernon Mills, Inc. v Murphy Textile Mills*, 148 AD2d 389, 539 NYS2d 334 (1st Dept 1989); *Parzek v New England Log Homes, Inc.*, 92 AD2d 954, 460 NYS2d 698 (3d Dept 1983). Comment 4 to UCC § 2-607(3) states: “ ‘A reasonable time’ for notification from a retail consumer is to be judged by different standards [from those applicable to a merchant buyer] so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of [a] remedy.” *Fischer v Mead Johnson Laboratories*, 41 AD2d 737, 341 NYS2d 257 (2d Dept 1973). UCC § 2-607 was held inapplicable to a product (oral contraceptive) intended for human ingestion; see also *Silverstein v R.H. Macy & Co.*, 266 App Div 5, 40 NYS2d 916 (1st Dept 1943) (predecessor statute not applicable to personal injury claim); *Kennedy v F.W. Woolworth Co.*, 205 App Div 648, 200 NYS 121 (1st Dept 1923) (former Personal Property Law § 30 inapplicable to sales of goods for immediate consumption). *Fischer v Mead Johnson Laboratories*, supra, and *Kennedy v F.W. Woolworth Co.*, supra, were cited with approval in *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). In light of *Sylvester v R. H. Macy & Co.*, 291 NY 552, 50 NE2d 656 (1943), it is likely that all consumer product claims ultimately will be held to be outside the UCC § 2-607 notice requirement. For discussions of the notice requirement, see Annot: 24 ALR4th 277; 89 ALR5th 319; 6 ALR3d 1371.

IV. Liability of Parties in the Distributive Chain Other Than the Manufacturer

Products liability cannot be imposed on a party that is outside the

manufacturing, selling or distribution chain, *Finerty v Abex Corp.*, 27 NY3d 236, 32 NYS3d 44, 51 NE3d 555 (2016); *Laurin Maritime AB v Imperial Chemical Industries PLC*, 301 AD2d 367, 752 NYS2d 855 (1st Dept 2003); *Porter v LSB Industries, Inc.*, 192 AD2d 205, 600 NYS2d 867 (4th Dept 1993). Licensors of trademarks are not liable in strict products liability, *Finerty v Abex Corp.*, *supra*; *Porter v LSB Industries*, *supra*.

In *Finerty v Abex Corp.*, 27 NY3d 236, 32 NYS3d 44, 51 NE3d 555 (2016), the Court of Appeals held that the parent corporation of a wholly-owned subsidiary could not be held liable on a cause of action for strict products liability on the theory that the parent corporation played a substantial role in the design, development, and use of the subsidiary's products. That the parent provided guidance to the subsidiary in the design of certain products and exercised control over the parent's trademark by describing how the mark was to be used on packaging did not provide a basis on which to subject the parent to strict products liability, *Finerty v Abex Corp.*, *supra*.

A corporation that acquires the assets of another corporation ordinarily does not assume the tort liability of its predecessor, *Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 (1983). The Court of Appeals enumerated in *Schumacher* four exceptions to this rule: "(1) [the successor corporation] expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations," see *Wass v Nassau*, 153 AD3d 887, 60 NYS3d 339 (2d Dept 2017); *Nationwide Mut. Fire Ins. Co. v Long Island Air Conditioning, Inc.*, 78 AD3d 801, 912 NYS2d 226 (2d Dept 2010); *Drexler v Highlift, Inc.*, 277 AD2d 196, 715 NYS2d 722 (2d Dept 2000); *Sweatland v Park Corp.*, 181 AD2d 243, 587 NYS2d 54 (4th Dept 1992). With respect to the second exception, a transaction structured as a purchase of assets only may be deemed a "de facto merger" if the following conditions are met: (1) continuity of ownership; (2) cessation of ordinary business operations and dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation, *AT & S Transp., LLC v Odyssey Logistics & Technology Corp.*, 22 AD3d 750, 803 NYS2d 118 (2d Dept 2005); see *Matter of New York City Asbestos Litigation [Van Nocker v A.W. Chesterton Co.]*, 15 AD3d 254, 789 NYS2d 484 (1st Dept 2005). Continuity of ownership is a critical element of a de facto merger, *Matter of New York City Asbestos Litigation [Van Nocker v A.W. Chesterton Co.]*, *supra*. With respect to the third exception, the successor entity cannot be a "mere continuation" of the purported predecessor entity if the latter has continued in existence after the asset transfer, *Meadows v Amsted Industries, Inc.*, 305 AD2d 1053, 760 NYS2d 604 (4th Dept 2003); see *Subramani v Bruno Machinery Corp.*, 289 AD2d 167, 736 NYS2d 315 (1st Dept 2001).

In *Semenetz v Sherling & Walden, Inc.*, 7 NY3d 194, 818 NYS2d 819, 851 NE2d 1170 (2006), the Court of Appeals declined to adopt a fifth exception to the rule known as the “product line exception,” which had previously been adopted by the Third Department in *Hart v Bruno Machinery Corp.*, 250 AD2d 58, 679 NYS2d 740 (3d Dept 1998), but rejected by the First Department, *New York v Charles Pfizer & Co., Inc.*, 260 AD2d 174, 688 NYS2d 23 (1st Dept 1999); see *Subramani v Bruno Machinery Corp.*, 289 AD2d 167, 736 NYS2d 315 (1st Dept 2001); see also *Rothstein v Tennessee Gas Pipeline Co.*, 259 AD2d 54, 696 NYS2d 528 (2d Dept 1999) (declining to reach the issue). The *Semenetz* Court concluded that acceptance of the “product line” exception would be “inconsistent with the basic justification for strict products liability because it would extend liability to a corporate successor that did not put the product in the stream of commerce. Notably, although the “continuing enterprise” exception discussed in *Hart v Bruno Machinery Corp.*, *supra* (citing *Trimper v Harris Corp.*, 441 F Supp 346 (EDMich 1977); *Trimper v Bruno-Sherman Corp.*, 436 F Supp 349 (EDMich 1977); *Turner v Bituminous Cas. Co.*, 397 Mich 406, 244 NW2d 873 (1976)) was referred to in *Semenetz*, the Court did not substantively discuss the doctrine. Nor did it settle the question whether it represents an additional exception, as the Appellate Division assumed, see *Semenetz v Sherling & Walden, Inc.*, 21 AD3d 1138, 801 NYS2d 78 (3d Dept 2005), *aff’d*, 7 NY3d 194, 818 NYS2d 819, 851 NE2d 1170 (2006), or instead is encompassed within the third “exception” identified in *Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 (1983).

Where there are circumstances warranting the imposition of liability on a successor corporation, the injured party can elect to proceed against the defunct corporation, the successor corporation or both, *Grant-Howard Associates v General Housewares Corp.*, 63 NY2d 291, 482 NYS2d 225, 472 NE2d 1 (1984).

V. Liability Where Product Manufacturer Is Difficult to Identify

As a general rule, plaintiff is required to establish that defendant manufactured the product in question and placed it in the stream of commerce, *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 640 NYS2d 860, 663 NE2d 901 (1996); *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989); *Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, 28 AD3d 1173, 814 NYS2d 471 (4th Dept 2006); see *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001); *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992); *Silver v Sportsstuff, Inc.*, 130 AD3d 907, 14 NYS3d 421 (2d Dept 2015); *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, 250 AD2d 49, 679 NYS2d 21 (1st Dept 1998); *Dominguez v Werner Mach. Co., Inc.*, 162 AD2d 932, 558 NYS2d 661 (3d Dept 1990); *Carrao by Carrao v Heitler*, 117 AD2d 308, 502 NYS2d 424 (1st Dept 1986). However, a defendant seeking summary judgment dismissing a complaint or cross-

claim against it has the initial burden of establishing that it did not manufacture or supply the product, *Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, supra.

The identity of the manufacturer can be proven circumstantially, see *Penn v Amchem Products*, 73 AD3d 493, 903 NYS2d 1 (1st Dept 2010); *Matter of New York City Asbestos Litigation [Oken v A.C. & S.]*, 7 AD3d 285, 776 NYS2d 253 (1st Dept 2004); *Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 747 NYS2d 79 (1st Dept 2002), *aff'd*, 99 NY2d 647, 760 NYS2d 96, 790 NE2d 269 (2003), and loss or destruction of the product does not necessarily require dismissal of the action, *Abar v Freightliner Corp.*, 208 AD2d 999, 617 NYS2d 209 (3d Dept 1994); *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 640 NYS2d 860, 663 NE2d 901 (1996); *Otis v Bausch & Lomb Inc.*, 143 AD2d 649, 532 NYS2d 933 (2d Dept 1988). The circumstantial evidence must establish that it is reasonably probable, not merely possible or evenly balanced, that defendant was the source of the offending product, *Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, 28 AD3d 1173, 814 NYS2d 471 (4th Dept 2006); *Healey v Firestone Tire & Rubber Co.*, supra; see *Baum v Eco-Tec, Inc.*, 5 AD3d 842, 773 NYS2d 161 (3d Dept 2004). Speculative or conjectural evidence of the manufacturer's identity is not enough and the complaint must be dismissed where there is no testimonial or documentary evidence that would support an inference that defendant manufactured the product, *Healey v Firestone Tire & Rubber Co.*, supra; *D'Amico v Manufacturers Hanover Trust Co.*, 173 AD2d 263, 569 NYS2d 962 (1st Dept 1991).

On occasion, identification of the manufacturer of the product which caused plaintiff's injury may be impossible. Market share liability, based on *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989), and *Matter of DES Market Share Litigation*, 79 NY2d 299, 582 NYS2d 377, 591 NE2d 226 (1992), provides an exception to the general rule that in common law negligence actions, a plaintiff must prove that defendant's conduct was a cause-in-fact of the injury. Because it is ordinarily impossible to establish the identity of the DES manufacturer whose product caused plaintiff's injury, for example, the Court of Appeals held that liability was to be apportioned among all drug manufacturers in accordance with their respective shares of the national market for DES. In order for a DES manufacturer to avoid liability, it must prove that "it was not a member of the market of DES sold for pregnancy use," *Hymowitz v Eli Lilly and Co.*, supra. Apparently, if a manufacturer produced DES but intended that its product be used for purposes other than in connection with pregnancy, it may avoid liability, see *Allen v Abbott Laboratories*, 160 AD2d 238, 553 NYS2d 352 (1st Dept 1990). Because market share is a discrete legal issue that is an integral part of the cause of action, there is a right to a jury trial on that issue, *Matter of DES Market Share Litigation*, supra. The market-share principle has not been extended beyond DES cases, see *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001), (rejecting in dicta application of market-share liability rule in lawsuit against 49 handgun manufacturers); *Brenner v*

American Cyanamid Co., 263 AD2d 165, 699 NYS2d 848 (4th Dept 1999) (market-share principle inapplicable to manufacturer of lead pigment used in certain paints).

In *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989) and *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982), the Court recognized the doctrine of alternative liability. Under the doctrine, where two or more defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, the burden is upon each defendant to prove that he or she has not caused the harm, *Silver v Sportsstuff, Inc.*, 130 AD3d 907, 14 NYS3d 421 (2d Dept 2015); see *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, 250 AD2d 49, 679 NYS2d 21 (1st Dept 1998); *Lamitie v Emerson Elec. Co. White Rodgers Div.*, 241 AD2d 827, 660 NYS2d 209 (3d Dept 1997). The central rationale for shifting the burden of proof in such a situation is that without this device the defendants will be silent, and the plaintiff will not recover, *Hymowitz v Eli Lilly and Co.*, *supra*; *Silver v Sportsstuff, Inc.*, *supra*. The doctrine compels the defendants to reveal the culpable party; if they do not identify the culpable party, all of the defendants will be held jointly and severally liable, *Hymowitz v Eli Lilly and Co.*, *supra*; *Silver v Sportsstuff, Inc.*, *supra*; see *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, *supra*; *Lamitie v Emerson Elec. Co. White Rodgers Div.*, *supra*.

To recover under the doctrine, a plaintiff must demonstrate that all possible tortfeasors are before the court; that all have breached a duty toward plaintiff; that the conduct of one of the defendants has caused plaintiff's injuries; and that defendants, as a group, have better access to information concerning the incident than does plaintiff, *Canavan v Galuski*, 2 AD3d 1039, 769 NYS2d 629 (3d Dept 2003); *Burns v Haines Equipment, Inc.*, 284 AD2d 922, 726 NYS2d 516 (4th Dept 2001); *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, 250 AD2d 49, 679 NYS2d 21 (1st Dept 1998); see *Silver v Sportsstuff, Inc.*, 130 AD3d 907, 14 NYS3d 421 (2d Dept 2015) (doctrine generally, but not invariably, requires that defendants have better access to information than plaintiff); see also *Baum v Eco-Tec, Inc.*, 5 AD3d 842, 773 NYS2d 161 (3d Dept 2004). A nexus between each defendant's conduct and plaintiff's injury is fundamental, *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, *supra*. The requirement that plaintiff demonstrate that all possible tortfeasors are before the court must be established with a virtual absolute level of certainty, *Canavan v Galuski*, *supra*; *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, *supra*. In light of the requirements for recovery under the doctrine, it is not available in an action involving a large number of possible wrongdoers, *Hymowitz v Eli Lilly and Co.*, 73 NY2d 487, 541 NYS2d 941, 539 NE2d 1069 (1989) (DES litigation), or where the action relates to a series of events occurring over a period of years, whose exact participants are uncertain, *New York Telephone Co. v AAER Sprayed Insulations, Inc.*, *supra* (asbestos litigation).

Another limited approach to establishing liability where the identity

of the manufacturer cannot be established, the “concerted action” principle, has been held to require a showing that all defendants had an understanding, express or tacit, to participate in a common plan to commit a tortious act, *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982); *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003); see also *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 492 NYS2d 584, 482 NE2d 63 (1985) (noting that Court of Appeals affirmance of use of concerted-action theory in *Bichler v Eli Lilly and Co.*, *supra*, resulted only from defendant’s failure to preserve objection to theory). The “concerted action” theory cannot be used to create industry-wide liability where all that plaintiff can show is parallel activity by manufacturers without any evidence of an agreement or common scheme, *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992). In *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003), however, the court upheld a concerted-action claim against a cigarette manufacturer, stating that the claim is available regardless of whether the act complained of was intentional or negligent.

VI. Disclaimer

In *Velez v Craine & Clark Lumber Corp.*, 33 NY2d 117, 350 NYS2d 617, 305 NE2d 750 (1973), the Court of Appeals stated that although strict products liability “sounds in tort,” there is no reason why, in the absence of some consideration of public policy, parties cannot by contract restrict or modify liability grounded in tort as between themselves. However, injured persons who were not parties to the contract cannot be barred from recovery by such restrictions, *id*; see *Fendley v Power Battery Co.*, 167 AD2d 260, 561 NYS2d 760 (1st Dept 1990); see also *Winant v Approved Ladder & Equipment Corp.*, 31 AD2d 965, 298 NYS2d 796 (2d Dept 1969), *aff’d*, 28 NY2d 529, 319 NYS2d 72, 267 NE2d 885 (1971) (disclaimer on lease for ladder, which was signed by one partner on behalf of partnership, held binding on other partner). The Restatement position is that strict liability cannot be disclaimed, Restatement (Third) Torts: Product Liability § 18; see 2 Frumer and Friedman, *Products Liability*, § 16A(5)(e). With respect to warranty liability, both UCC § 2-316, which leaves the seller free to disclaim, and UCC § 2-719(3), which permits limitation or exclusion of consequential damages, provide that limitations of such damages for personal injury in consumer goods cases are *prima facie* unconscionable. Thus, however effective a disclaimer may be in warding off claims by the purchaser, it may be ineffective if the purchaser seeks indemnity from the seller in a personal injury action brought against the purchaser by a person injured by the malfunctioning of the goods, *Alger v Abele Tractor & Equipment Co., Inc.*, 92 AD2d 677, 460 NYS2d 202 (3d Dept 1983). Whether the somewhat broader principle stated in *Velez v Craine & Clark Lumber Corp.*, *supra*, will be applied in warranty cases is not clear.

The Magnuson-Moss Warranty Act, 15 USC §§ 2301–2312, is meant to supplement state law, which supplies the rules governing personal injury claims, 15 USC § 2311, see *Mendelson v General Motors Corp.*,

105 Misc2d 346, 432 NYS2d 132 (Sup 1980), *aff'd*, 81 AD2d 831, 441 NYS2d 410 (2d Dept 1981); *Sherman, Products Liability for the General Practitioner*, § 4.02. The Act prohibits a seller from disclaiming or modifying any implied warranty (whether of merchantability or fitness) whenever the seller either offers a written warranty or enters into a service contract with the consumer within 90 days of the sale, 15 USC § 2308. The Act specifically permits a seller to limit or exclude liability for consequential damages arising from a breach of an implied warranty, 15 USC § 2304(a)(2), so long as the exclusion or limitation conspicuously appears on the face of the warranty. However, UCC § 2-719(3) which makes limitations of consequential damages for injury to the person *prima facie* unconscionable, remains fully applicable.

VII. Statute of Limitations

A. Negligence and Strict Liability.

The statute of limitations on actions for personal injury or property damage is three years and applies to negligence and strict liability claims, CPLR 214(b); *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985); *Martin v Edwards Laboratories, Div. of American Hosp. Supply Corp.*, 60 NY2d 417, 469 NYS2d 923, 457 NE2d 1150 (1983). A cause of action accrues for purposes of CPLR 214 when all of the facts necessary to the cause of action have occurred so that the party is entitled to obtain relief in court, *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 666 NYS2d 536, 689 NE2d 506 (1997); *Snyder v Town Insulation, Inc.*, 81 NY2d 429, 599 NYS2d 515, 615 NE2d 999 (1993); *Aetna Life and Cas. Co. v Nelson*, 67 NY2d 169, 501 NYS2d 313, 492 NE2d 386 (1986). In cases involving personal injury, the claim accrues upon injury rather than when the sale occurred, *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975) (injury 21 years after sale). In cases involving property damage, the products liability cause of action accrues at the time of injury, *St. Patrick's Home for Aged and Infirm v Laticrete Intern., Inc.*, 264 AD2d 652, 696 NYS2d 117 (1st Dept 1999) (injury occurred, and cause of action accrued, on date that allegedly defective exterior wall panels were installed). In an asbestos property damage claim, the cause of action accrues when the asbestos was installed, for it was at that point that the building owner sustained an injury in fact, *MRI Broadway Rental, Inc. v U.S. Mineral Products Co.*, 92 NY2d 421, 681 NYS2d 783, 704 NE2d 550 (1998). The MRI Broadway Court rejected plaintiff's theory that the statute of limitations did not begin to run until friable asbestos particles in the air caused actual physical damage to the building.

1. Cases Involving Exposure to Toxic Substances.

Under the traditional view, the injury is deemed to occur upon impact or exposure to the defective product, even if the harm or illness is not manifested or discovered until years later, *Consorti v Owens-Corning Fiberglas Corp.*, 86 NY2d 449, 634 NYS2d 18, 657 NE2d 1301

(1995); *Snyder v Town Insulation, Inc.*, 81 NY2d 429, 599 NYS2d 515, 615 NE2d 999 (1993); *Steinhardt v Johns-Manville Corp.*, 54 NY2d 1008, 446 NYS2d 244, 430 NE2d 1297 (1981); *Schwartz v Heyden Newport Chemical Corp.*, 12 NY2d 212, 237 NYS2d 714, 188 NE2d 142 (1963); *Schmidt v Merchants Despatch Transp. Co.*, 270 NY 287, 200 NE 824 (1936). This principle was often applied to preclude recovery for injuries arising from exposure to toxic substances, the effects of which might not be manifested for many years.

The accrual-on-impact rule was modified by the 1986 enactment of CPLR 214-c, which generally provides a three year statute of limitations, measured from plaintiff's actual or imputed discovery of injury, in actions to recover for personal injuries or property damage "caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property," see *Rothstein v Tennessee Gas Pipeline Co.*, 87 NY2d 90, 637 NYS2d 674, 661 NE2d 146 (1995); *Jensen v General Elec. Co.*, 82 NY2d 77, 603 NYS2d 420, 623 NE2d 547 (1993) (CPLR 214-c applies to property damage actions caused by all substances, including hazardous waste emanating from continuing trespass and continuing nuisance condition); see also *Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson, AIA*, 100 NY2d 202, 761 NYS2d 141, 791 NE2d 398 (2003) (CPLR 214-c applies to claims caused by latent effects of exposure to toxic substance, but not to claim against architect for negligent removal of asbestos); *Thoma v Schodack*, 6 AD3d 957, 776 NYS2d 109 (3d Dept 2004) (salt may, under certain circumstances, be a "toxic substance"); *Manhattanville College v James John Romeo Consulting Engineer, P.C.*, 5 AD3d 637, 774 NYS2d 542 (2d Dept 2004) (dissipated carbon monoxide caused no delayed or latent damage). The term "substance" is not restricted to toxic chemicals and includes biological substances, such as contaminated blood, *DiMarco v Hudson Valley Blood Services*, 147 AD2d 156, 542 NYS2d 521 (1st Dept 1989) (hospital patient who contracted AIDS through blood transfusion); *Prego v New York*, 147 AD2d 165, 541 NYS2d 995 (2d Dept 1989) (hospital extern who contracted AIDS after being pricked by contaminated needle). The statute does not apply to claims based on injury caused by a computer keyboard, *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 666 NYS2d 536, 689 NE2d 506 (1997), or a sliver from a razor left after a pedicure, *Semenza v Lilly's Nails*, 116 AD3d 409, 983 NYS2d 20 (1st Dept 2014), or by compressed air, *Patterson v New York*, 289 AD2d 213, 734 NYS2d 196 (2d Dept 2001), since, none of these products is a toxic substance, see *Miniero v New York*, 65 AD3d 861, 885 NYS2d 45 (1st Dept 2009) (CPLR 214-c inapplicable to injuries that can manifest themselves immediately upon exposure, such as those arising from high sound levels from gunfire). CPLR 214-c(2) applies to property damage actions arising from hazardous waste substances emanating from a continuous trespass and a continuous nuisance condition, which must be instituted within three years of actual or imputed discovery, *Jensen v General Elec. Co.*, 82 NY2d 77, 603 NYS2d 420, 623 NE2d 547 (1993); *Pfohl v Amax, Inc.*, 222 AD2d 1068, 635 NYS2d 880 (4th Dept 1995). However, CPLR 214-c does not apply to actions for injunctive relief, which are still governed

by the common-law doctrine of continuing wrongs, *Jensen v General Electric Co.*, *supra*.

“Exposure” for the purpose of CPLR 214-c means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection, CPLR 214-c(1). The term “injury” in CPLR 214-c refers to an actual illness or physical condition or other similarly discoverable objective manifestation of the damage caused by previous exposure to an injurious substance, *Whitney v Agway Inc.*, 238 AD2d 782, 656 NYS2d 455 (3d Dept 1997); *Sweeney v General Printing Inc.*, Div. of Sun Chemical Corp., 210 AD2d 865, 621 NYS2d 132 (3d Dept 1994).

CPLR 214-c’s three-year limitations period commences to run on “the date of discovery of the injury by the plaintiff” or “the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier,” see *Pfohl v Amax, Inc.*, 222 AD2d 1068, 635 NYS2d 880 (4th Dept 1995). “Discovery of the injury” means discovery of the primary physical condition upon which the claim is based and not when the connection between those symptoms and the injured party’s exposure to a toxic substance is recognized, *Matter of New York County DES Litigation [Wetherill v Eli Lilly and Co.]*, 89 NY2d 506, 655 NYS2d 862, 678 NE2d 474 (1997); see *Whitney v Quaker Chemical Corp.*, 90 NY2d 845, 660 NYS2d 862, 683 NE2d 768 (1997); *Semenza v Lilly’s Nails*, 116 AD3d 409, 983 NYS2d 20 (1st Dept 2014); *Scheidel v A.C. and S. Inc.*, 258 AD2d 751, 685 NYS2d 829 (3d Dept 1999); *Krogmann v Glens Falls City School Dist.*, 231 AD2d 76, 661 NYS2d 82 (3d Dept 1997); *Hedlund v Tompkins*, 235 AD2d 980, 652 NYS2d 877 (3d Dept 1997). Thus, a plaintiff must be considered to have discovered such an injury when the plaintiff is actually diagnosed as suffering from a particular disease, even though unaware of its cause, *Matter of New York County DES Litigation [Wetherill v Eli Lilly and Co.]*, *supra*; *Sweeney v General Printing Inc.*, Div. of Sun Chemical Corp., 210 AD2d 865, 621 NYS2d 132 (3d Dept 1994).

Early symptoms of the condition may be too isolated or inconsequential to trigger the running of the statute of limitations under CPLR 214-c, *O’Halloran v 345 Park Co.*, 251 AD2d 260, 675 NYS2d 55 (1st Dept 1998) (plaintiff disabled from work for two and a half days). Further, under the “two injury” or “second injury” rule, even where an injury resulting from exposure to a toxic substance has previously been discovered, CPLR 214-c’s three-year limitations period begins to run anew when a separate and distinct disease or illness arising from the same exposure is discovered and the injured party seeks to recover for that disease or illness, *Fusaro v Porter-Hayden Co.*, 145 Misc2d 911, 548 NYS2d 856 (Sup 1989), *aff’d*, 170 AD2d 239, 565 NYS2d 357 (1st Dept 1991) (plaintiff may bring action within three years after discovery of mesothelioma resulting from asbestos exposure even though claim based on asbestosis caused by such exposure time-barred); see *Shapiro v Ansell Perry, Inc.*, 291 AD2d 301, 737 NYS2d 843 (1st Dept 2002) (fact issue existed, based on expert affidavit, as to whether recently discovered “Type I” latex allergic condition, which involves respiratory symptoms, is sufficiently separate and distinct from previously

discovered “Type IV” latex allergic condition, which is manifested by dermatological symptoms).

CPLR 214-c(4) provides a qualified exception to the three-year statute of limitations in CPLR 214-c(2) in situations in which a plaintiff was aware of the injury but there was a justifiable delay in the discovery of its cause, *Giordano v Market America, Inc.*, 15 NY3d 590, 915 NYS2d 884, 941 NE2d 727 (2010); *Pompa v Burroughs Wellcome Co.*, 259 AD2d 18, 696 NYS2d 587 (3d Dept 1999). In these circumstances, an action may be brought more than three years after discovery of the injury if the cause of the injury is alleged to have been discovered within five years after actual or imputed discovery of the injury and the action was commenced within one year of discovery of the cause, CPLR 214-c(4); see *Giordano v Market America, Inc.*, *supra*; *Pompa v Burroughs Wellcome Co.*, *supra*. The provisions of CPLR 214-c(4) are limited to actions for injuries caused by the latent effects of exposure to a substance, and are triggered only when the cause of an injury is unknown at the time the injury is discovered, *Giordano v Market America, Inc.*, *supra*. An injury that occurs within hours of exposure to a substance can be considered “latent” for the purposes of applying CPLR 214-c(4), *id*. When the cause is known at the time the injury is discovered, the three-year limitations period provided in CPLR 214-c(2) governs, *Moore v Smith Corona Corp.*, 175 AD2d 458, 572 NYS2d 510 (3d Dept 1991); see generally *Whitney v Agway Inc.*, 238 AD2d 782, 656 NYS2d 455 (3d Dept 1997); *Johnson v Ashland Oil, Inc.*, 195 AD2d 980, 601 NYS2d 756 (4th Dept 1993).

A plaintiff seeking to invoke this exception must plead and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of the injury had not been discovered prior to the expiration of three years from actual or imputed discovery of the injury, CPLR 214-c(4); *Giordano v Market America, Inc.*, 15 NY3d 590, 915 NYS2d 884, 941 NE2d 727 (2010) (causal relationship sufficiently ascertained when the relationship is generally accepted by the relevant technical, scientific or medical community); *Hedlund v Tompkins*, 235 AD2d 980, 652 NYS2d 877 (3d Dept 1997); see *Matter of New York County DES Litigation [Wetherill v Eli Lilly and Co.]*, 89 NY2d 506, 655 NYS2d 862, 678 NE2d 474 (1997); *Pompa v Burroughs Wellcome Co.*, 259 AD2d 18, 696 NYS2d 587 (3d Dept 1999); *Krogmann v Glens Falls City School Dist.*, 231 AD2d 76, 661 NYS2d 82 (3d Dept 1997). In evaluating when this test has been met, the focus is on the available technical knowledge of the scientific and medical communities of a causal relationship or connection between the substance at issue and the symptoms alleged by plaintiff, *Giordano v Market America, Inc.*, *supra*; *Pompa v Burroughs Wellcome Co.*, *supra*. A causal relationship or connection between the substance and the plaintiff's symptoms will be sufficiently ascertained under CPLR 214-c(4) when the relationship or connection is generally accepted by the relevant technical, scientific or medical community, *Giordano v Market America, Inc.*, *supra*.

CPLR 214-c does not apply to medical or dental malpractice ac-

tions, CPLR 214-c(5). Thus, the viability of a products liability claim against the manufacturer under CPLR 214-c does not extend the time to bring action against the physician who implanted the product years earlier, CPLR 214-c(5); see *Goldsmith v Howmedica, Inc.*, 67 NY2d 120, 500 NYS2d 640, 491 NE2d 1097 (1986). To the extent that the action is against a physician for malpractice in prescribing the injury-producing substance, for example, the action would continue to be governed by the applicable medical and dental malpractice statute, Comment to PJI 2:150. To the extent that the action is against a physician or hospital in connection with a foreign object, see CPLR 214-a.

The provisions of CPLR 214-c are subject to the “borrowing statute,” CPLR 202, which requires application of a foreign statute of limitations where a non-resident’s claim accrued outside the state, if the applicable foreign limitations period is shorter than the New York period, *Dugan v Schering Corp.*, 86 NY2d 857, 635 NYS2d 164, 658 NE2d 1037 (1995); *Besser v E.R. Squibb & Sons, Inc.*, 146 AD2d 107, 539 NYS2d 734 (1st Dept 1989), *aff’d*, 75 NY2d 847, 552 NYS2d 923, 552 NE2d 171 (1990); see generally *Insurance Co. of North America v ABB Power Generation, Inc.*, 91 NY2d 180, 668 NYS2d 143, 690 NE2d 1249 (1997). The shorter foreign limitations period applies even if plaintiff changed residence to New York after the claim accrued, *Besser v E.R. Squibb & Sons, Inc.*, *supra*; see also *Tanges v Heidelberg North America, Inc.*, 93 NY2d 48, 687 NYS2d 604, 710 NE2d 250 (1999) (rejecting application of borrowing statute to Connecticut statute of repose).

2. Cases Involving “Repetitive Stress Injuries”

Since a computer keyboard is neither a toxic substance that is ingested into the body, as in the typical “exposure” case, nor an object implanted but not assimilated into the body, as in the typical “implantation” case, a cause of action for “repetitive stress” injuries allegedly resulting from computer keyboard use accrues against the manufacturer upon the earlier of onset of symptoms or the last use of the injury-producing device, *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 666 NYS2d 536, 689 NE2d 506 (1997); *Seeman v International Business Machines Corp.*, 252 AD2d 578, 676 NYS2d 211 (2d Dept 1998); see also *Piper v International Business Machines Corp.*, 219 AD2d 56, 639 NYS2d 623 (4th Dept 1996). The Blanco court specifically rejected application of CPLR 214-c, under which accrual is measured from the date that plaintiff actually became aware of his or her injuries, *Blanco v American Tel. & Tel. Co.*, *supra*.

B. Breach of Warranty.

The limitations period on the usual breach-of-warranty claim is four years, measured from tender of delivery, UCC § 2-725(1)(2); *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985); *Cohoes v Kestner Engineers P.C.*, 226 AD2d 914, 640 NYS2d 917 (3d Dept 1996); *Niagara Mohawk Power Corp. v Ferranti-Packard Transformers, Inc.*, 201 AD2d 902, 607 NYS2d 808 (4th Dept 1994);

Calabria v St. Regis Corp., 124 AD2d 514, 508 NYS2d 186 (1st Dept 1986). Thus, if the suit is brought against parties in the distributive chain, such as a manufacturer, wholesaler or retailer, the accrual point may be different as to each defendant. *Heller v U.S. Suzuki Motor Corp.*, *supra*, holds that the accrual point is the date when goods are tendered for delivery to the next link in the distributive chain, see also *Rissew v Yamaha Motor Co., Ltd.*, 129 AD2d 94, 515 NYS2d 352 (4th Dept 1987).

Although UCC § 2-725(2) provides that a cause of action for breach of warranty accrues when tender of delivery is made, there is an exception where a warranty explicitly extends to future performance of the goods. In such a case, the cause of action accrues when the breach is or should have been discovered, UCC § 2-725(2); *Mittasch v Seal Lock Burial Vault, Inc.*, 42 AD2d 573, 344 NYS2d 101 (2d Dept 1973). A warranty of future performance is one that guarantees that the product will work for a specified period of time, *St. Patrick's Home for Aged and Infirm v Laticrete Intern., Inc.*, 264 AD2d 652, 696 NYS2d 117 (1st Dept 1999). Warranties to repair or replace the product in the event that it fails to perform, without any promise of performance, do not constitute warranties of future performance, *id.*

If the four-year period provided in UCC § 2-725 has expired prior to the accident, an injured infant is deprived of the tolling provisions of CPLR 208, since at the time of the accident, the four-year period has passed, *Ribley v Harsco Corp.*, 57 AD2d 234, 394 NYS2d 741 (3d Dept 1977); see *Donacik v Pool Mart, Inc.*, 270 AD2d 921, 705 NYS2d 784 (4th Dept 2000).

C. Fraudulent Concealment.

The New York courts have rejected a separate cause of action for fraud in misrepresenting the suitability of a product for a particular use or in failing to disclose the product's unsuitability for the use recommended by the manufacturer, *New York Seven-Up Bottling Co., Inc. v Dow Chemical Co.*, 96 AD2d 1051, 466 NYS2d 478 (2d Dept 1983), *aff'd*, 61 NY2d 828, 473 NYS2d 973, 462 NE2d 150 (1984); *Riley v State*, 105 AD2d 1104, 482 NYS2d 626 (4th Dept 1984); see *St. Patrick's Home for Aged and Infirm v Laticrete Intern., Inc.*, 264 AD2d 652, 696 NYS2d 117 (1st Dept 1999) (plaintiff was damaged first and foremost by alleged defects in exterior wall panels, and additional allegation that defendant knew that its product was defective did not entitle plaintiff to the longer limitations period for fraud). Thus, a fraud claim cannot be used to extend the accrual date of a cause of action arising from a product defect, at least where the fraud did not cause a separate injury, *New York Seven-Up Bottling Co., Inc. v Dow Chemical Co.*, *supra*. However, a separate cause of action has been recognized where the misconduct complained of was distinct from the conduct involved in the manufacture and initial marketing of the product, *Catherwood v American Sterilizer Co.*, 132 AD2d 938, 518 NYS2d 485 (4th Dept 1987); *Young v Robertshaw Controls Co.*, 104 AD2d 84, 481 NYS2d 891 (3d

Dept 1984); *Angie v Johns Manville Corp.*, 94 AD2d 939, 463 NYS2d 956 (4th Dept 1983). Moreover, in *Standish-Parkin v Lorillard Tobacco Co.*, 12 AD3d 301, 786 NYS2d 13 (1st Dept 2004), and *New York v Lead Industries Ass'n, Inc.*, 190 AD2d 173, 597 NYS2d 698 (1st Dept 1993), the courts permitted fraud claims paired with strict liability claims to go forward, holding that misrepresentations of safety to the public at large, for the purpose of influencing the marketing of a product known to be defective, give rise to separate causes of action for fraud.

Notably, the significance of this line of cases has been greatly diminished by the enactment of CPLR 214-c, which postpones accrual of the cause of action in certain cases until after discovery of the injury, as is also the case in fraud causes of action. However, the cited cases may have continuing significance in situations where CPLR 214-c is unavailable, see *Oeffler v Miles Inc.*, 241 AD2d 822, 660 NYS2d 897 (3d Dept 1997). For a further discussion of fraud and its relationship to claims based on product defects, see Comment to PJI 3:20.

VIII. Comparative Fault

Comparative fault principles apply to personal injury claims sounding in strict liability or warranty, see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Sheppard v Charles A. Smith Well Drilling and Water Systems*, 93 AD2d 474, 463 NYS2d 546 (3d Dept 1983). *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973), conditioned product liability upon proof that (1) plaintiff or another was using the product for the purpose and in the manner normally intended; (2) if plaintiff was the user, he or she could not by the exercise of reasonable care have both discovered the defect and perceived its danger; and (3) by the exercise of reasonable care plaintiff could not otherwise have averted injury. Although *Codling* was decided when contributory negligence was a complete bar to recovery, its formula for recovery remains applicable. Thus, under comparative negligence, where plaintiff is a user of the product, defendant may seek to establish the plaintiff's culpable conduct under all three branches of the *Codling* test and thereby reduce plaintiff's recovery. For example, where plaintiff used the product for an unintended, but reasonably foreseeable purpose, plaintiff may recover, but his or her damages may be diminished, *Sheppard v Charles A. Smith Well Drilling and Water Systems*, 93 AD2d 474, 463 NYS2d 546 (3d Dept 1983); see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Craft v Mid Island Dept. Stores, Inc.*, 112 AD2d 969, 492 NYS2d 780 (2d Dept 1985). Plaintiff, of course, must establish that the product was defective and that the defect was a proximate cause of the injuries before any recovery may be had, *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986). Misuse and abuse of a product by the plaintiff becomes an issue only after it is determined that the defendant's product is defective and not reasonably safe. Where varying inferences may be drawn as to the foreseeability of plaintiff's use of the product, the issue is for the jury, *Trivino v Jamesway Corp.*, 148 AD2d 851, 539 NYS2d 123 (3d Dept 1989). When a product is so dangerous

and so defectively designed that its misuse is foreseeable, summary judgment may be granted to plaintiff, *M.H. v Bed Bath & Beyond Inc.*, 156 AD3d 33, 64 NYS3d 205 (1st Dept 2017).

In cases involving comparative fault, defendant bears the burden of pleading and proving plaintiff's fault, CPLR 1412, 3018(b). As to comparative fault generally, see PJI 2:36.

The doctrine of primary assumption of risk, which constitutes a complete bar to plaintiff's recovery, is not available in a strict products liability action to eliminate or reduce a manufacturer's duty to produce a non-defective product, even where the product's dangerous qualities are obvious to and appreciated by the user, *Lamey v Foley*, 188 AD2d 157, 594 NYS2d 490 (4th Dept 1993). A defect in a product used by participants in sporting activities is not a risk inherent in the sport itself, *Repka v Arctic Cat, Inc.*, 20 AD3d 916, 798 NYS2d 629 (4th Dept 2005) (action involving allegedly defectively designed and manufactured snowmobile). Since manufacturing and design defects unaccompanied by adequate warnings are almost always "concealed" conditions representing an unreasonably increased risk, they are not risks which the participants may be deemed to have assumed, *id.*

IX. Preemption

Statutes sometimes set standards of product safety. Violation of such a statute should be treated in the same way it would be in a negligence case, see Introductory Statement on Statutory Standard of Care preceding PJI 2:25; see also *Wallace v Parks Corp.*, 212 AD2d 132, 629 NYS2d 570 (4th Dept 1995) Compliance with a federal safety standard constitutes some evidence of due care but does not by itself preclude the imposition of liability, *Feiner v Calvin Klein, Ltd.*, 157 AD2d 501, 549 NYS2d 692 (1st Dept 1990). However, liability may not be imposed upon a manufacturer on a theory preempted by federal law, *Medtronic, Inc. v Lohr*, 518 US 470, 116 SCt 2240 (1996); see *Bates v Dow Agrosciences LLC*, 544 US 431, 125 SCt 1788 (2005) (state common law actions based on improper labeling preempted by Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC § 136v(b)); *Cipollone v Liggett Group, Inc.*, 505 US 504, 112 SCt 2608 (1992) (Public Health Cigarette Smoking Act of 1969, 15 USC § 1334(b), preempts state common law actions based on failure to warn); *Feldman v CSX Transp., Inc.*, 31 AD3d 698, 821 NYS2d 85 (2d Dept 2006) (Federal Safety Appliance Act, 49 USC § 20301 et seq., preempts state products liability claims based on design defect and failure to warn where plaintiff alleges failure to include safety appliances or instructions not required by Federal Railroad Administration statute and regulations, 49 CFR, part 231; however, state negligence claims based in noncompliance with federal standards not preempted); *Hanly v Quaker Chemical Co., Inc.*, 29 AD3d 860, 818 NYS2d 96 (2d Dept 2006) (Federal Hazardous Substances Act [FHSA] preempts claims based on failure to include additional warning label not mandated by Act; however, state court action based on failure to comply with FHSA not preempted); *Lopez v*

Hernandez, 253 AD2d 414, 676 NYS2d 613 (2d Dept 1998) (infant's claims predicated upon failure to warn preempted by FHSA, 15 USC § 1261 et seq., but causes of action based on negligence, breach of express warranty and implied warranty, and strict products liability not premised on failure to warn or inadequate labeling are not preempted); *Wallace v Parks Corp.*, 212 AD2d 132, 629 NYS2d 570 (4th Dept 1995) (FHSA preempts claims based upon theory that defendant's labeling and packaging should have included additional, different or alternatively stated warnings from those required under FHSA; but claims based upon defective design and upon negligent testing, manufacturing and formulating not preempted); *McSorley v Philip Morris, Inc.*, 170 AD2d 440, 565 NYS2d 537 (2d Dept 1991). A federal statute that explicitly preempts state "requirements" precludes different or additional duties imposed by state common law, *Riegel v Medtronic, Inc.*, 552 US 312, 128 SCt 999 (2008) (Medical Device Amendment of 1976, 21 U.S.C. § 360k(a)); see *Diaz v Little Remedies Co., Inc.*, 81 AD3d 1419, 918 NYS2d 281 (4th Dept 2011) (21 USC § 379r(a)(2)) preempts a State from establishing a requirement "that is different from or in addition to, or that is otherwise not identical with, a requirement under the Poison Prevention Packaging Act of 1970 [15 USC § 1471 et seq.] or the Fair Packaging and Labeling Act [15 USC § 1451 et seq.]." However, the savings exception to 21 USC § 379r(a)(2) saves from preemption a state court action based upon failure to warn.

The Protection of Lawful Commerce in Arms Act (PLCAA), 15 USC §§ 7901-7903, generally shields manufacturers and sellers of firearms from liability for harm caused by the criminal or unlawful misuse of their non-defective products, i.e., products that functioned as designed and intended and prohibits the commencement of a "qualified civil liability action," defined in relevant part, as "a civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief[] resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." *Williams v Beemiller, Inc.*, 100 AD3d 143, 952 NYS2d 333 (4th Dept 2012), amended on reargument, 103 AD3d 1191, 962 NYS2d 834 (4th Dept 2013) (New York action fell within the PLCAA's predicate exception and was not precluded by the Act).

The National Traffic and Motor Vehicle Safety Act of 1966 [NTMVSA], currently codified at 49 USC 30101, et seq. preempts a state common law tort action based on a failure to install an airbag, *Geier v American Honda Motor Co., Inc.*, 529 US 861, 120 SCt 1913 (2000) (abrogating *Drattel v Toyota Motor Corp.*, 92 NY2d 35, 677 NYS2d 17, 699 NE2d 376 (1998)). The Act does not preempt a claim based on a failure to install passenger seat belts on buses, *Doomes v Best Transit Corp.*, 17 NY3d 594, 935 NYS2d 268, 958 NE2d 1183 (2011). Moreover, neither the NTMVSA nor the relevant provisions of Motor Vehicle Safety Standard 208, see 49 CFR § 571.208, preempts an action based on a claim that special design-related circumstances inherent in defendant's vehicle necessitated installation of a different passenger restraint system, *Alami v Volkswagen of America, Inc.*, 10 AD3d 344, 780 NYS2d 638 (2d Dept 2004). Geier does not automatically

exempt automobile manufacturers from liability whenever a federal regulation provides options as to the type of restraint system to be employed, *Williamson v Mazda Motor of America, Inc.*, 131 SCt 1131 (2011); *Chevere v Hyundai Motor Co.*, 4 AD3d 226, 774 NYS2d 6 (1st Dept 2004). Thus, the provision of the Motor Vehicle Safety Standard 208 that affords auto manufacturers the choice of installing either lap belts or lap and shoulder belts on rear inner seats, does not preempt state law claims that, if successful, would deny manufacturers the choice of belts for rear inner seats, *Williamson v Mazda Motor of America, Inc.*, *supra* (distinguishing *Geier* on basis that choice among different kinds of passive restraint devices was a significant objective of federal regulation at issue in *Geier*, whereas choice between competing belts was not significant objective of federal regulation in *Williamson*). Moreover, *Geier* precludes actions alleging a general failure to equip a vehicle properly, but does not preclude common-law claims premised on state law against a manufacturer which has unreasonably opted to meet only minimum performance requirements, *Chevere v Hyundai Motor Co.*, *supra*.

The Flammable Fabrics Act of 1953, 15 USC §§ 1191–1204, which prohibits the sale and distribution of fabrics intended for use in clothing that does not comply with the threshold standards contained in the Act, preempts inconsistent statutory enactments, but does not preempt a state common-law action, *Perez v Mini-Max Stores, Inc.*, 231 AD2d 162, 661 NYS2d 659 (2d Dept 1997); see *Pack by Soja v E.R.O. Industries, Inc.*, 248 AD2d 1009, 669 NYS2d 995 (4th Dept 1998).

The Federal Food, Drug and Cosmetic Act (FDCA), 21 USC § 301 et seq., does not preempt state law claims against brand-name drug manufacturers based on inadequate drug warnings, *Wyeth v Levine*, 555 US 555, 129 SCt 1187 (2009). However, the Act does preempt state law claims against generic drug manufacturers based on inadequate drug warnings, *PLIVA, Inc. v Mensing*, 131 SCt 2567 (2011). The Supreme Court distinguished state law claims against brand-name drug manufacturers—which are not pre-empted—from claims against generic drug manufacturers—which are pre-empted—on the ground that, under the Act and its implementing regulations, a brand-name manufacturer could unilaterally strengthen its warning and therefore comply with both state tort duties and federal pharmaceutical labeling law, *id.* However, a generic drug manufacturer could not change its label on its own volition and thus it was impossible for that manufacturer to simultaneously comply with both state and federal obligations, *id.* Claims in negligence, strict products liability and breach of warranty based on the design and manufacture of a pacemaker lead are not pre-empted by federal law merely because the device has undergone the pre-market notification procedure required by the Food and Drug Administration, *Medtronic, Inc. v Lohr*, 518 US 470, 116 SCt 2240 (1996); *Romano v Medtronic, Inc.*, 233 AD2d 258, 650 NYS2d 544 (1st Dept 1996). In contrast, the Medical Device Amendments of 1976, 21 USC § 360c et seq., pre-empt state common-law tort actions based on the design, labeling and manufacture of Class III medical devices that have undergone the rigorous pre-market approval process mandated by

the statute, *Riegel v Medtronic, Inc.*, 552 US 312, 128 SCt 999 (2008); see 21 USC § 360k(a)(1). This preemption principle does not preclude state actions for damages based on violations of Federal Drug Administration regulations, *Riegel v Medtronic, Inc.*, supra. Regulations promulgated by the Occupational Safety and Health Administration (OSHA) govern only employee-employer relationships and are not applicable to strict products liability actions by employees against manufacturers, *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 (1st Dept 2002).

For a discussion of the effect of Federal statutes and regulations requiring warnings, see Comment to PJI 2:120.

X. Miscellaneous Matters

The firefighter's rule does not apply to products liability actions sounding in negligence, breach of warranty and products liability brought by a firefighter against a manufacturer of firefighters' safety equipment that failed to provide adequate protection against hazards foreseeably encountered by firefighters, *Shepard v Morning Pride Mfg., Inc.*, 217 AD2d 308, 636 NYS2d 173 (3d Dept 1996).

Federal Maritime Law governs a products liability claim against a designer, manufacturer and/or distributor of a boat and its component parts where: (1) the injury occurs on a navigable body of water, (2) placing the vessel into navigable water with a defect sufficiently carries the potential to disrupt maritime commerce and (3) the general character of the activity giving rise to the accident, such as the operation of a boat on a navigable body of water, shows a substantial relationship to traditional maritime activity, *O'Hara v Bayliner*, 89 NY2d 636, 657 NYS2d 569, 679 NE2d 1049 (1997). Where the above factors are present, the federal statute of limitations governs and the New York state infancy tolling provisions are not applicable, *id.*

a. STRICT LIABILITY

PJI 2:120. Strict Products Liability

A (manufacturer, wholesaler, distributor, retailer, processor of materials, maker of a component part) that sells a product in a defective condition is liable for injury that results from use of the product when the product is used for its intended or reasonably foreseeable purpose.

A product is defective if it is not reasonably safe—that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition.

A product may be defective as a result of [*state where appropriate: a manufacturing flaw, a defective design or inadequate warnings or instructions*]. The burden of proving that the product was defective and that the defect was a substantial factor in causing plaintiff's injury is on the plaintiff.

[*Insert the following two paragraphs where a manufacturing defect claim has been made:*]

The plaintiff, AB, claims that the [*state product*] [*manufactured by, sold by*] defendant CD was defective because [*state plaintiff's contentions, such as: there was a defect in the vehicle's manufacture in that the brakes failed to work*]. CD denies that the [*state product*] was defective and contends [*state defendant's contentions*].

It is not necessary to find that defendant CD knew or should have known of the product's potential for causing injury in order for you to determine that it was not reasonably safe. It is sufficient that a reasonable person who did in fact know of the product's potential for causing injury would have concluded that the product should not have been marketed in that condition.

[Insert the following three paragraphs where a design defect claim has been made:]

The plaintiff, AB, claims that the [state product] [manufactured by, sold by] defendant CD was defective because [state plaintiff's contentions, such as the vehicle was defectively designed in that the wheel base was too narrow for safe use on highways, the cutting machine was dangerous without a hand guard]. CD denies that the [state product] was defectively designed and contends [state defendant's contentions].

A product is defectively designed if a reasonable person who knew or should have known of the product's potential for causing injury and of the feasible alternative design[s] would have concluded that the product should not have been marketed in that condition. Whether the product should have been marketed in that condition depends upon a balancing of the risks involved in using the product against (1) the product's usefulness and its costs, and (2) the risks, usefulness and costs of the alternative design[s] as compared to the product the defendant did market.

It is not necessary to find that the defendant CD knew of the product's potential for causing injury in order for you to decide that it was defectively designed. It is sufficient that a reasonable person who did in fact know of the product's potential for causing injury would have concluded that the product should not have been marketed in that condition.

[Insert the following two paragraphs where a failure to warn or inadequate warning claim has been made:]

The plaintiff, AB, claims that the [state product] [manufactured by, sold by] defendant CD was defective because [state plaintiff's contentions, such as the safety warnings were inadequate in that they failed to warn of the risk of rollover accidents resulting from the vehicle's higher center of gravity]. CD denies that [state where appropriate: warnings were needed, the prod-

uct warnings were inadequate] and contends [*state defendant's contentions*].

The manufacturer of a product which is reasonably certain to be harmful if used in a way that the manufacturer should reasonably foresee is under a duty to use reasonable care to give adequate warning of any danger known to it or which in the use of reasonable care it should have known and which the user of the product ordinarily would not discover. Reasonable care means that degree of care which a reasonably prudent person would use under the same circumstances.

If you find that, at the time the [*state product*] was marketed [*state where appropriate: there was no manufacturing flaw; it was not defectively designed; no warnings regarding any safety hazards were necessary; the safety warnings accompanying the product were adequate*], then you will find that the [*state product*] was not defective and you need proceed no further in your deliberations on this issue.

If you find that, at the time the [*state product*] was marketed, the [*state product*] was defective [*state where appropriate*] in any of the ways I have discussed, then you will proceed to consider whether the defect was a substantial factor in causing AB's injury, that is, whether a reasonable person would regard it as a cause of the injury. If you find that the defect was not a substantial factor in causing AB's injury, you need proceed no further in your deliberations on this issue.

[Where defendant has asserted an affirmative defense of culpable conduct on the part of plaintiff, insert the following three paragraphs:]

If you find that the defect in the [*state product*] was a substantial factor in causing AB's injury, then you will proceed to consider whether there was negligence on AB's part that contributed to (his, her) injuries. The burden of proving that AB's negligence contributed to (his, her) injuries is on

CD. In this regard you will consider [state where appropriate: whether at the time of the occurrence the [state product] was being misused, whether AB in the use of reasonable care could have both discovered the defect and realized its danger, whether AB, by the use of reasonable care, could have otherwise avoided his/her injury.

If you find that the [state product] was misused, that AB in the use of reasonable care could have discovered the defect and realized its danger, that AB in the use of reasonable care could otherwise have avoided (his, her) injury, then you must apportion the responsibility of AB and CD for causing AB's injury.

Weighing all the facts and circumstances you must consider the total responsibility, that is, the responsibility of both AB and CD that contributed to causing the injury and decide what percentage is chargeable to each. In your verdict, you will state the percentages you find. The total of these percentages must equal one hundred percent. I will furnish you with a verdict sheet, on which you should write these percentages.

Comment

[See also Introductory Statement to this Division.]

Based on *Fasolas v Bobcat of New York, Inc.*, 33 NY3d 421, 104 NYS3d 550, 128 NE3d 627 (2019) (citing PJI); *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984) (citing PJI); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983) (citing PJI); *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980); *Velez v Craine & Clark Lumber Corp.*, 33 NY2d 117, 350 NYS2d 617, 305 NE2d 750 (1973); *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962); *Genesee County Patrons Fire Relief Ass'n v L. Sonneborn Sons*, 263 NY 463, 189 NE 551 (1934); *Rosebrock v General Electric Co.*, 236 NY 227, 140 NE 571 (1923); see *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003); *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Lugo by Lopez v LJM Toys, Ltd.*, 75 NY2d 850, 552 NYS2d 914, 552 NE2d 162 (1990); *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986);

Lancaster Silo & Block Co. v Northern Propane Gas Co., 75 AD2d 55, 427 NYS2d 1009 (4th Dept 1980) (citing PJI); Restatement, Second, Torts, §§ 388, 389, 397; Annot: 3 ALR3d 1016; Annot: 52 ALR3d 101.

A product may be “defective” because of a flaw in the manufacturing process, inadequate instructions or warnings or a defect in the design, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003); *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998); *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 523 NYS2d 418, 517 NE2d 1304 (1987); *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986); *Perazone v Sears, Roebuck and Co.*, 128 AD2d 15, 515 NYS2d 908 (3d Dept 1987). Inasmuch as products liability plaintiffs often assert one or more of these theories, the pattern charge is set forth in the form of an umbrella instruction that may be given in all products liability cases. The specific subcharges describing the substantive standards for the various theories, i.e., manufacturing defect, design defect and failure to warn/inadequate warnings, should be inserted as appropriate. It is recommended that the specific contentions pertaining to each of plaintiff’s theories of liability be stated separately and followed immediately by the relevant subcharge.

The pattern charge assumes that plaintiff was a user of the product. If plaintiff was a non-user, portions of the charge addressing misuse of the product by the plaintiff may require modification in light of the evidence presented. The causation language of the charge is based on case law holding that the defect must be “a substantial factor in bringing about plaintiff’s injury,” see *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); see also *Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 569 NYS2d 337, 571 NE2d 645 (1991).

The definition of “not reasonably safe” in the second paragraph of the pattern charge comes from *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984), and *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983) (citing PJI); see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Welch v Outboard Marine Corp.*, 481 F2d 252 (5th Cir 1973). The pattern charge uses the phrase “not reasonably safe” rather than “unreasonably dangerous,” because the latter phrase carries with it a connotation of extrahazardous danger that the former does not and that could confuse the jury.

The Court of Appeals has concluded that a design defect may render a product “not reasonably safe” and has adopted that standard as set forth in this comment and pattern charge, *Haran by Haran v Union Carbide Corp.*, 68 NY2d 710, 506 NYS2d 311, 497 NE2d 678 (1986) (citing PJI); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983) (citing PJI); see *Denny v Ford Motor Co.*, 87

NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). Cover v Cohen, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984), and Voss v Black & Decker Mfg. Co., *supra*, made clear that the “unreasonably dangerous” concept does not apply in this state, thereby rendering obsolete the discussion of that concept in *Bolm v Triumph Corp.*, 33 NY2d 151, 350 NYS2d 644, 305 NE2d 769 (1973); *Mendel v Pittsburgh Plate Glass Co.*, 25 NY2d 340, 305 NYS2d 490, 253 NE2d 207 (1969) (ovrld on other grounds, *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975)), and *Collins v Caldor of Kingston, Inc.*, 73 AD2d 708, 422 NYS2d 524 (3d Dept 1979). The “not reasonably safe” standard has also been applied to manufacturing defects, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); but see *Restatement, Third, Torts*, § 2(a) (excluding “not reasonably safe” language from definition of product with manufacturing defect). The “not reasonably safe” definition in the pattern charge may have to be expanded upon in cases involving defective design and inadequate warnings, see *Comment, infra*.

Although there may be little practical or analytical difference between a *prima facie* case in negligence and one in strict liability for design defect or inadequate warnings, it would be incorrect to give a negligence instruction in a strict liability action, since plaintiff need not establish that defendant was negligent, but only that the product is not reasonably safe, see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Haran by Haran v Union Carbide Corp.*, 68 NY2d 710, 506 NYS2d 311, 497 NE2d 678 (1986); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983).

I. Manufacturing Defect

A. General Principles

The thrust of strict liability law originally was to relieve plaintiff of the burden of proving that the defendant was negligent in manufacturing a defective unit. Under strict liability, if the product is defective, plaintiff has established the basis for liability without proving fault, *Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55, 427 NYS2d 1009 (4th Dept 1980).

To establish a strict products liability claim based on a manufacturing defect, plaintiff must prove that the product did not perform as intended and that it was defective when it left the manufacturer’s control, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 783 NYS2d 439 (4th Dept 2004); *Nichols v Agway, Inc.*, 280 AD2d 889, 720 NYS2d 691 (4th Dept 2001); *Opera v Hyva, Inc.*, 86 AD2d 373, 450 NYS2d 615 (4th Dept 1982); see *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973). In other words, the particular unit of the product differs from the manufacturer’s own internal quality standards. Where a manufacturing defect is alleged, plaintiff must establish that the product was not built to specifications or that the product, as constructed,

deviated from any such specifications or design, *Repka v Arctic Cat, Inc.*, 20 AD3d 916, 798 NYS2d 629 (4th Dept 2005); *McArdle v Navistar Intern. Corp.*, 293 AD2d 931, 742 NYS2d 146 (3d Dept 2002).

B. Burden of Proof and Circumstantial Proof of a Defect

The burden of proving that the product was defective is upon plaintiff, but plaintiff is not required to prove the specific defect, especially where the product is complicated in nature. *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003); *Winckel v Atlantic Rentals & Sales, Inc.*, 159 AD2d 124, 557 NYS2d 951 (2d Dept 1990); *Narciso v Ford Motor Co.*, 137 AD2d 508, 524 NYS2d 251 (2d Dept 1988); see *Schlanger v Doe*, 53 AD3d 827, 861 NYS2d 499 (3d Dept 2008); *Pugliese v Ford Motor Co., Inc.*, 53 AD2d 1052, 385 NYS2d 890 (4th Dept 1976); *Harmon v Statfeld*, 51 AD2d 761, 379 NYS2d 511 (2d Dept 1976). Proof of a defect may be circumstantial, *Ramos v Howard Industries, Inc.*, 10 NY3d 218, 855 NYS2d 412, 885 NE2d 176 (2008); *Speller ex rel. Miller v Sears, Roebuck and Co.*, supra; *Slater v Sears, Roebuck & Co.*, 280 AD2d 950, 721 NYS2d 203 (4th Dept 2001); *Yager v Arlen Realty & Development Corp.*, 95 AD2d 853, 464 NYS2d 214 (2d Dept 1983); see *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 783 NYS2d 439 (4th Dept 2004); see also *Depelteau v Ford Motor Co.*, 28 AD2d 1178, 284 NYS2d 490 (3d Dept 1967) (jury could infer negligent manufacture or inspection where truck brakes failed soon after truck was delivered, bleeder valve was loose, there was evidence that ordinary driving would not cause such loosening and there was no evidence of tampering).

A plaintiff's reliance on circumstantial evidence of a product defect does not relieve a manufacturer seeking summary judgment of its initial burden to show that the product was not defective as a matter of law, *Schlanger v Doe*, 53 AD3d 827, 861 NYS2d 499 (3d Dept 2008). With respect to a motion for summary judgment in a defective manufacturing or design defect case, a defendant meets its initial burden by submitting evidence that its product was not defective and that it was reasonably safe for its intended use, *Ramos v Howard Industries, Inc.*, 10 NY3d 218, 855 NYS2d 412, 885 NE2d 176 (2008) (product unavailable); *Menear v Kwik Fill*, 174 AD3d 1354, 105 NYS3d 766 (4th Dept 2019). That burden can be met by expert testimony demonstrating that the product was functional and was not unreasonably dangerous for its intended use, and by other evidence demonstrating that the product was tested before it left the manufacturer and complied with industry standards, *Menear v Kwik Fill*, supra. The burden then shifts to the nonmovant to raise an issue of fact by submitting evidence of a specific flaw in the product or circumstantial evidence that the product did not perform as intended, excluding all causes for the product's failure not attributable to the defendant, *Ramos v Howard Industries, Inc.*, supra; *Menear v Kwik Fill*, supra.

The availability of theories based on circumstantial proof is particularly important in cases where the product is unavailable for

inspection or has been so damaged that meaningful inspection is not feasible. In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must show that the product did not perform as intended and, further, must exclude all other causes for the product's failure that are not attributable to defendants. If a plaintiff is unable to prove both elements, a jury may not infer that the harm was caused by a defective product unless plaintiff offers competent evidence identifying a specific flaw, *Ramos v Howard Industries, Inc.*, 10 NY3d 218, 855 NYS2d 412, 885 NE2d 176 (2008); *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003); *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981); *Halloran v Virginia Chemicals Inc.*, 41 NY2d 386, 393 NYS2d 341, 361 NE2d 991 (1977); *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); *Shelden v Hample Equipment Co., Inc.*, 89 AD2d 766, 453 NYS2d 934 (3d Dept 1982), *aff'd*, 59 NY2d 618, 463 NYS2d 194, 449 NE2d 1272 (1983); *Saunders v Farm Fans, div. of ffi Corp.*, 24 AD3d 1173, 807 NYS2d 241 (4th Dept 2005); *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff'd*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959); *Coley v Michelin Tire Corp.*, 99 AD2d 795, 472 NYS2d 125 (2d Dept 1984).

In *Speller ex rel. Miller v Sears, Roebuck and Co.*, 100 NY2d 38, 760 NYS2d 79, 790 NE2d 252 (2003), the Court held that plaintiff carried the burden of coming forward with sufficient circumstantial evidence to show that a defect in a refrigerator caused a house fire. Although the manufacturer in *Spelling* submitted evidence of an alternative explanation for the fire, i.e., a stove top grease fire, plaintiff raised a triable question of fact by submitting expert affidavits concluding that the fire had originated in the refrigerator and not from the stove. In contrast, in *Ramos v Howard Industries, Inc.*, 10 NY3d 218, 855 NYS2d 412, 885 NE2d 176 (2008), summary judgment for defendant manufacturer was warranted where plaintiff failed to meet his burden of coming forward with evidence excluding the possible alternative causes for the transformer explosion that allegedly caused his injuries. The manufacturer in *Ramos* proffered evidence that its transformers were designed and manufactured under state-of-the-art conditions, that each unit was individually tested and that it was virtually impossible for a unit with an internal flaw to leave the plant. As to possible alternative causes for the explosion, the manufacturer submitted an expert affidavit positing that the transformer could have malfunctioned because it was improperly rewired or rebuilt after it left the manufacturer's plant. Plaintiff's expert's affidavit, which rejected defendant's expert's theories and asserted that the transformer had an internal electrical flaw, was speculative and therefore failed to exclude the alternative explanations that the manufacturer offered. The *Ramos* holding suggests that, where plaintiff's claim rests on circumstantial evidence, defendant manufacturer can preclude recovery by offering one or more hypothetical alternative causes that plaintiff is unable to refute with specific proof.

However, plaintiffs are not required to rule out all other possible

causes of injury-producing accidents when their claims are based on specific identified design and/or manufacturing defects, *Estate of Smalley v Harley-Davidson Motor Company Group LLC*, 170 AD3d 1549, 96 NYS3d 402 (4th Dept 2019); *Call v Banner Metals, Inc.*, 45 AD3d 1470, 846 NYS2d 827 (4th Dept 2007). Further, to defeat a manufacturer's motion for summary judgment, plaintiff need not conclusively establish that all causes but defective manufacture have been excluded, *Norton v Albany County Airport Authority*, 52 AD3d 871, 859 NYS2d 296 (3d Dept 2008). Rather, plaintiff is required only to establish the existence of a triable question of fact by offering competent evidence which, if credited by the jury, would be sufficient to rebut the manufacturer's alternative-cause evidence. The test for defeating summary judgment is whether a reasonable jury could conclude that plaintiff excluded all other causes of the accident, *id.* For example, evidence that sliding glass doors were inspected daily and were found to be functioning properly 90 minutes before and immediately after the occurrence was sufficient to enable a factfinder to exclude improper maintenance as a cause of the doors' malfunction, at least where there was a dearth of prior complaints of a similar malfunction and there was no direct evidence of improper maintenance, *id.*

In a case in which the proof of defect is circumstantial rather than direct, the following should be inserted after the third paragraph of the pattern charge:

PJI 2:120.1

The plaintiff must prove by a fair preponderance of the evidence that the [*state product*] was defective. In this case, the product itself was unavailable. To establish that the product was defective, plaintiff must prove two things: first, that the product did not perform as intended; second, that the circumstances surrounding the occurrence exclude all causes other than the product's failure. If these two elements have been established, the law permits, but does not require, you to infer from the happening of the occurrence that the product was defective.

If you find that there is some cause other than the claimed defect for the occurrence, or that there was no defect, you will find for defendant on this issue.

Caveat: This *res-ipsa* type charge should not be given where the evidence does not support the inference that the defect existed at the time the product left the manufacturer's hands, *Brandon v Caterpillar*

Tractor Corp., 125 AD2d 625, 510 NYS2d 165 (2d Dept 1986) (citing PJI).

Existence of the defect at the time the product left the hands of the manufacturer must be established by plaintiff as part of the prima facie case, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Steckal v Houghton Elevator Co., Inc.*, 59 NY2d 628, 463 NYS2d 186, 449 NE2d 1264 (1983); *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980); *Smolen v Grandview Dairy*, 301 NY 265, 93 NE2d 839 (1950); *Brandon v Caterpillar Tractor Corp.*, 125 AD2d 625, 510 NYS2d 165 (2d Dept 1986) (citing PJI); Restatement, Second, Torts § 402A, Comment g. That fact may be proved by circumstantial evidence, especially when the product was sealed, *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff'd*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959); *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 210 AD2d 899, 620 NYS2d 654 (4th Dept 1994); *Narciso v Ford Motor Co.*, 137 AD2d 508, 524 NYS2d 251 (2d Dept 1988). A long lapse of time between marketing of the product and occurrence of the mishap may create difficulty of proof, but does not bar liability, *Markel v Spencer*, *supra*.

If there is a fact question concerning whether the defect developed after the product left the hands of the manufacturer, the following should be charged:

PJI 2:120.2

If you find that the [*state product*] was defective, you must next decide whether the defect existed when the product left the hands of the defendant. The fact that the [*state product*] has been out of the defendant's hands and has been handled or used by other persons (including the plaintiff) does not prevent you from drawing the inference that the product was defective when it left the defendant's hands, if on all the evidence you find that to be a reasonable inference. If you find that the probability that someone else caused the defect is remote, then you may infer that the defect existed when the [*state product*] left the defendant's hands. If you do not find that the defect existed at the time the product left the defendant's hands, you will find for the defendant on this issue.

C. Evidentiary Considerations

Evidence that the manufacturer issued recall letters to owners of

the product is admissible to show the existence of the defect, *Iadicicco v Duffy*, 60 AD2d 905, 401 NYS2d 557 (2d Dept 1978); *Barry v Manglass*, 55 AD2d 1, 389 NYS2d 870 (2d Dept 1976). To minimize any prejudice, the jury should be instructed that such letters do not establish that the defect was present in the particular product, nor do they constitute an admission by the manufacturer that the particular product was defective, *Barry v Manglass*, *supra*. A "Product Safety Bulletin" suggesting that elevator owners replace a particular part with a newer one to minimize "vandalism and other abuse" was not a recall letter and, consequently, was not admissible, *Thomas v Westinghouse Elec. Corp.*, 180 AD2d 491, 579 NYS2d 397 (1st Dept 1992).

Evidence of post-manufacture modifications is also admissible on the question of the existence of a manufacturing defect, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984), as is expert testimony, *Blinn v Allied-Ford Corp.*, 24 AD2d 755, 264 NYS2d 1 (1st Dept 1965), *aff'd*, 30 AD2d 642, 291 NYS2d 759 (1st Dept 1968). *Caprara v Chrysler Corp.*, 52 NY2d 114, 436 NYS2d 251, 417 NE2d 545 (1981), approved modification evidence as tending to show (1) the nature of the manufacturing defect, (2) that the manufacturer recognized the defect, and (3) the probability that the defect caused the accident. However, before evidence of a design change is admissible in a manufacturing defect case, there must be some evidence of a manufacturing defect, *Perazone v Sears, Roebuck and Co.*, 128 AD2d 15, 515 NYS2d 908 (3d Dept 1987). For a more detailed discussion of the admissibility of post-manufacture modifications in design-defect cases, see Comment, *infra*.

II. Design Defect

Under New York law, a manufacturer has a duty to design a product so that it avoids an unreasonable risk of harm to anyone who is likely to be exposed to danger when the product is being used as intended. Additionally, a manufacturer has the duty to design its product so that it avoids an unreasonable risk of harm when it is being used for an unintended but foreseeable use, *Hoover v New Holland North America, Inc.*, 23 NY3d 41, 988 NYS2d 543, 11 NE3d 693 (2014); *Lugo by Lopez v LjN Toys, Ltd.*, 75 NY2d 850, 552 NYS2d 914, 552 NE2d 162 (1990); *Micallef v Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976). The analysis is somewhat different for certain products such as knives and guns, that, by their very nature, must be dangerous in order to be functional, see *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 727 NYS2d 7, 750 NE2d 1055 (2001); *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980). Indeed, a product's defect is related to its condition, not its intrinsic function, *Robinson v Reed-Prentice Division of Package Machinery Co.*, *supra*; *Forni v Ferguson*, 232 AD2d 176, 648 NYS2d 73 (1st Dept 1996). Thus, since the manufacture, sale and ownership of guns is legally permitted, plaintiffs must allege the existence of a legally cognizable defect in the condition of a gun or its parts to establish liability against the manufacturer, *Forni v Ferguson*, *supra*. The Court of Appeals has

refused to impose a duty of care on handgun manufacturers based on a negligent entrustment or negligent marketing theory in the absence of evidence that the manufacturer knows or has reason to know that distributors are engaging in substantial sales of guns into gun-trafficking markets on a consistent basis, *Hamilton v Beretta U.S.A. Corp.*, supra. Similarly, even though the lead pigment in lead-based interior paint is inherently dangerous to young children, the company that manufactured such pigment before its distribution was prohibited by New York City in 1960 cannot be held liable under a design-defect theory, since the pigments were not defective when made, the manufacturer did not have exclusive control of the risk in that it did not determine which and how much pigment to use in the paint and it did not control what action the homeowner or landlord took once the paint peeled and flaked, *Smith v 2328 University Ave. Corp.*, 52 AD3d 216, 859 NYS2d 71 (1st Dept 2008).

The Protection of Lawful Commerce in Arms Act, 15 USC § 7901 et seq, shields manufactures and sellers of certain firearms and ammunition from civil liability for damages resulting from the criminal or unlawful misuse of such products by third parties, *King v Klocek*, 187 AD3d 1614, 133 NYS3d 356 (4th Dept 2020). However, that statute specifically exempts, among other things, actions brought against sellers for negligent entrustment, 15 USC § 7903(5)(A)(ii), or where the manufacturer or seller knowingly violated a state or federal statute applicable to the sale or marketing of the product, 15 USC § 7903(5)(A)(iii), see *King v Klocek*, supra (retail seller of ammunition not entitled to dismissal where plaintiff alleged ammunition was sold in violation of law prohibiting sale to persons under 21 years of age).

A. General Principles

In a design defect case there is no claim that the unit that caused injury to the plaintiff is different from any other unit of the same model produced by the manufacturer. The claim is that an entire model line or a particular feature of an entire model line is defective, see *Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 523 NYS2d 418, 517 NE2d 1304 (1987).

Where design defect is alleged, the “not reasonably safe” standard set forth in the pattern charge requires, among others, balancing the alternative designs available against the existing risk while taking into account the cost of the proposed alternative, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); see *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011); *Sage v Fairchild-Swearingen Corp.*, 70 NY2d 579, 523 NYS2d 418, 517 NE2d 1304 (1987); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983) (citing PJI); *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980); *Micallef v Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976); *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955

NYS2d 63 (2d Dept 2012); *Banks v Makita, U.S.A., Inc.*, 226 AD2d 659, 641 NYS2d 875 (2d Dept 1996); *Doty v Navistar Intern. Transp. Corp.*, 219 AD2d 32, 639 NYS2d 592 (4th Dept 1996). “In balancing the risks inherent in the product, as designed, against its utility and cost, the jury may consider several factors Those factors may include the following: (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product—that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer’s ability to spread any cost related to improving the safety of the design,” *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011); *Voss v Black & Decker Mfg. Co.*, *supra* (citing PJI); see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Giunta v Delta Intern. Machinery*, 300 AD2d 350, 751 NYS2d 512 (2d Dept 2002) (citing PJI). The third and fourth factors may not be satisfied by a mere theoretical possibility that a safer product could be made, or even that a safer design had been suggested to defendant, *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010); *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012). However, it may suffice in a proper case to show that the alternative safer design had, in fact, been implemented and sold by another manufacturer, even without a further showing that the safer design was in common use or was required by existing industry standards, *Adams v Genie Industries, Inc.*, *supra*; see also *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012). While consumer expectations or awareness of a product’s dangers are a factor to consider, the fact that a risk presented by a product is open, obvious or generally known and thus within consumer expectations is not an independent basis for dismissing a design defect cause of action, *Tomasino v American Tobacco Co.*, 23 AD3d 546, 807 NYS2d 603 (2d Dept 2005); *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003) (citing Restatement, Third, Torts, Products Liability § 2, Comment g). Similarly, the adequacy of a product’s warnings, even when coupled with a user’s failure to read or follow the warnings, does not end the inquiry with respect to a defective design claim, *Yun Tung Chow v Reckitt & Colman, Inc.*, *supra*.

Evidence of a feasible alternative design may be used to establish a design defect, *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); see *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010). Evidence of alternative design is sufficient to present a question of fact for the jury, *id*; *Giunta v Delta Intern. Machinery*, 300 AD2d 350, 751 NYS2d 512 (2d Dept 2002) (citing PJI); *Doty v Navistar Intern. Transp. Corp.*, 219 AD2d 32, 639 NYS2d 592 (4th Dept 1996). However, to establish a *prima facie* case based on alternative design, plaintiff must also offer evidence that it was feasible to design the product in a safer manner and that the

proposed design would have prevented some of plaintiff's injuries, *Felix v Akzo Nobel Coatings Inc.*, 262 AD2d 447, 692 NYS2d 413 (2d Dept 1999) (quick-drying lacquer sealer was not defectively designed because volatile solvent in sealer was necessary to its performance); but see *Adams v Genie Industries, Inc.*, supra; see also *Samyn v Ariens Company*, 177 AD3d 917, 114 NYS3d 445 (2d Dept 2019) (issue of fact as to whether failure to include clean-out tool with snow thrower constituted design defect, given that defendant manufactured such tool and sold it separately from snow thrower as part of "safety kit"); *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012) (question of fact "as to whether the utility of the solvent-based sealer did not outweigh its inherent danger because particular water-based sealers, which were safer than the solvent-based sealer, were equally useful."); *Abar v Freightliner Corp.*, 208 AD2d 999, 617 NYS2d 209 (3d Dept 1994); *De Matteo v Big V Supermarkets Inc.*, 204 AD2d 932, 611 NYS2d 970 (3d Dept 1994); *Burgos v Lutz*, 128 AD2d 496, 512 NYS2d 424 (2d Dept 1987) (citing PJI). One consideration in assessing the feasibility of a proffered alternative design is the function of the product, see *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 872 NYS2d 415, 900 NE2d 966 (2008). Thus, the court in *Felix v Akzo Nobel Coatings*, supra, rejected a design defect claim that was based on the contention that quick drying lacquer sealer could have been made safer through the use of a less flammable solvent base, since the proposed "alternative design" would have greatly increased the drying time and therefore did not serve the same function. But see *Adams v Genie Industries, Inc.*, supra; see also *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012) (summary judgment denied where expert testimony proffered that despite the two to three hour drying time set forth on the labels, in his experience more recently developed water-based sealers dried in twenty minutes, the same amount of time as the solvent-based sealers). Similarly, in *Adamo v Brown & Williamson Tobacco Corp.*, supra, which involved a claim of negligent design, the Court considered the extent to which consumer acceptance of a proposed alternative product design affects the "feasibility" analysis. The issue in *Adamo* was whether ostensibly safer "light" cigarettes were a "feasible" alternative to regular cigarettes even though "large numbers" of consumers prefer the latter. In that context, the Court held that, because of the lack of consumer acceptance, the light cigarettes were not a "feasible" alternative. The *Adamo* Court stressed, however, that a showing of consumer acceptance is necessary only where, as in the case of cigarettes, the only function that the product has is to give pleasure to the consumer. In contrast, where the product has a practical function, such as cutting wood or molding plastic, a showing of customer acceptance of a safer alternative design is not required, *id.*, citing *Voss v Black & Decker Mfg. Co.*, supra; *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980).

If the court determines that plaintiff has presented a *prima facie* case, then the risk-utility factors are to be submitted to the jury "in some reasonably simple fashion," *Fallon v Clifford B. Hannay & Son*,

Inc., 153 AD2d 95, 550 NYS2d 135 (3d Dept 1989) (citing PJI); see *Giunta v Delta Intern. Machinery*, 300 AD2d 350, 751 NYS2d 512 (2d Dept 2002). Where a qualified expert has opined that the product is defective or dangerous, describes why it is dangerous, explains how it can be made safer and concludes that it is feasible to do so, it is usually for the jury to make the risk/utility analysis, *Wengenroth v Formula Equipment Leasing, Inc.*, 11 AD3d 677, 784 NYS2d 123 (2d Dept 2004); *Milazzo v Premium Technical Services Corp.*, 7 AD3d 586, 777 NYS2d 167 (2d Dept 2004). There may well be cases in which the facts presented on one or more of the factors should be marshaled for the jury so that the jury will more clearly understand what is involved in its decision whether the product was in fact “not reasonably safe,” see *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983).

A defendant seeking summary judgment dismissing plaintiff’s design defect claim, must demonstrate, through evidence in admissible form, that its product is reasonably safe for its intended use; that is, the utility of the product outweighs its inherent danger, *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011). Thus, a defendant moving for summary judgment in a defective design case must do more than state, in categorical language in an attorney’s affirmation, that its product is inherently dangerous and that its dangers are well known, *id.* A defendant establishes *prima facie* entitlement to summary judgment by establishing that the product was reasonably safe for its intended use, that is, the utility of the product outweighed its inherent danger, was cost-effective, and may be safely used when the warnings and instructions provided on the label are followed, *Andrade v T.C. Dunham Paint Co., Inc.*, 99 AD3d 834, 955 NYS2d 63 (2d Dept 2012). A defendant manufacturer meets its burden on summary judgment by establishing not only that its product was safe but that it complied with applicable industry standards, *Lyall v Justin Boot Company*, 194 AD3d 1237, 148 NYS3d 519 (3d Dept 2021) (manufacturer of logger boots established design conformed to industry standard, which does not require resistance to chainsaw cuts); *Pacy v Cowen Holdings, Inc.*, 148 AD3d 1747, 50 NYS3d 745 (4th Dept 2017); *Palmatier v Mr. Heater Corporation*, 159 AD3d 1084, 71 NYS3d 717 (3d Dept 2018).

There is no post-sale duty to recall or retrofit a product after a manufacturer discovers risks that were not known when the product was sold, *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010). In such situations, the seller’s obligation is limited to a duty to warn, *id.*; see *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984).

1. Prescription Drugs

The application of design-defect principles to prescription drugs, which are often unavoidably unsafe, presents special analytical

difficulties. The view of the Restatement, Second, Torts § 402A, Comment k is that so long as such drugs are properly prepared and proper warning is given, there should be no design-defect liability. While a majority of jurisdictions considering the issue have advocated applying Comment k on a limited case-by-case basis, the Court of Appeals has apparently adopted the minority view favoring broad application of Comment k, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); see also *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 423 NYS2d 95 (4th Dept 1979), *aff'd*, 52 NY2d 768, 436 NYS2d 614, 417 NE2d 1002 (1980). The Restatement, Third, Torts § 6(c) contains a modified version of Comment k under which a design-defect claim against a drug or medical-device manufacturer is available only “if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits would not prescribe the drug or medical device for any class of patients.” The New York courts have not yet addressed the applicability of this standard.

In *Bruesewitz v Wyeth LLC*, 131 SCt 1068 (2011), the Supreme Court concluded that the National Childhood Vaccine Injury Act of 1986 (42 USC § 300aa-22(b)(1)), which established a compulsory but non-binding no-fault compensation program for persons injured by vaccines, preempts state law design defect claims against vaccine manufacturers. In so concluding, the Court noted that Congress, in passing the Act, did not adopt the Comment k “unavoidable unsafe products” standard.

B. Availability of Optional Safety Equipment

In *Scarangella v Thomas Built Buses, Inc.*, 93 NY2d 655, 695 NYS2d 520, 717 NE2d 679 (1999), the Court of Appeals held that, where a manufacturer offers a product with an optional safety device that is not a required accessory, and the purchaser chooses not to obtain the safety device, the product is not defectively designed if the evidence and reasonable inferences therefrom show: (1) the buyer is thoroughly knowledgeable about the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer’s use of the product, see *Fasolas v Bobcat of New York, Inc.*, 33 NY3d 421, 104 NYS3d 550, 128 NE3d 627 (2019) (citing PJI). In such a case, the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability, *id*; *Scarangella v Thomas Built Buses, Inc.*, *supra*. In contrast, where one or more of these factors are not present, there is no justification for departing from the accepted rationale imposing strict liability upon the manufacturer because it is in the superior position to discover any design defects, *id*; see *Passante v Agway Consumer Products, Inc.*, 12 NY3d 372, 881 NYS2d 641, 909

NE2d 563 (2009); *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Campbell v International Truck and Engine Corp.*, 32 AD3d 1184, 822 NYS2d 188 (4th Dept 2006). In *Scarangella v Thomas Built Buses*, *supra*, the Court held that the manufacturer of a school bus cannot be held liable for a design defect where it offered an optional back-up alarm on its buses, which the purchaser did not choose to purchase. The Court observed that the buyer was a highly knowledgeable consumer aware that the back-up alarm was available and that, in the actual circumstances of the buyer's operation of the buses, the risk of harm from the absence of a back-up alarm was not substantial, see *Cordani v Thompson & Johnson Equipment Co., Inc.*, 16 AD3d 1002, 792 NYS2d 675 (3d Dept 2005) (applying *Scarangella* factors and reaching same result in case involving forklift sold without backup alarm, which was optional equipment that buyer elected not to purchase); *Sexton v Cincinnati Inc.*, 16 AD3d 1090, 792 NYS2d 264 (4th Dept 2005) (applying *Scarangella* factors and reaching same result in case involving press brake machine sold without safety device on foot switch; safety device was optional equipment that buyer elected not to purchase). In contrast, the Court held in *Passante v Agway Consumer Products, Inc.*, *supra*, that there were material issues of fact as to whether the second element of the *Scarangella* test was established where defendants failed to show that their equipment would normally be used in circumstances in which it was not unreasonably dangerous without the optional safety system that was available from the manufacturer. In that situation, the manufacturer and seller of the dock leveler were potentially liable under a design-defect theory, even though it was conceded that the purchaser was knowledgeable about dock levelers and knew that a safety device was available as an option, *id*; see *Mariani v Guardian Fences of WNY, Inc.*, 194 AD3d 1380, 148 NYS3d 571 (4th Dept 2021) (defendant truck sellers failed to eliminate triable issues of fact regarding first element of *Scarangella* test, where purchaser of the truck testified at deposition that he did not know that backup alarm was available as option).

In *Fasolas v Bobcat of New York, Inc.*, 33 NY3d 421, 104 NYS3d 550, 128 NE3d 627 (2019) (citing PJI), the Court of Appeals held that a product sold into a rental market is not categorically exempt from the *Scarangella* test. In that case, plaintiff's decedent died as a result of being crushed by a tree while operating a Bobcat loader that he rented from a rental center that rented equipment to a diverse clientele, which included both professionals and homeowners. The loader was not equipped with an optional "door kit," which would have enclosed the cab so as to protect the operator from airborne material. At trial, the plaintiff's expert opined that, without the door kit, the loader was defectively designed to be sold into the rental market, where it would be used by untrained consumers. The jury returned a verdict for the plaintiff. The Court of Appeals reversed and granted Bobcat a new trial, holding that it was error for the trial court to deny Bobcat's request to instruct the jury on the *Scarangella* exemption and, further, it was also error to instruct the jury on a modified version of PJI 2:120 that asked the jury to decide whether the loader was safe for use in the "rental market." The Court of Appeals found that "placement in the rental mar-

ket” was an improper characterization of the loader’s use under the third prong of the Scarangella test; rather, the loader’s contemplated use was to dig or move soil. Moreover, the nature of the market transaction that placed the product into the end-user’s hands (i.e., whether the end-user purchased or rented the product) is not a consideration for the jury in determining whether the product is reasonably safe for its intended or reasonably foreseeable purpose, *id.*

C. Manufacturers of Custom-Made Products

There are several Appellate Division decisions holding that when a product is manufactured in accordance with plans and specifications provided by the purchaser, the manufacturer is not liable for an injury caused by an alleged design defect in the product, unless the specifications are so patently defective that a manufacturer of ordinary prudence would be placed on notice that the product is dangerous and likely to cause injury, *Houlihan v Morrison Knudsen Corp.*, 2 AD3d 493, 768 NYS2d 495 (2d Dept 2003); *Santana v Seagrave Fire Apparatus Corp.*, 305 AD2d 395, 759 NYS2d 509 (2d Dept 2003); *West v Troy*, 231 AD2d 825, 647 NYS2d 63 (3d Dept 1996); see also *517 Union St. Associates LLC v Town Homes of Union Square LLC*, 176 AD3d 1350, 111 NYS3d 715 (3d Dept 2019); *Rechlin v Allweather Contractors*, 298 AD2d 907, 747 NYS2d 844 (4th Dept 2002); *Beckles v General Elec. Corp.*, 248 AD2d 575, 670 NYS2d 539 (2d Dept 1998). The Court of Appeals has noted that where a custom manufacturer simply executes the design specifications of its client and is not itself involved in the design process, courts of other jurisdictions are divided as to whether the manufacturer may be strictly liable for design defect, *Sprung v MTR Ravensburg Inc.*, 99 NY2d 468, 758 NYS2d 271, 788 NE2d 620 (2003) (citing *Moon v Winger Boss Co., Inc.*, 205 Neb 292, 287 NW2d 430 (1980) (no strict liability); *Michalko v Cooke Color and Chemical Corp.*, 91 NJ 386, 451 A2d 179 (1982) (strict liability)). The Court did not resolve the question in *Sprung* because there was an issue of fact with respect to the custom fabricator’s involvement in the design of the product.

D. Post-Sale Modifications

A manufacturer’s duty does not extend to designing a product that is impossible to abuse or one whose safety features may not be circumvented. Accordingly, modifications after the product has left the manufacturer’s hands that substantially alter the product may relieve the seller of liability if the alteration was a proximate cause of the injury, *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980) (destruction of key safety feature); see *Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 569 NYS2d 337, 571 NE2d 645 (1991) (in-ground installation of above-ground pool and surrounding pool with deck so as to obscure its depth transformed the pool’s configuration and created new potential danger not attributable to pool’s manufacturer); *Barnes v Pine Tree Machinery*, 261 AD2d 295, 691 NYS2d 398 (1st Dept 1999) (removal of safety guards installed by defendant); *Colonial Indem. Ins. Co. v*

NYNEX, 260 AD2d 833, 688 NYS2d 744 (3d Dept 1999) (third party replaced standard rubber cord with solid copper cable, which caused fire); *Ernest v S.M.S. Engineering, Inc.*, 223 AD2d 801, 635 NYS2d 799 (3d Dept 1996) (abrogated on other grounds by *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998)) (using tools to remove adjustable side arms and installing additional control panel that was not designed, manufactured or installed by defendant); *Gray v Navistar Intern. Corp.*, 218 AD2d 904, 630 NYS2d 596 (3d Dept 1995) (conversion of unfinished chassis-cab to dump truck without defendant's knowledge); *Paul v Ford Motor Co.*, 200 AD2d 724, 607 NYS2d 90 (2d Dept 1994) (modification of incomplete chassis-cab of truck to aircraft service truck); *Zuniga v Karl W. Schmidt & Associates, Inc.*, 208 AD2d 719, 617 NYS2d 502 (2d Dept 1994) (removal of safety guard from conveyor belt); *Wood v Peabody Intern. Corp.*, 187 AD2d 824, 589 NYS2d 960 (3d Dept 1992) (removal of safety lock on trailer). However, the removal by the user of a severely damaged safety guard did not absolve the manufacturer from liability where plaintiff demonstrated that the damage was the result of foreseeable misuse of the product, *Hoover v New Holland North America, Inc.*, 23 NY3d 41, 988 NYS2d 543, 11 NE3d 693 (2014). In that situation, there was a question of fact as to whether the safety guard in its original condition was itself reasonably safe; if not, the post-sale removal of the damaged safety guard could not be said to have rendered a "safe" product defective, *id.* The presence of an allegedly defectively designed safety device in Hoover was what distinguished that case from *Robinson v Reed-Prentice Division of Package Machinery Co.*, *supra*.

A manufacturer may be liable for failure to warn against foreseeable modifications that render the product unsafe, *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998). Similarly, where a machine is purposefully manufactured to permit its use without a safety device, a manufacturer may have at least a duty to warn of the consequences of using the machine when the safety devices have been removed, *LaPaglia v Sears Roebuck and Co., Inc.*, 143 AD2d 173, 531 NYS2d 623 (2d Dept 1988), or rendered inoperative, *Miller v Anetsberger Bros., Inc.*, 124 AD2d 1057, 508 NYS2d 954 (4th Dept 1986); see *Smith v Royce W. Day Co. Inc.*, 242 AD2d 394, 661 NYS2d 101 (3d Dept 1997). However, liability may not be imposed for failure to warn of post-sale modifications if a warning would have been superfluous, such as where the modification posed an open and obvious risk, where the injured party was fully aware of the hazard through general knowledge or common sense or where the injured person participated in the removal of a safety device having an obvious purpose, *Liriano v Hobart Corp.*, *supra*; see *Montufar v Shiva Automation Service*, 256 AD2d 607, 683 NYS2d 125 (2d Dept 1998) (question of fact whether manufacturer gave adequate warnings of danger after learning that plaintiff's employer intended to bypass safety feature). For a more detailed discussion of the manufacturer's duty to warn, see Comment, *infra*.

Post-sale modifications that are contemplated or foreseeable by the manufacturer do not absolve the manufacturer of responsibility. In

Lopez v Precision Papers, Inc., 67 NY2d 871, 501 NYS2d 798, 492 NE2d 1214 (1986), for example, the removal by plaintiff's employer of a safety guard attached to a forklift did not, as a matter of law, insulate the forklift manufacturer from liability. Given evidence that the guard was easily removable, that the forklift was more versatile without it, and that the forklift was purposefully manufactured to allow it to be used without the guard, a jury question was presented as to whether the forklift was reasonably safe for uses intended or reasonably anticipated by the manufacturer, *id*; see *Tuesca v Rando Mach. Corp.*, 226 AD2d 157, 640 NYS2d 106 (1st Dept 1996), *aff'd*, 89 NY2d 966, 655 NYS2d 884, 678 NE2d 497 (1997) (issue of fact raised whether machine was reasonably safe where defendant purposefully manufactured machine to permit use without safety plexiglass guard); *Smith v Royce W. Day Co. Inc.*, 242 AD2d 394, 661 NYS2d 101 (3d Dept 1997) (removable safety device); *Smith v Minster Mach. Co.*, 233 AD2d 892, 649 NYS2d 257 (4th Dept 1996) (power-press purposefully manufactured to permit use without key safety feature); see also *LaPaglia v Sears Roebuck and Co., Inc.*, 143 AD2d 173, 531 NYS2d 623 (2d Dept 1988).

Post-sale modifications that are not substantial or material do not insulate the manufacturer from liability for defective design. Disabling a safety device by making a slight change in its position without removing the safety device is not a material alteration, *Miller v Anetsberger Bros., Inc.*, 124 AD2d 1057, 508 NYS2d 954 (4th Dept 1986); see *Dickerson v George J. Meyer Mfg.*, 248 AD2d 970, 669 NYS2d 1001 (4th Dept 1998) (disabling safety device by taping over it is not material alteration).

E. Misuse of Product

A manufacturer who sells a defectively designed product is liable for injuries resulting from foreseeable misuses of the product as well as from the product's intended use, *Lugo by Lopez v LJN Toys, Ltd.*, 75 NY2d 850, 552 NYS2d 914, 552 NE2d 162 (1990); see *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). Misuse of a product which is so outrageous that there is no product defect, and, therefore, no liability at all should not be confused with a use of the product which was not intended but was reasonably foreseeable, see *Pfohl v Amax, Inc.*, 222 AD2d 1068, 635 NYS2d 880 (4th Dept 1995) (court dismissed plaintiffs' strict products liability action based on contamination of property from chemicals manufactured by defendants and leached from nearby hazardous waste dump because chemicals deposited at dump were not being used for purpose and in manner normally intended). In the latter case, plaintiff's recovery may be diminished in accordance with comparative fault principles, *Schafer v Standard Ry. Fusee Corp.*, 200 AD2d 564, 606 NYS2d 332 (2d Dept 1994); *Sheppard v Charles A. Smith Well Drilling and Water Systems*, 93 AD2d 474, 463 NYS2d 546 (3d Dept 1983); see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Craft v Mid Island Dept. Stores, Inc.*, 112 AD2d 969, 492 NYS2d 780 (2d Dept 1985).

It should be noted that, although many of the cases use the negligence concept of “foreseeability” in this context, the focus of analysis in a strict products case is whether the use to which the product was put by the consumer was abnormal, given the realities of actual use of the product by consumers generally, *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980). The difference may be clarified by example: to put metal objects in a food blender causing the glass to shatter and injure a third person is to use the blender for an unintended purpose, relieving the manufacturer of liability. The manufacturer of a motor vehicle, however, has a duty to design a vehicle that will minimize the aggravation of injury in the event of a collision because in actual use collisions occur frequently enough to be within the expected use of such a vehicle.

Generally, a plaintiff’s mishandling of a product alone is not enough to entitle a defendant to summary judgment dismissing a design defect claim, *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 (2011). Rather, summary judgment in a strict products liability case may be granted on the basis of the plaintiff’s conduct only when the plaintiff’s actions constituted the sole proximate cause of his or her injuries, *id.* This is because a product, even with adequate warnings, may be so dangerous, and its misuse may be so foreseeable, that a factfinder employing the required risk-utility analysis could conclude that the utility of the product did not outweigh the risk inherent in marketing it, *id.*

The dismantling of a product for purposes of salvaging scrap metal does not constitute a reasonably foreseeable use of the product, *Hockler v William Powell Co.*, 129 AD3d 463, 11 NYS3d 45 (1st Dept 2015). Therefore, a plaintiff cannot recover under strict products liability for exposure to asbestos in dismantling valves in order to salvage their scrap metal, *id.*

F. Statutory and Regulatory Considerations

Statutes sometimes set standards of product safety. Violation of such a statute should be treated in the same way that statutory violations are treated in a negligence case, see *Introductory Statement on Statutory Standard of Care* preceding PJI 225; see also *Feldman v CSX Transp., Inc.*, 31 AD3d 698, 821 NYS2d 85 (2d Dept 2006); *Restatement, Third, Torts § 4(a)* (citing *Martin v Herzog*, 228 NY 164, 126 NE 814 (1920)). The jury should be charged that if it finds that the statute has been violated, then as a matter of law the product was not reasonably safe.

Compliance with a federal safety standard constitutes some evidence of due care but does not by itself preclude the imposition of liability, *Lugo by Lopez v LjN Toys, Ltd.*, 146 AD2d 168, 539 NYS2d 922 (1st Dept 1989), *aff’d*, 75 NY2d 850, 552 NYS2d 914, 552 NE2d 162 (1990); *Palmatier v Mr. Heater Corporation*, 159 AD3d 1084, 71 NYS3d

717 (3d Dept 2018); *Mercogliano v Sears, Roebuck and Co.*, 303 AD2d 566, 756 NYS2d 472 (2d Dept 2003); *Feiner v Calvin Klein, Ltd.*, 157 AD2d 501, 549 NYS2d 692 (1st Dept 1990); *Stone v Sterling Drug, Inc.*, 111 AD2d 1017, 490 NYS2d 468 (3d Dept 1985); *Sherman v M. Lowenstein & Sons, Inc.*, 28 AD2d 922, 282 NYS2d 142 (2d Dept 1967); see Restatement, Third, Torts § 4(b). However, liability may not be imposed upon a manufacturer on a theory that has been preempted by federal law, *Medtronic, Inc. v Lohr*, 518 US 470, 116 SCt 2240 (1996); *Feldman v CSX Transp., Inc.*, 31 AD3d 698, 821 NYS2d 85 (2d Dept 2006) (Federal Safety Appliance Act, 49 USC § 20301 et seq. preempts state products liability claims based on design defect and failure to warn where plaintiff alleges failure to include safety appliances or instructions not required by Federal Railroad Administration statute and regulations, 49 CFR, part 231; however, state negligence claims based on noncompliance with federal standards not preempted); *Lopez v Hernandez*, 253 AD2d 414, 676 NYS2d 613 (2d Dept 1998) (infant's claims predicated upon theory of failure to warn preempted by Federal Hazardous Substances Act; but causes of action based on negligence, breach of express warranty and implied warranty, and strict products liability that are not premised on failure to warn or inadequate labeling not preempted); *Wallace v Parks Corp.*, 212 AD2d 132, 629 NYS2d 570 (4th Dept 1995) (Federal Hazardous Substance Act [FHSA], 15 USC § 1261 et seq., preempts claims based upon theory that defendant's labeling and packaging should have included additional, different or alternatively stated warnings from those required under FHSA; but claims based upon defective design and upon negligent testing, manufacturing and formulating not preempted); *McSorley v Philip Morris, Inc.*, 170 AD2d 440, 565 NYS2d 537 (2d Dept 1991) (cigarette warnings bar state tort claims).

The Federal National Traffic and Motor Vehicle Safety Act of 1966 preempts a state common-law tort action based on a failure to install an airbag, *Geier v American Honda Motor Co., Inc.*, 529 US 861, 120 SCt 1913, abrogating *Drattell v Toyota Motor Corp.*, 92 NY2d 35, 677 NYS2d 17, 699 NE2d 376 (1998), but neither the National Traffic and Motor Vehicle Safety Act of 1966 nor the relevant provisions of Federal Motor Vehicle Safety Standard 208 preempts an action based on a claim that special design-related circumstances inherent in defendant's vehicle necessitated installation of a different passenger restraint system, *Alami v Volkswagen of America, Inc.*, 10 AD3d 344, 780 NYS2d 638 (2d Dept 2004). *Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed, *Williamson v Mazda Motor of America, Inc.*, 131 SCt 1131 (2011); *Chevere v Hyundai Motor Co.*, 4 AD3d 226, 774 NYS2d 6 (1st Dept 2004). Thus, the provision of the Motor Vehicle Safety Standard 208 that affords auto manufacturers the choice of installing either lap belts or lap and shoulder belts on rear inner seats, does not preempt state law claims that, if successful, would deny manufacturers the choice of belts for rear inner seats, *Williamson v Mazda Motor of America, Inc.*, *supra* (distinguishing *Geier* on basis that choice among different kinds of passive restraint devices was a significant objective of federal regulation at issue in *Geier*, whereas choice

between competing belts was not significant objective of federal regulation in Williamson). Moreover, Geier precludes actions alleging a general failure to equip a vehicle properly, but does not preclude common-law claims premised on state law against a manufacturer who has unreasonably opted to meet only minimum performance requirements, *Chevere v Hyundai Motor Co.*, *supra*.

The Flammable Fabrics Act of 1953 (15 USC §§ 1191–1204), which prohibits the sale and distribution of fabrics intended for use in clothing that does not comply with the threshold standards contained in the Act, preempts inconsistent statutes, but does not preempt a state common-law action, *Perez v Mini-Max Stores, Inc.*, 231 AD2d 162, 661 NYS2d 659 (2d Dept 1997); see *Palmatier v Mr. Heater Corporation*, 159 AD3d 1084, 71 NYS3d 717 (3d Dept 2018); *Mercogliano v Sears, Roebuck and Co.*, 303 AD2d 566, 756 NYS2d 472 (2d Dept 2003); *Pack by Soja v E.R.O. Industries, Inc.*, 248 AD2d 1009, 669 NYS2d 995 (4th Dept 1998). Claims concerning the design and manufacture of a pacemaker lead that are based in negligence, strict products liability and breach of warranty are not preempted by federal law merely because the device has undergone the pre-market notification procedure required by the Food and Drug Administration, *Medtronic, Inc. v Lohr*, 518 US 470, 116 S Ct 2240 (1996); *Romano v Medtronic, Inc.*, 233 AD2d 258, 650 NYS2d 544 (1st Dept 1996). However, federal regulations promulgated under the Medical Device Amendments to the Food, Drug and Cosmetic Act governing Class III medical devices that have undergone full pre-market approval review, see 21 USC §§ 360c(a)(1)(c), 360k(a); 21 CFR § 814.44(e, f), preempt New York common-law claims based on negligence, strict liability and implied warranty, as long as the New York claims seek to impose requirements that are different from, or in addition to, any requirement applicable to the device under federal law, *Riegel v Medtronic, Inc.*, 552 US 312, 128 S Ct 999 (2008) (Medical Device Amendment of 1976, 21 U.S.C. § 360k(a)); see also *Diaz v Little Remedies Co., Inc.*, 81 AD3d 1419, 918 NYS2d 281 (4th Dept 2011) (21 USC § 379r(a)(2), preempting a State from establishing a requirement “that is different from or in addition to, or that is otherwise not identical with, a requirement under the Poison Prevention Packaging Act of 1970 [15 USC § 1471 et seq.] or the Fair Packaging and Labeling Act [15 USC § 1451 et seq.]”). The National Childhood Vaccine Injury Act, 42 USC § 300aa-1 et seq., which establishes a no-fault compensation program for individuals injured as a result of routine childhood vaccines, preempts all design-defect claims for vaccines covered by the Act, *Bruesewitz v Wyeth LLC*, 131 S Ct 1068 (2011).

Regulations promulgated by the Occupational Safety and Health Administration (OSHA) govern only employer-employee relationships and are not applicable to strict products liability actions by employees against manufacturers, *Jemmott v Rockwell Mfg. Co., Power Tools Div.*, 216 AD2d 444, 628 NYS2d 184 (2d Dept 1995).

G. Evidentiary Considerations

A federal safety standard promulgated after the product has been

delivered is not admissible to prove a defect in the product, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984). In a design defect case, evidence of post-manufacture modification of the product by the manufacturer is not generally admissible to prove the defect, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Camillo v Geer*, 185 AD2d 192, 587 NYS2d 306 (1st Dept 1992); *Bolm v Triumph Corp.*, 71 AD2d 429, 422 NYS2d 969 (4th Dept 1979), but is admissible for other purposes, such as to prove feasibility of using a different design or warnings, *Cover v Cohen*, *supra*; *Rainbow v Albert Elia Bldg. Co., Inc.*, 79 AD2d 287, 436 NYS2d 480 (4th Dept 1981), *aff'd* for reasons in AD opinion, 56 NY2d 550, 449 NYS2d 967, 434 NE2d 1345 (1982); *Doty v Navistar Intern. Transp. Corp.*, 219 AD2d 32, 639 NYS2d 592 (4th Dept 1996); *Bartlett by Bartlett v General Elec. Co.*, 90 AD2d 183, 457 NYS2d 628 (3d Dept 1982); *Opera v Hyva, Inc.*, 86 AD2d 373, 450 NYS2d 615 (4th Dept 1982), unless feasibility is conceded, *Cover v Cohen*, *supra*; *Demirovski v Skil Corp.*, 203 AD2d 319, 610 NYS2d 551 (2d Dept 1994). When such evidence is offered to show feasibility, the plaintiff must also offer evidence that the design changes were within the state of the art at the time of manufacture, *Baleno by Baleno v Jacuzzi Research, Inc.*, 93 AD2d 982, 461 NYS2d 659 (4th Dept 1983); see also *Bartlett by Bartlett v General Elec. Co.*, 90 AD2d 183, 457 NYS2d 628 (3d Dept 1982) (design changes made after product's manufacture admissible where technology to make change existed at time of manufacture); see generally *Terry v Erie Foundry Co.*, 235 AD2d 414, 652 NYS2d 308 (2d Dept 1997). Because such evidence can be highly prejudicial, its relevance should be evaluated prior to admission and outside of the jury's presence. Further, if the court decides to admit the evidence, it should give a tailored limiting instruction, *Cover v Cohen*, *supra*.

On a motion for summary judgment, defendant may meet its initial burden by showing that the product was "state of the art" at the time of its design and manufacture and complied with all applicable industry standards, *Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 783 NYS2d 439 (4th Dept 2004); see *Lombard v Centrico, Inc.*, 161 AD2d 1071, 557 NYS2d 627 (3d Dept 1990).

III. Inadequate Warnings and Instructions

Failure to warn about the dangers attendant upon the use of a product may make a product defective, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Torrogrossa v Towmotor Co.*, 44 NY2d 709, 405 NYS2d 448, 376 NE2d 920 (1978); see *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992); *Bukowski v CooperVision Inc.*, 185 AD2d 31, 592 NYS2d 807 (3d Dept 1993). Liability may be imposed based upon either the complete failure to warn of a particular hazard or the inclusion of warnings that are insufficient, *German v Morales*, 24 AD3d 246, 806 NYS2d 493 (1st Dept 2005); *Bukowski v CooperVision Inc.*, *supra*; *Johnson v Johnson Chemical Co., Inc.*, 183

AD2d 64, 588 NYS2d 607 (2d Dept 1992); see *Passante v Agway Consumer Products, Inc.*, 12 NY3d 372, 881 NYS2d 641, 909 NE2d 563 (2009).

A. General Principles

The manufacturer's duty extends to warning consumers of latent dangers resulting from the foreseeable use of its product of which the manufacturer knew or should have known, even if the particular use is an unintended one, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992); *Samyn v Ariens Company*, 177 AD3d 917, 114 NYS3d 445 (2d Dept 2019); *Polimeni v Minolta Corp.*, 227 AD2d 64, 653 NYS2d 429 (3d Dept 1997); *Bukowski v CooperVision Inc.*, 185 AD2d 31, 592 NYS2d 807 (3d Dept 1993); *Oliver v NAMCO Controls*, 161 AD2d 1188, 556 NYS2d 430 (4th Dept 1990).

The duty to warn of dangers in the use of the product exists even though the product is perfectly designed and made, *Genesee County Patrons Fire Relief Ass'n v L. Sonneborn Sons*, 263 NY 463, 189 NE 551 (1934); *Rosebrock v General Electric Co.*, 236 NY 227, 140 NE 571 (1923); *Alfieri v Cabot Corp.*, 17 AD2d 455, 235 NYS2d 753 (1st Dept 1962), *aff'd*, 13 NY2d 1027, 245 NYS2d 600, 195 NE2d 310 (1963). The manufacturer is under a duty to ascertain the nature of its product and is presumed to have superior knowledge of it, *Noone v Fred Perlberg, Inc.*, 268 App Div 149, 49 NYS2d 460 (1st Dept 1944), *aff'd*, 294 NY 680, 60 NE2d 839 (1945). Thus, evidence that defendant distributor had not tested or investigated the safety of its asbestos containing dental liners was sufficient to permit the jury to conclude that the distributor had failed to adequately warn potential users of the danger, *Penn v Amchem Products*, 73 AD3d 493, 903 NYS2d 1 (1st Dept 2010).

The manufacturer is required to keep abreast of developments in the state of the art, through research, accident or other reports, scientific literature, and other available methods and may be held liable for failure to warn of dangers and risks which come to its attention following user operation of the product, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984) (citing PJI); *Andre v Mecta Corp.*, 186 AD2d 1, 587 NYS2d 334 (1st Dept 1992); see *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); *Nemeth v Brenntag North America*, 183 AD3d 211, 123 NYS3d 12 (1st Dept 2020) (citing PJI) (court properly instructed jury that distributor of minerals and pigments, including talc, was held to knowledge of an expert in its field); see also *Young v Robertshaw Controls Co.*, 104 AD2d 84, 481 NYS2d 891 (3d Dept 1984) (deliberate concealment of known danger). Even though no warning was required at the time of sale, if facts thereafter come to the manufacturer's attention indicative of defects in design or the necessity for warning, the manufacturer is under a duty either to remedy the defects or, if a

complete remedy is not feasible, at least to give adequate warnings and instructions concerning the methods for minimizing the danger to purchasers of the product and not merely to the dealers through whom the product was sold, *Cover v Cohen*, supra; *Baker v St. Agnes Hospital*, 70 AD2d 400, 421 NYS2d 81 (2d Dept 1979). The post-sale duty of a manufacturer to warn involves the weighing of a number of factors, including the degree of danger that the problem involves, the number of the reported instances, the burden of providing the warning, and the burden and/or ability to track a product post-sale, *Cover v Cohen*, supra; see *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Vincenty v Cincinnati Inc.*, 25 AD3d 463, 807 NYS2d 92 (1st Dept 2006).

An independent contractor hired to correct a specific problem in an elevator has no duty to warn the building owner of defects unrelated to the problem it was hired to correct, *McMurray v P.S. Elevator, Inc.*, 224 AD2d 668, 638 NYS2d 720 (2d Dept 1996); *Vergara v Scripps Howard, Inc.*, 261 AD2d 302, 691 NYS2d 392 (1st Dept 1999). Similarly, in the absence of a contract requiring a repairer to provide routine or systematic maintenance of a product, the repairer has no duty, as an independent contractor, to warn of any purported design defects in the product, *Dauernheim v Lendlease Cars, Inc.*, 238 AD2d 462, 656 NYS2d 671 (2d Dept 1997) (issue of fact as to whether repairer and lessor owed duty to warn vehicle lessee of alleged defect by virtue of ongoing business relationship between repairer and lessor); *Ayala v V & O Press Co.*, 126 AD2d 229, 512 NYS2d 704 (2d Dept 1987); see *Plank v UIS, Inc.*, 186 AD2d 1039, 588 NYS2d 473 (4th Dept 1992) (modifications).

The duty to warn extends to foreseeable users of the product, *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962); *Beckhusen v E. P. Lawson Co.*, 9 NY2d 726, 214 NYS2d 342, 174 NE2d 327 (1961); *Howard Stores Corp. v Pope*, 1 NY2d 110, 150 NYS2d 792, 134 NE2d 63 (1956); *Oliver v NAMCO Controls*, 161 AD2d 1188, 556 NYS2d 430 (4th Dept 1990); *Young v Elmira Transit Mix, Inc.*, 52 AD2d 202, 383 NYS2d 729 (4th Dept 1976). Thus, the duty to warn extends to the original or ultimate purchasers of the product, to employees of those purchasers, and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016). The duty rests on foreseeability based on the manufacturer's knowledge or notice of danger, *Rosebrock v General Electric Co.*, 236 NY 227, 140 NE 571 (1923); see *McLaughlin v Mine Safety Appliances Co.*, supra; *Noone v Fred Perlberg, Inc.*, 268 App Div 149, 49 NYS2d 460 (1st Dept 1944), aff'd, 294 NY 680, 60 NE2d 839 (1945); *Sider v General Electric Co.*, 203 App Div 443, 197 NYS 98 (4th Dept 1922), aff'd, 238 NY 64, 143 NE 792 (1924); *Kelly v Academy Broadway Corp.*, 206 AD2d 794, 615 NYS2d 123 (3d Dept 1994), and includes an obligation to warn of design dangers that may result from deterioration of a part if the user would otherwise be unaware of the danger, *Beckhusen v E. P. Lawson Co.*, supra.

B. Causation

The absence of warnings must be a proximate cause of plaintiff's

injuries such that, if adequate warnings had been provided, the injury would not have occurred, *Howard v Poseidon Pools, Inc.*, 72 NY2d 972, 534 NYS2d 360, 530 NE2d 1280 (1988); *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986); *Haggerty v Wyeth Ayerst Pharmaceuticals*, 11 AD3d 511, 782 NYS2d 842 (2d Dept 2004); *Mayorga v Reed-Prentice Packaging Machinery Co.*, 238 AD2d 483, 656 NYS2d 652 (2d Dept 1997); *Banks v Makita, U.S.A., Inc.*, 226 AD2d 659, 641 NYS2d 875 (2d Dept 1996); *Johnson v Johnson Chemical Co., Inc.*, 183 AD2d 64, 588 NYS2d 607 (2d Dept 1992); *Petrie v B.F. Goodrich Co.*, 175 AD2d 669, 572 NYS2d 595 (4th Dept 1991). The plaintiff's burden of proving proximate causation includes the burden of demonstrating that he or she would have heeded the warnings, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016); see *Palmatier v Mr. Heater Corporation*, 159 AD3d 1084, 71 NYS3d 717 (3d Dept 2018). Negligence of the purchaser or user in failing to inspect and discover the danger does not necessarily constitute an intervening or superseding cause insulating the manufacturer from liability to third persons, *Rosebrock v General Electric Co.*, 236 NY 227, 140 NE 571 (1923); *Sider v General Electric Co.*, 203 App Div 443, 197 NYS 98 (4th Dept 1922), *aff'd*, 238 NY 64, 143 NE 792 (1924).

There are two potential causation issues in failure to warn cases: (1) whether the failure to warn caused plaintiff to use the product in a way that he or she would not have if there had been an adequate warning and (2) whether the manner in which the plaintiff used the product caused the injury. It is the first of these issues that has occasioned considerable discussion in the case law.

1. *Open and Obvious Dangers*

A person need not be warned of a limited class of hazards that are patently dangerous or pose open and obvious risks, *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998); *Palmatier v Mr. Heater Corporation*, 159 AD3d 1084, 71 NYS3d 717 (3d Dept 2018); *Lonigro v TDC Electronics, Inc.*, 215 AD2d 534, 627 NYS2d 695 (2d Dept 1995); *Lancaster Silo & Block Co. v Northern Propane Gas Co.*, 75 AD2d 55, 427 NYS2d 1009 (4th Dept 1980); see *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982); *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 423 NYS2d 95 (4th Dept 1979), *aff'd*, 52 NY2d 768, 436 NYS2d 614, 417 NE2d 1002 (1980) (physician following course of self-treatment); *Barclay v Techno-Design, Inc.*, 129 AD3d 1177, 10 NYS3d 665 (3d Dept 2015); *Secone v Raymond Corp.*, 240 AD2d 391, 658 NYS2d 1021 (2d Dept 1997); *Banks v Makita, U.S.A., Inc.*, 226 AD2d 659, 641 NYS2d 875 (2d Dept 1996); *DePasquale v Morbark Industries, Inc.*, 221 AD2d 409, 633 NYS2d 543 (2d Dept 1995) (obvious danger of injury if one's leg were to come in contact with feed wheels on wood chipping machine was obvious); *Von Bartheld v Marathon Organization, Inc.*, 190 AD2d 667, 593 NYS2d 290 (2d Dept 1993) (where cursory visual inspection would have revealed that pool into which plaintiff dove was above ground and merely four feet deep, there is no

duty to warn plaintiff of obvious dangers involved in diving into such pool); *Oza v Sinatra*, 176 AD2d 926, 575 NYS2d 540 (2d Dept 1991); *Cramer v Toledo Scale Co., Inc.*, 158 AD2d 966, 551 NYS2d 718 (4th Dept 1990); *Caris v Mele*, 134 AD2d 475, 521 NYS2d 260 (2d Dept 1987); *Gordon v Goldman Bros., Inc.*, 130 AD2d 457, 515 NYS2d 39 (2d Dept 1987) (manufacturer of common variety of work boots owed no duty to warn of dangers in using boots in rock climbing); *Belling v Haugh's Pools, Ltd.*, 126 AD2d 958, 511 NYS2d 732 (4th Dept 1987); *Landrine v Mego Corp.*, 95 AD2d 759, 464 NYS2d 516 (1st Dept 1983); see also *Wood v Peabody Intern. Corp.*, 187 AD2d 824, 589 NYS2d 960 (3d Dept 1992). Further, the absence of an adequate warning will not lead to liability where the injured party was fully aware of the hazard through general knowledge, observation or common sense, or participated in the removal of a safety device whose purpose was obvious, *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986); *Fredette v Southampton*, 95 AD3d 940, 944 NYS2d 206 (2d Dept 2012); *Vergara v Scripps Howard, Inc.*, 261 AD2d 302, 691 NYS2d 392 (1st Dept 1999); *Barnes v Pine Tree Machinery*, 261 AD2d 295, 691 NYS2d 398 (1st Dept 1999); *Schiller v National Presto Industries, Inc.*, 225 AD2d 1053, 639 NYS2d 217 (4th Dept 1996).

Thus, where an experienced swimmer, familiar with the conditions of a swimming pool, chose to dive recklessly into shallow water, the resulting injuries were not, as a matter of law, proximately caused by the failure to warn of the dangers of such activity, *Howard v Poseidon Pools, Inc.*, 72 NY2d 972, 534 NYS2d 360, 530 NE2d 1280 (1988); *Magnus v Fawcett*, 224 AD2d 241, 637 NYS2d 707 (1st Dept 1996); *Smith v Stark*, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 (1986); see *Martinez v New York*, 276 AD2d 756, 715 NYS2d 167 (2d Dept 2000) (slippery condition at edge).

The open-and-obvious defense generally does not apply when there are aspects of the hazards that are concealed or not reasonably apparent to the user, *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998). Whether the condition was sufficiently open and obvious as not to require a warning may be an issue for the jury, see *Smith v Minster Mach. Co.*, 233 AD2d 892, 649 NYS2d 257 (4th Dept 1996); *Trivino v Jamesway Corp.*, 148 AD2d 851, 539 NYS2d 123 (3d Dept 1989); see also *Heller v Encore of Hicksville, Inc.*, 53 NY2d 716, 439 NYS2d 332, 421 NE2d 824 (1981); *Travelers Ins. Co. v Federal Pacific Elec. Co.*, 211 AD2d 40, 625 NYS2d 121 (1st Dept 1995); but see *Doty v Navistar Intern. Transp. Corp.*, 219 AD2d 32, 639 NYS2d 592 (4th Dept 1996) (as a matter of law, danger that slowly revolving auger with protruding screws would ensnare nearby clothing not readily discernible by 9-year-old).

2. *Knowledgeable Users*

A failure to give adequate warnings may not lead to liability where the person who would benefit from the warning is already aware of the hazard, *Palmatier v Mr. Heater Corporation*, 159 AD3d 1084, 71 NYS3d

717 (3d Dept 2018); *Barclay v Techno-Design, Inc.*, 129 AD3d 1177, 10 NYS3d 665 (3d Dept 2015); *Public Adm'r of Bronx County v 485 East 188th Street Realty Corp.*, 116 AD3d 1, 981 NYS2d 381 (1st Dept 2014); *Fredette v Southampton*, 95 AD3d 940, 944 NYS2d 206 (2d Dept 2012); *Hall v Husky Farm Equipment, Ltd.*, 92 AD3d 1188, 939 NYS2d 604 (3d Dept 2012); *Steuhl v Home Therapy Equipment, Inc.*, 51 AD3d 1101, 857 NYS2d 335 (3d Dept 2008); *Travelers Ins. Co. v Federal Pacific Elec. Co.*, 211 AD2d 40, 625 NYS2d 121 (1st Dept 1995); *Lombard v Centrico, Inc.*, 161 AD2d 1071, 557 NYS2d 627 (3d Dept 1990); see *Rickicki v Borden Chemical, Division of Borden, Inc.*, 159 AD3d 1457, 72 NYS3d 302 (4th Dept 2018). Thus, where the assembler of a hospital bed testified that he had been trained in the assembly of the bed by defendant manufacturer, had been assembling such beds for five years and knew about the importance of installing the clevis pin and hitch pin properly, any failure by defendant to warn of the dangers of incorrect installation of such pins was not a proximate cause of any injuries resulting from faulty installation, *Steuhl v Home Therapy Equipment, Inc.*, *supra*.

While the question whether the duty to warn can be one for the court in a proper case, *Barclay v Techno-Design, Inc.*, 129 AD3d 1177, 10 NYS3d 665 (3d Dept 2015) (summary judgment), in most cases whether a party is a knowledgeable user is a question of fact for the jury, *Public Adm'r of Bronx County v 485 East 188th Street Realty Corp.*, 116 AD3d 1, 981 NYS2d 381 (1st Dept 2014). Furthermore, even if a user has some degree of knowledge of the potential hazards of a particular product, a failure to warn claim should not be dismissed as a matter of law where reasonable minds can differ about the extent of the claimant's knowledge, *id.* Thus, the facts that an injured person had used the product before and had been told by his employer that the product was flammable and required certain safety precautions were not sufficient to justify summary judgment where there was no evidence that the injured person knew the specific properties of the product or knew of the regulations prohibiting its indoor use in New York City, *id.*

3. User's Failure to Read Warnings

The manufacturer's failure to warn of a risk or an unsafe condition may not have been a substantial cause of plaintiff's injury if plaintiff admitted that he or she did not read the product's warnings, was not looking for warnings and customarily did not do so, see *Sosna v American Home Products*, 298 AD2d 158, 748 NYS2d 548 (1st Dept 2002); *Guadalupe v Dracket Products Co.*, 253 AD2d 378, 676 NYS2d 177 (1st Dept 1998); *Rodriguez v Davis Equipment Corp.*, 235 AD2d 222, 651 NYS2d 528 (1st Dept 1997); see also *Estrada v Berkel Inc.*, 14 AD3d 529, 789 NYS2d 172 (2d Dept 2005) (failure to warn not substantial cause of injuries sustained by two-year-old child who placed hand in restaurant meat grinder, since child could not read).

However, the injured plaintiff's failure to read a warning label may not preclude the manufacturer's liability where there is a claim that the

manufacturer could have used a more conspicuous or otherwise more effective method of conveying its warning, *Vail v KMart Corp.*, 25 AD3d 549, 807 NYS2d 399 (2d Dept 2006); *German v Morales*, 24 AD3d 246, 806 NYS2d 493 (1st Dept 2005); *Johnson v Johnson Chemical Co., Inc.*, 183 AD2d 64, 588 NYS2d 607 (2d Dept 1992). In such instances, the reasonableness of the plaintiff's actions is a question for the trier of fact, *Johnson v Johnson Chemical Co., Inc.*, *supra*.

C. Adequacy of Warnings

In all but the most unusual of circumstances the adequacy of a warning is a question of fact, *Montufar v Shiva Automation Service*, 256 AD2d 607, 683 NYS2d 125 (2d Dept 1998); *DiMura v Albany*, 239 AD2d 828, 657 NYS2d 844 (3d Dept 1997); see *Samyn v Ariens Company*, 177 AD3d 917, 114 NYS3d 445 (2d Dept 2019). Whether a warning is adequate as a matter of law or presents a factual question for resolution by a jury requires a careful analysis of the warning's language, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); *McDonnell v Chelsea Mfrs., Inc.*, 259 AD2d 674, 687 NYS2d 172 (2d Dept 1999); *Doty v Navistar Intern. Transp. Corp.*, 219 AD2d 32, 639 NYS2d 592 (4th Dept 1996); *Johnson v Johnson Chemical Co., Inc.*, 183 AD2d 64, 588 NYS2d 607 (2d Dept 1992); *Frederick v Niagara Mach. & Tool Works*, 107 AD2d 1063, 486 NYS2d 564 (4th Dept 1985).

A warning must be commensurate with the risk involved in the ordinary use of the product, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993). Analysis of the adequacy of a warning starts with ascertainment of the seriousness of the risk, i.e., the side effects of the product, *Martin v Hacker*, *supra*; *Forte v Weiner*, 200 AD2d 421, 606 NYS2d 220 (1st Dept 1994). Accordingly, the adequacy of warnings must be evaluated in light of the most serious potential consequence, *Martin v Hacker*, *supra*. The nature of the warning and the persons to whom it should be given depends on a variety of factors, including the harm that may result absent a warning, the reliability and adverse interest of the person to be warned, the kind of product involved, and the burden in disseminating the warning, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Frederick v Niagara Mach. & Tool Works*, 107 AD2d 1063, 486 NYS2d 564 (4th Dept 1985); see *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993) (warning placed on drug package not diluted by language in an entirely different section stating that some "adverse reactions" "usually disappear" where warning is addressed to physicians). Once the general level of risk is established, the court should evaluate the warning's language for its accuracy, clarity, and relative consistency, *Martin v Hacker*, *supra*. For a warning to be accurate, it must be correct, fully descriptive and complete, and it must convey updated information as to all of the product's dangers, *id*.

Inadequate directions for use may give rise to liability, *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962) (misleading package labeling and instructions); *Cooley v*

Carter-Wallace Inc., 102 AD2d 642, 478 NYS2d 375 (4th Dept 1984). Thus, where the manufacturer knows or should know that the product is likely to deteriorate with the passage of time, it has a duty to label the product to indicate the date of manufacture and the time during which the ingredients may safely be used or the manner in which they should be kept in order to prevent deterioration, *Rosenbusch v Ambrosia Milk Corp.*, 181 App Div 97, 168 NYS 505 (1st Dept 1917). The directions given, whether by label or otherwise, must not be misleading, *Alfieri v Cabot Corp.*, 17 AD2d 455, 235 NYS2d 753 (1st Dept 1962), *aff'd*, 13 NY2d 1027, 245 NYS2d 600, 195 NE2d 310 (1963); *Crist v Art Metal Works*, 230 App Div 114, 243 NYS 496 (1st Dept 1930), *aff'd*, 255 NY 624, 175 NE 341 (1931).

The warning must be considered as a whole, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993), and evaluated in the light of its meaning to a reasonably prudent person, *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962). Thus, a warning against a specific danger may be construed as an assurance of safety in other respects, *Crist v Art Metal Works*, 230 App Div 114, 243 NYS 496 (1st Dept 1930), *aff'd*, 255 NY 624, 175 NE 341 (1931); *Henry v Crook*, 202 App Div 19, 195 NYS 642 (3d Dept 1922); see *Haberly v Reardon Co.*, 319 SW2d 859 (Mo 1958) (decided under New York law).

The size of type in which a warning is printed may make the warning inadequate, *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 226 NYS2d 407, 181 NE2d 430 (1962). The placement of a warning upon the container rather than the product may also play a part in whether the product is reasonably safe, particularly if the manufacturer should reasonably foresee that the original purchaser may not have the means or opportunity of warning third persons who may be subject to danger from the product, *McLaughlin v Mine Safety Appliances Co.*, *supra*. If, in normal use, the product may be expected to fall into the hands of a third person without its cover or container, the warning may have to be embossed on the product itself rather than be placed on or in the container, *McLaughlin v Mine Safety Appliances Co.*, *supra*; see *Tucci v Bossert*, 53 AD2d 291, 385 NYS2d 328 (2d Dept 1976).

D. Duty to Warn of Post-Sale Modifications or Use With Other Products

A manufacturer is not responsible for injuries resulting from substantial or unforeseeable alterations or modifications of a product by a third party that render the product defective or unsafe. *Robinson v Reed-Prentice Division of Package Machinery Co.*, 49 NY2d 471, 426 NYS2d 717, 403 NE2d 440 (1980). However, liability may exist under a failure-to-warn theory in such circumstances, *Liriano v Hobart Corp.*, 92 NY2d 232, 677 NYS2d 764, 700 NE2d 303 (1998). In *Liriano*, the court recognized that, although it is virtually impossible to design a product to prevent all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to

warn of the dangers of foreseeable modifications that pose a risk of injury. Thus, where a safety device may be easily removed or avoided by a slight change in its position, the duty to warn includes the duty to warn of the danger inherent in bypassing or removing the safety device, *Miller v Anetsberger Bros., Inc.*, 124 AD2d 1057, 508 NYS2d 954 (4th Dept 1986); see *Smith v Royce W. Day Co. Inc.*, 242 AD2d 394, 661 NYS2d 101 (3d Dept 1997).

If a subsequent modification is not foreseeable, however, there is no duty to warn, *Vergara v Scripps Howard, Inc.*, 261 AD2d 302, 691 NYS2d 392 (1st Dept 1999); see *LaPaglia v Sears Roebuck and Co., Inc.*, 143 AD2d 173, 531 NYS2d 623 (2d Dept 1988). In *Vergara*, the subsequent unsafe modification was not foreseeable because the safety device was welded onto the machine and required substantial effort to remove. Under those circumstances, a duty to warn could only be premised on the manufacturer's subsequent discovery of the dangerous alteration.

Where the foreseeable combination of one sound product with another sound product creates a dangerous condition, the manufacturer of each product may owe a duty to warn consumers of the dangers, see *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 582 NYS2d 373, 591 NE2d 222 (1992); *Groton v Tokheim Corp.*, 202 AD2d 728, 608 NYS2d 565 (3d Dept 1994); *Miranda v C. Schmidt & Sons, Inc.*, 200 AD2d 378, 608 NYS2d 73 (1st Dept 1994). But that does not mean that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product that is compatible for use with a defective product of the other manufacturer, *Rastelli v Goodyear Tire & Rubber Co.*, *supra*. *Rastelli* held that a tire manufacturer had no duty to warn about the use of its tire with a potentially dangerous multi-piece rim produced by a different manufacturer where the tire manufacturer did not contribute to any defect in the rim and had no control over the rim.

The manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended, *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765, 37 NYS3d 723, 59 NE3d 458 (2016). The *Matter of New York City Asbestos Litigation (Dummitt)* Court concluded that a valve manufacturer, which took affirmative steps to integrate its valves with third-party asbestos-laden products, had a duty to warn the reasonably foreseeable users of its valves that the synergistic use of the valves with the third-party products could expose the users to carcinogenic asbestos dust, *id.*

E. Post-Sale Modification or Destruction of Warnings

A material alteration of a product's warning may have the effect of relieving the manufacturer of any potential liability, *Van Buskirk v*

Migliorelli, 185 AD2d 587, 586 NYS2d 378 (3d Dept 1992). Likewise, where it is not foreseeable that a purchaser will discard warnings provided with the product and fail to warn the user of the danger created by the altered product, the manufacturer is not liable for failure to warn, *Darsan v Globe Slicing Mach. Co., Inc.*, 200 AD2d 551, 606 NYS2d 317 (2d Dept 1994).

F. Prescription Drugs and Medical Devices

Although a prescription drug is by its nature an inherently unsafe product which would result, in the usual case, in the imputation of strict liability to its manufacturer, there is no such liability when a drug is properly prepared and accompanied by proper directions and warnings, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 423 NYS2d 95 (4th Dept 1979), *aff'd*, 52 NY2d 768, 436 NYS2d 614, 417 NE2d 1002 (1980).

A prescription drug or medical-device manufacturer discharges its duty to warn by warning the medical community of those risks of which the manufacturer has or should in the exercise of due diligence have knowledge, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); *Cutroneo v Dryer*, 12 AD3d 811, 784 NYS2d 247 (3d Dept 2004) (surgical rods); *McDonnell v Chelsea Mfrs., Inc.*, 259 AD2d 674, 687 NYS2d 172 (2d Dept 1999) (prescription drugs); *Bukowski v CooperVision Inc.*, 185 AD2d 31, 592 NYS2d 807 (3d Dept 1993) (contact lenses); see also *Andre v Mecta Corp.*, 186 AD2d 1, 587 NYS2d 334 (1st Dept 1992) (manufacturer of electroconvulsive therapy [ECT] machine had no duty to warn hospital specializing in ECT treatment of well-known side effects of treatment with machine). The prescribing provider then acts as an “informed” or “learned” intermediary between the manufacturer and the patient, assessing the risks and benefits of the drug and advising the patient of its possible risks and side effects, *Martin v Hacker*, 185 AD2d 553, 586 NYS2d 407 (3d Dept 1992), *aff'd*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); *Bukowski v CooperVision Inc.*, *supra*. Implicit in the application of the informed-intermediary doctrine is the existence of a medical professional with the knowledge and expertise to assimilate technical information and, further, a corresponding need for that professional to assess the risks and benefits of the drug or device in light of the particular patient’s medical history and treatment needs, *Bukowski v CooperVision Inc.*, *supra*. In New York, the informed-intermediary doctrine has been applied to prescription drugs and certain medical devices, see *Cutroneo v Dryer*, 12 AD3d 811, 784 NYS2d 247 (3d Dept 2004) (surgical rods); *Banker v Hoehn*, 278 AD2d 720, 718 NYS2d 438 (3d Dept 2000) (argon laser used by physician to remove birthmark), but has not been extended to other products, see *Rickicki v Borden Chemical, Division of Borden, Inc.*, 159 AD3d 1457, 72 NYS3d 302 (4th Dept 2018); *Polimeni v Minolta Corp.*, 227 AD2d 64, 653 NYS2d 429 (3d Dept 1997) (chemical toner). There is no general rule regarding whether one supplying a product for the use of others through an intermediary has a duty to the ultimate product user directly or may rely on the intermediary to relay hazards. *Rickicki v Borden Chem.*, *supra*.

While the drug manufacturer's duty is to warn the physician, the manufacturer is directly liable to the patient for a breach of that duty, *Bikowicz v Nedco Pharmacy, Inc.*, 130 AD2d 89, 517 NYS2d 829 (3d Dept 1987); but see *Banker v Hoehn*, 278 AD2d 720, 718 NYS2d 438 (3d Dept 2000) (even in absence of proper warning, physician's personal knowledge of specific potential adverse effect was intervening circumstance that severed causal connection between manufacturer's alleged failure to warn and plaintiff's injury).

The manufacturer's warning must provide sufficient information to those prescribing physicians and other potential health care providers who may be expected to have the least knowledge and experience with the drug, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); see *Lindsay v Ortho Pharmaceutical Corp.*, 637 F2d 87 (2d Cir 1980) (citing PJI). The requirement of clarity in the context of a drug warning means that the language of the warning must be direct, unequivocal, and sufficiently forceful to convey the risk, *Martin v Hacker*, *supra*. A warning that is otherwise clear may be obscured by inconsistencies or contradictory statements made in different sections of a package insert regarding the same side effect or from language in a later section that dilutes the intensity of a caveat made in an earlier section, *id*; see *Popham v Reyner*, 121 AD2d 617, 503 NYS2d 645 (2d Dept 1986) (question of fact whether manufacturer undercut its warnings and nullified or eroded their adequacy). Such contradictions will not create a question of fact as to the warning's adequacy if the language of a particular admonition against a side effect is precise, direct, and unequivocal and has sufficient force, *Martin v Hacker*, *supra*. The clarity of the entire warning may in such instances offset inconsistencies elsewhere in an insert. Thus, a court should consider a warning as a whole, and any vagueness in an individual sentence may be overcome if, when read as a whole, the warning conveys a meaning as to the consequences that is unmistakable, *id*.

A warning for a prescription drug may be held adequate as a matter of law if it provides specific, detailed information on the risks of the drug, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993); *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 423 NYS2d 95 (4th Dept 1979), *aff'd*, 52 NY2d 768, 436 NYS2d 614, 417 NE2d 1002 (1980). The court must examine not only the meaning and informational content of the language but also its form and manner of expression, always bearing in mind that the warning is to be read and understood by physicians, not laypersons, *Martin v Hacker*, *supra*. The factors to be considered in resolving this question include whether the warning is accurate, clear, consistent on its face, and whether it portrays with sufficient intensity the risk involved in taking the drug, *id*.

Even if the drug manufacturer has provided proper warnings through package inserts or labelling, the manufacturer remains under a twofold continuing duty to "keep abreast of knowledge of its product as gained through research, adverse reaction reports, scientific literature and other available methods [and] take such steps as are reasonably

necessary to bring that knowledge to the attention of the medical profession,” *Baker v St. Agnes Hospital*, 70 AD2d 400, 421 NYS2d 81 (2d Dept 1979); see *Sacher by Sacher v Long Island Jewish-Hillside Medical Center, Inc.*, 142 AD2d 567, 530 NYS2d 232 (2d Dept 1988); *Bikowicz v Nedco Pharmacy, Inc.*, 130 AD2d 89, 517 NYS2d 829 (3d Dept 1987).

Where there was no showing that when plaintiff began taking the drug he suffered from a condition listed in the contraindications section, the adequacy of that section is not relevant to plaintiff's claim based upon a failure to warn, *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993).

It is not yet clear whether failure-to-warn liability may result from the marketing of a new or experimental drug from which unpredictable results may flow and which presents scientifically unknowable hazards at the time it was marketed. The New York cases to date appear to require actual or constructive notice of the risks, see *Martin v Hacker*, 83 NY2d 1, 607 NYS2d 598, 628 NE2d 1308 (1993) (drug manufacturer has duty to warn of potential dangers of which it knows or should know); *Eiser v Feldman*, 123 AD2d 583, 507 NYS2d 386 (1st Dept 1986); *Baker v St. Agnes Hospital*, 70 AD2d 400, 421 NYS2d 81 (2d Dept 1979) (drug manufacturer required to warn of dangers of which it knows or should have known).

G. Duty to Warn of Risks Arising from Sensitivities and Allergic Reactions

A manufacturer has a duty to warn of the risk of allergic reactions to a product ingredient of which the manufacturer has actual or constructive knowledge and which is common to a substantial number of prospective customers, *Kaempfe v Lehn & Fink Products Corp.*, 21 AD2d 197, 249 NYS2d 840 (1st Dept 1964), *aff'd*, 20 NY2d 818, 284 NYS2d 708, 231 NE2d 294 (1967); see *Restatement, Third, Torts*, § 2, *Comment k*; *Prosser & Keeton, Torts* (5th Ed) § 96; *Annot*: 53 ALR3d 298; 26 ALR2d 963. However, where a reasonably safe product, in general use, may produce an allergic reaction, not common to normal persons, but only a “microscopic fraction of potential users,” there is no special duty to warn, *Kaempfe v Lehn & Fink Products Corp.*, *supra*; see *Karr v Inecto, Inc.*, 247 NY 360, 160 NE 398 (1928); *Cooley v Carter-Wallace Inc.*, 102 AD2d 642, 478 NYS2d 375 (4th Dept 1984); *Willson v Faxon, Williams & Faxon*, 138 App Div 359, 364, 122 NYS 778 (4th Dept 1910); see also *Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 (2d Dept 2002) (speculative assertion of plaintiff's attorney that there may be large numbers of other consumers who have had adverse reactions to defendant's product but who never complained, was insufficient to rebut defendant's showing that insubstantial number of consumers complained of skin reactions to its product); *Holmes v Grumman Allied Industries*, 103 AD2d 909, 478 NYS2d 143 (3d Dept 1984), and if such a user sustains injury solely as a result of the allergy, the manufacturer is not liable, *Drake v Charles of Fifth Ave., Inc.*, 33 AD2d 987, 307 NYS2d 310 (4th Dept 1970); *Ravo v Lido*, 17 AD2d 476,

236 NYS2d 135 (2d Dept 1962), unless it can be said by its advertising to have expressly warranted its safety to all users, *Spiegel v Saks* 34th St., 43 Misc2d 1065, 252 NYS2d 852 (AppT 1964), *aff'd*, 26 AD2d 660, 272 NYS2d 972 (2d Dept 1966); *Drake v Charles of Fifth Ave., Inc.*, *supra*.

For statutory provisions regarding the obligation to provide warnings of allergens, see Food Allergen Labeling and Consumer Protection Act of 2004, 21 USC § 374a.

H. Statutory and Regulatory Considerations

Statutes and regulations often prescribe the warnings required for particular categories of products, see Flammable Fabrics Act, 15 USC § 1191ff; Federal Hazardous Substances Labeling Act, 15 USC § 1261ff; Cigarette Labeling and Advertising Act, 15 USC § 1331ff; Federal Food, Drug and Cosmetics Act, 21 USC § 301ff; Food Allergen Labeling and Consumer Protection Act of 2004, 21 USC 374a; Food and Drug Administration, Guidelines for Industry, Consumer Directed Broadcast Advertisements (regulating direct advertisement of prescription drugs); I.C.C. Regulations on Explosives and Other Dangerous Articles, 49 CFR Parts 71–78 promulgated pursuant to 18 USC § 835; see also *Cipollone v Liggett Group, Inc.*, 505 US 504, 112 SCt 2608 (1992).

In some instances, common-law claims based on failure to warn or inadequate warnings are preempted by such statutes and regulations. For example, in *Lopez v Hernandez*, 253 AD2d 414, 676 NYS2d 613 (2d Dept 1998), the court held that a common-law failure-to-warn claim predicated on the risks of using a sulfuric acid-based drain cleaner was preempted by the Federal Hazardous Substances Act [FHSA], 15 USC § 1261, *et seq.*, see *Hanly v Quaker Chemical Co., Inc.*, 29 AD3d 860, 818 NYS2d 96 (2d Dept 2006) (FHSA preempts claims based on failure to include additional warning label not mandated by Act; however, state court action based on failure to comply with FHSA not preempted); *Sabbatino v Rosin & Sons Hardware & Paint, Inc.*, 253 AD2d 417, 676 NYS2d 633 (2d Dept 1998); see also *Feldman v CSX Transp., Inc.*, 31 AD3d 698, 821 NYS2d 85 (2d Dept 2006) (Federal Safety Appliance Act, 49 USC § 20301 *et seq.* preempts state products liability claims based on failure to warn where plaintiff alleges failure to provide instructions not required by Federal Railroad Administration statute and regulations, 49 CFR, part 231).

The Federal Food, Drug and Cosmetic Act (FDCA), 21 USC § 301 *et seq.*, does not preempt state law claims against brand-name drug manufacturers based on inadequate drug warnings, *Wyeth v Levine*, 555 US 555, 129 SCt 1187 (2009). The FDCA leaves brand-name drug manufacturers with the primary responsibility for warning labels, although the Federal Food and Drug Administration has the authority to require label changes. However, the Act does preempt state law claims against generic drug manufacturers based on inadequate drug warnings, *PLIVA, Inc. v Mensing*, 131 SCt 2567 (2011). The Supreme Court

distinguished state law claims against brand-name drug manufacturers—which are not pre-empted—from claims against generic drug manufacturers—which are pre-empted—on the ground that, under the Act and its implementing regulations, a brand-name manufacturer could unilaterally strengthen its warning and therefore comply with both state tort duties and federal pharmaceutical labeling law, *id.* However, a generic drug manufacturer could not change its label on its own volition and thus it was impossible for that manufacturer to simultaneously comply with both state and federal obligations, *id.*

The National Childhood Vaccine Injury Act, 42 USC § 300aa-1 et seq., which establishes a no-fault compensation program for individuals injured as a result of routine childhood vaccines and preempts state common-law claims based on vaccines covered by the Act, provides that “vaccines shall be presumed to be accompanied by proper directions and warnings” if the vaccine manufacturer shows that it complied in all material respects with the Federal Food, Drug and Cosmetic Act, *id.* § 300aa-22(b)(2); see *Bruesewitz v Wyeth LLC*, 131 SCt 1068 (2011).

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 USC § 136, expressly pre-empts state common law causes of action that seek to recover damages for injuries allegedly arising as a result of inadequate warning labels on regulated products, *Bates v Dow Agrosciences LLC*, 544 US 431, 125 SCt 1788 (2005); *Esposito v Contec, Inc.*, 147 AD3d 1384, 47 NYS3d 180 (4th Dept 2017); *Sherman v Claire Mfg. Co.*, 239 AD2d 487, 657 NYS2d 453 (2d Dept 1997); *June v Laris*, 205 AD2d 166, 618 NYS2d 138 (3d Dept 1994); *Warner v American Fluoride Corp.*, 204 AD2d 1, 616 NYS2d 534 (2d Dept 1994). However, nonlabel-related design defect claims are properly allowed, *Babalola v Crystal Chemicals, Inc.*, 225 AD2d 370, 644 NYS2d 1 (1st Dept 1996), as are claims based on breach of warranty, ordinary negligence, defective design and manufacture, and those claims based on express and implied warranties that are voluntarily assumed, *Esposito v Contec, Inc.*, 147 AD3d 1384, 47 NYS3d 180 (4th Dept 2017); *Villano v Builders Square Inc.*, 275 AD2d 565, 713 NYS2d 85 (3d Dept 2000). In *Babalola v Crystal Chemicals, Inc.*, *supra*, the court held that the defendant manufacturer was entitled to assert a preemption defense even though the label ultimately affixed to the product was different from the one approved by federal regulatory agency. The *Babalola* court stated that FIFRA preemption applies even though the defendant failed to submit to the agency the “material safety data sheet” prepared for the product.

The Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969, 15 USC § 1331 et seq., preempts causes of action for failure to warn of the risks associated with smoking, *Cipollone v Liggett Group, Inc.*, 505 US 504, 112 SCt 2608 (1992), as well as causes of action for failure to warn of the risks associated with exposure to environmental cigarette smoke, *Tormey v American Tobacco Co.*, 48 AD3d 1063, 850 NYS2d 309 (4th Dept 2008). However, in *Miele v American Tobacco Co.*, 2 AD3d 799, 770 NYS2d 386 (2d Dept 2003), the court held that the federal statute does not preempt claims based on alleged fraudulent concealment of material

facts regarding the dangerous and addictive properties of cigarettes, since the claim arises from the state-law duty not to deceive, see *Tomasino v American Tobacco Co.*, 23 AD3d 546, 807 NYS2d 603 (2d Dept 2005). The statute, as amended, does preempt state common law claims based on cigarette advertising and labeling, *Cipollone v Liggett Group, Inc.*, 505 US 504, 112 SCt 2608 (1992).

The foregoing discussion of statutes and regulations affecting the duty to warn and of the preemptive effect of such statutes and regulations is illustrative and does not represent an exhaustive review of the subject, which is beyond the scope of this chapter. As to the effect of statutes or regulations generally, see Introductory Statement on Statutory Standard of Care preceding PJI 2:25.

I. Warning Duties of Successor Entities and Parties Other Than Manufacturers

A duty to warn may be imposed on a successor corporation that maintains sufficient links to the purchaser of products manufactured by its predecessor, *Sullivan v Joy Mfg. Co.*, 70 NY2d 806, 523 NYS2d 427, 517 NE2d 1313 (1987); *Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 464 NYS2d 437, 451 NE2d 195 (1983). Among the factors to be considered in determining whether there exists a sufficient link to create a duty to warn are “[s]uccession to a predecessor’s service contracts, coverage of the particular machine under a service contract, service of that machine by the purchaser corporation, [and] a purchaser corporation’s knowledge of defects and of the location or owner of th[e] machine,” *Schumacher v Richards Shear Co., Inc.*, supra. A single service call, however, is not sufficient to impose liability on the successor corporation, *Sullivan v Joy Mfg. Co.*, supra; *Schumacher v Richards Shear Co.*, supra; *Goldman v Packaging Industries, Inc.*, 144 AD2d 533, 534 NYS2d 388 (2d Dept 1988). The duty to warn is imposed upon a successor corporation because of some special relationship, frequently economic, that flowed from sufficient links to the purchaser of products manufactured by its predecessor, *Sullivan v Joy Mfg. Co.*, supra; *Schumacher v Richards Shear Co.*, supra; *Wensing by Wensing v Paris Industries—New York*, 158 AD2d 164, 558 NYS2d 692 (3d Dept 1990); see *Rothstein v Tennessee Gas Pipeline Co.*, 259 AD2d 54, 696 NYS2d 528 (2d Dept 1999) (no duty to warn imposed on successor corporation where record failed to establish that it had relationship with any of predecessor corporation’s customers). The duty of a purchaser of corporate assets to warn may be discharged by an unequivocal warning to known users of the product to discontinue the use of the product entirely until steps are taken to insure its safety, *Flecha v Seybold Mach. Co.*, 146 AD2d 515, 536 NYS2d 455 (1st Dept 1989). For a discussion of the general principles applicable to the strict products liability of successor corporations, see the introductory comments to this Chapter.

The failure to provide warnings gives rise to liability not only against the manufacturer but against the distributor and retailer as well, *Johnson v Johnson Chemical Co., Inc.*, 183 AD2d 64, 588 NYS2d

607 (2d Dept 1992); see *Buley v Rexnord Process Machinery Div.*, 105 AD2d 965, 482 NYS2d 104 (3d Dept 1984). While a casual seller of surplus merchandise is not subject to strict liability, it has a duty of reasonable care to warn its immediate purchaser of known defects which are not obvious or readily discoverable, *Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d 89, 511 NYS2d 821, 503 NE2d 1358 (1986); see *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998) (casual manufacturer); *McCarthy v Checchin*, 24 AD3d 1080, 806 NYS2d 751 (3d Dept 2005) (same); *Goldman v Packaging Industries, Inc.*, 144 AD2d 533, 534 NYS2d 388 (2d Dept 1988) (repairer); *Breidenstein v Ludlow Corp.*, 116 AD2d 1024, 498 NYS2d 639 (4th Dept 1986) (machine parts); *Copp v Corning Glass Works*, 114 AD2d 144, 497 NYS2d 970 (4th Dept 1986). A casual lessor has a similar duty to warn the lessee of known defects that are not obvious or readily discernible, *Burns v Haines Equipment, Inc.*, 284 AD2d 922, 726 NYS2d 516 (4th Dept 2001); *Piper v Kabar Mfg. Corp.*, 251 AD2d 1050, 674 NYS2d 184 (4th Dept 1998).

J. Procedural and Evidentiary Issues

A federal safety standard promulgated after the product has been delivered is not admissible to prove a defect in the product, but may be admitted to establish a breach of the duty to provide warnings of risks revealed after the product was manufactured and marketed, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984). Because such evidence can be highly prejudicial, however, its relevance should be evaluated prior to admissions and outside of the jury's presence. If the court decides to admit the evidence, it should give a tailored limiting instruction, *id.*

Evidence of post-manufacture modification of the product by the manufacturer is not admissible to establish strict liability for failure to warn or instruct, *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984); *Opera v Hyva, Inc.*, 86 AD2d 373, 450 NYS2d 615 (4th Dept 1982), but may be admissible for other purposes, such as to prove feasibility of using a different design or different warnings, *Cover v Cohen*, *supra*; *Doty v Navistar Intern. Transp. Corp.*, 219 AD2d 32, 639 NYS2d 592 (4th Dept 1996); *Opera v Hyva, Inc.*, *supra*. In a failure to warn case, the fact that defendant, after the manufacture of the unit involved but before the occurrence, made its warnings more comprehensive is not generally admissible, *Haran by Haran v Union Carbide Corp.*, 68 NY2d 710, 506 NYS2d 311, 497 NE2d 678 (1986).

An advisory communication issued by the manufacturer to its dealers after delivery of the product may be admissible on the issue of the duty to warn under certain circumstances, but the relevance of such communications should be evaluated prior to admission outside of the jury's presence, see *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378, 461 NE2d 864 (1984). Where the court decides to admit communications about service or product improvements, the jury must be instructed that the documents are relevant only to the issues of failure to warn or

feasibility of alternative designs, *Brandon v Caterpillar Tractor Corp.*, 125 AD2d 625, 510 NYS2d 165 (2d Dept 1986); see *Cover v Cohen*, *supra*.

K. Statute of Limitations

The date of injury is the benchmark for determining the accrual of a cause of action based on failure to warn, *Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 666 NYS2d 536, 689 NE2d 506 (1997). Accrual of the cause of action cannot be postponed by an allegation that defendant had a continuing duty to warn plaintiff of the dangers of using a defectively designed product, *Blanco v American Tel. & Tel. Co.*, *supra*; see *Schwartz v Heyden Newport Chemical Corp.*, 12 NY2d 212, 237 NYS2d 714, 188 NE2d 142 (1963); *Coughlin v International Business Machines Corp.*, 225 AD2d 256, 650 NYS2d 477 (3d Dept 1996).

L. Punitive Damages

The Court of Appeals has suggested that punitive damages may be recoverable in a strict products liability action where the theory of liability is failure to warn and there is evidence that the failure was wanton or in conscious disregard of the rights of others, *Home Ins. Co. v American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481, 550 NE2d 930 (1990); see *Dumesnil v Proctor and Schwartz Inc.*, 199 AD2d 869, 606 NYS2d 394 (3d Dept 1993).

Special verdicts are imperative in products liability cases, see *Davis v Caldwell*, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741 (1981); *DePasquale v Morbark Industries, Inc.*, 221 AD2d 409, 633 NYS2d 543 (2d Dept 1995); PJI 1:97 (special verdicts); see also *Bichler v Eli Lilly and Co.*, 55 NY2d 571, 450 NYS2d 776, 436 NE2d 182 (1982). The following questions should be used in conjunction with the pattern charge. The questions should correspond to the theories of defect that have been submitted to the jury. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a Court exhibit. Questions 3, 4 and 5 of the special verdict form should be submitted to the jury either individually or in combination depending on the proof.

Special Verdict Form PJI 2:120 SV-I

- (1) Was the defendant's product not reasonably safe in that
 - (a) It was defectively manufactured?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

- (b) It was defectively designed?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

- (c) It was marketed with no or inadequate warnings?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

If your answer to all of these questions is “No,” proceed no further on this claim. If you have answered “Yes” to one or more of these questions, you should continue and answer Question 2.

- (2)(a) If you answered “Yes” to Question 1(a), was the manufacturing defect a substantial factor in causing plaintiff’s injury?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

- (b) If you answered “Yes” to Question 1(b), was the design defect a substantial factor in causing plaintiff’s injury?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

- (c) If you answered “Yes” to Question 1(c), was the failure to warn or inadequate warning a substantial factor in causing plaintiff’s injury?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

If your answer to all of these questions is “No,” proceed no further on this claim. If your answer to any of these questions is “Yes,” you should continue and answer Questions 3, 4 and 5.

- (3)(a) Did plaintiff misuse defendant’s product?

(3)(b) If you answered “Yes,” to Question (3)(a), was plaintiff’s injury caused by his or her misuse of defendant’s product?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

(4) Could the plaintiff, by the use of reasonable care, have discovered the defect and realized its danger?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

(5) Could the plaintiff, by the use of reasonable care, have avoided his or her injury?

Yes ____ No ____

At least five jurors must agree on the answer to this question.

If your answers to each of Questions 3, 4 and 5 are “No,” proceed no further and report to the court. If your answer to any of these questions is “Yes,” you should continue and answer Question 6.

(6) What is the percentage of responsibility chargeable to defendant and what is the percentage of responsibility chargeable to plaintiff?

Defendant ____%
Plaintiff ____%
Total must be 100%

At least five jurors must agree on the answer to this question.

b. NEGLIGENCE

PJI 2:125. Products Liability—Negligent Manufacture

The plaintiff AB claims that the defendant CD negligently manufactured [*state product*]. Negligence is a failure to use reasonable care. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances. A manufacturer of a (product, component part) owes a duty to use reasonable care in the manufacture of the (product, part) so that it will be reasonably safe for its intended or foreseeable uses. Reasonable care means that degree of care that a reasonably prudent manufacturer of such a (product, part) would use in the making, inspecting and testing of the (product, part) and its materials (and parts) in order to produce a reasonably safe product.

If you find that the [*state product*] was not reasonably safe for its intended or foreseeable uses because CD failed to use reasonable care in manufacturing [*state where appropriate: inspecting, testing*] it, you will find that CD was negligent. If, however, you find that the [*state product*] was reasonably safe for its intended or foreseeable uses or that CD used reasonable care in manufacturing [*state where appropriate: inspecting, testing*] it, you will find that CD was not negligent.

Comment

Caveat 1: The pattern charge should be given only where evidence of defendant's negligence has been introduced.

Caveat 2: The pattern charge assumes that there is no issue as to causation. Where causation is disputed, the charge must be modified accordingly, see PJI 2:70.

Based on *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998); *Saunders v Farm Fans, div. of ffi Corp.*, 24 AD3d 1173, 807 NYS2d 241 (4th Dept 2005); Annot. 79 ALR2d 401.

The pattern charge deals only with liability based on negligence. Claims based on alleged design defects or on a manufacturer's or seller's failure to provide adequate warnings are separately addressed in PJI 2:120. As to the negligence liability of a component part manufacturer or a product repairer, see PJI 2:125A and 2:125B, *infra*.

Manufacturers and sellers of products in the normal course of business are under a duty to exercise reasonable care to avoid the occurrence of injuries resulting from negligent manufacture, *Gebo v Black Clawson Co.*, 92 NY2d 387, 681 NYS2d 221, 703 NE2d 1234 (1998); *Saunders v Farm Fans, div. of ffi Corp.*, 24 AD3d 1173, 807 NYS2d 241 (4th Dept 2005). A vendor who purchases products from a reputable supplier may have reasonable ground for believing the products to be free from defects, but a vendor who buys from an unknown manufacturer or from one of dubious reputation does not have such a reasonable ground, *Krumpek v Millfeld Trading Co., Inc.*, 272 AD2d 879, 709 NYS2d 265 (4th Dept 2000); *Outwater v Miller*, 3 AD2d 670, 158 NYS2d 562 (2d Dept 1957).

The duty of a manufacturer to exercise reasonable care is also applicable to lessors. Thus, one who leases a product to another is under a duty to use reasonable care to see that the product is reasonably safe for use for the purpose for which it is leased. Accordingly, before leasing the product, the lessor is required to make such inspections and tests as a reasonably prudent person in the business would recognize as necessary in order to lease a safe product, *La Rocca v Farrington*, 276 App Div 126, 93 NYS2d 363 (2d Dept 1949), *aff'd*, 301 NY 247, 93 NE2d 829 (1950); see *Dufur v Lavin*, 101 AD2d 319, 476 NYS2d 389 (3d Dept 1984), *aff'd*, 65 NY2d 830, 493 NYS2d 123, 482 NE2d 919 (1985); UCC §§ 2-314, 2-315; see also *Wengenroth v Formula Equipment Leasing, Inc.*, 11 AD3d 677, 784 NYS2d 123 (2d Dept 2004) (commercial lessor may be held liable for defect in leased product); *Winckel v Atlantic Rentals & Sales, Inc.*, 159 AD2d 124, 557 NYS2d 951 (2d Dept 1990) (same); *Industralease Automated & Scientific Equipment Corp. v R.M.E. Enterprises, Inc.*, 58 AD2d 482, 396 NYS2d 427 (2d Dept 1977) (commercial lessor impliedly warrants that chattel is fit for purpose intended).

Where continued use of a leased chattel may cause deterioration and affect its safety, an issue of fact is raised with respect to whether reasonable care required the lessor to make more than a visual inspection, see *Maguire v R & R Trucking Co.*, 19 AD2d 745, 242 NYS2d 889 (2d Dept 1963); *De Maria v Renee Operating Corp.*, 282 App Div 221, 122 NYS2d 236 (1st Dept 1953). Expert testimony may be required to make out a *prima facie* case that more than a visual inspection is required, *Maguire v R & R Trucking Co.*, *supra*.

With respect to bailments, the case law draws a distinction between bailors for hire and gratuitous bailors. A bailor for hire is under a duty to discover defects and is therefore subject to liability for defects which

the bailor reasonably should have discovered even though it had no actual knowledge of such defects, *La Rocca v Farrington*, 276 App Div 126, 93 NYS2d 363 (2d Dept 1949), *aff'd*, 301 NY 247, 93 NE2d 829 (1950). Moreover, the bailor for hire is not relieved of liability for a defect discoverable on visual inspection, even though the bailee had an equal opportunity to discover the defect, *id.* The duty of reasonable care to discover defects applies to a bailor for hire of a motor vehicle, *O'Brien v Hendrick Hudson Garage*, 250 App Div 650, 295 NYS 686 (3d Dept 1937); see *Elfeld v Burkhams Auto Renting Co.*, 299 NY 336, 87 NE2d 285 (1949), and to railroad cars circulating among carriers and shippers, *Bierzynski v New York Cent. R. Co.*, 31 AD2d 294, 297 NYS2d 457 (4th Dept 1969), *aff'd*, 29 NY2d 804, 327 NYS2d 365, 277 NE2d 412 (1971); see UCC § 2-314.

A gratuitous bailor, on the other hand, is under no duty to inspect. The only duty of a gratuitous bailor to the bailee is to give warning of those defects of which the bailor has actual knowledge and are not obvious or readily discernible, *Acampora v Acampora*, 194 AD2d 757, 599 NYS2d 614 (2d Dept 1993); *Ruggiero v Max Braun & Sons, Inc.*, 141 AD2d 528, 529 NYS2d 144 (2d Dept 1988); *Daoust v Palmenteri*, 109 AD2d 774, 486 NYS2d 288 (2d Dept 1985). In the case of automobiles, a gratuitous bailor owes no greater duty to a passenger riding with the bailee, *Knapp v Gould Auto. Co.*, 252 App Div 430, 299 NYS 688 (4th Dept 1937).

The maker of a component part or processor of materials incorporated into a product that is finished or assembled by another is liable for defects in the component part or materials due to its own negligence, see *Mueller v Teichner*, 6 NY2d 903, 190 NYS2d 709, 161 NE2d 14 (1959); *Smith v Peerless Glass Co.*, 259 NY 292, 181 NE 576 (1932); *Clark v Bendix Corp.*, 42 AD2d 727, 345 NYS2d 662 (2d Dept 1973); see also *Ayala v V & O Press Co.*, 126 AD2d 229, 512 NYS2d 704 (2d Dept 1987) (repairer). However, where the component parts or materials were made in accordance with the design, plans and specifications of the owner and assembler of the unit, the maker of the component part may not be held liable in negligence absent proof of a defect in manufacture, since the component part maker cannot be expected to anticipate safety features appropriate for the whole system, *Sexton v Cincinnati Inc.*, 16 AD3d 1090, 792 NYS2d 264 (4th Dept 2005); see *Lonigro v TDC Electronics, Inc.*, 215 AD2d 534, 627 NYS2d 695 (2d Dept 1995); *Leahy v Mid-West Conveyor Co., Inc.*, 120 AD2d 16, 507 NYS2d 514 (3d Dept 1986) (design defect); *Munger v Heider Mfg. Corp.*, 90 AD2d 645, 456 NYS2d 271 (3d Dept 1982). A component part manufacturer has no duty to discover exactly how the purchaser intends to use the part, *Butler v Interlake Corp.*, 244 AD2d 913, 665 NYS2d 192 (4th Dept 1997). This rule is not applicable to a manufacturer of an entire machine, *Daley v Gemini Bakery Equipment Co.*, 228 AD2d 210, 643 NYS2d 106 (1st Dept 1996).

PJI 2:125A. Products Liability—Negligence of Maker of Assembled Product

[Use if the defendant is a maker of a product containing assembled component parts or materials]

A manufacturer who uses in its product any (material, part) manufactured by another is under a duty to make such inspections and tests of the (material, part) as a reasonably prudent manufacturer in its business would recognize as necessary to secure a finished product reasonably safe for its intended or normal use. That duty may exist even though the (material, part) was obtained from a reputable (producer, manufacturer). The failure to (make, use reasonable care in making) such inspections and tests is negligence.

Comment

Based on *Mueller v Teichner*, 6 NY2d 903, 190 NYS2d 709, 161 NE2d 14 (1959); *Smith v Peerless Glass Co.*, 259 NY 292, 181 NE 576 (1932); *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff'd*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959); Annot: 6 ALR3d 91.

A manufacturer that uses in its product any component part or material manufactured by another is under a duty to make such inspections and tests of the part or material as a reasonably prudent manufacturer in its business would recognize as necessary to produce a finished product reasonably safe for its intended or normal use, see *Mueller v Teichner*, 6 NY2d 903, 190 NYS2d 709, 161 NE2d 14 (1959); *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff'd*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959); *Sapp v Niagara Mach. and Tool Works*, 45 AD3d 1261, 845 NYS2d 626 (4th Dept 2007); see also *Maguire v R & R Trucking Co.*, 19 AD2d 745, 242 NYS2d 889 (2d Dept 1963) (discussing nature of required inspection); see generally Annot: 6 ALR3d 91. Evidence that an assembler failed to make inspections or tests customarily made in the same or similar industry, *Smith v Peerless Glass Co.*, 259 NY 292, 181 NE 576 (1932), or, conversely, that defendant complied with the standard practices of the industry, *Sherman v M. Lowenstein & Sons, Inc.*, 28 AD2d 922, 282 NYS2d 142 (2d Dept 1967); see *Phillips v Roux Laboratories*, 286 App Div 549, 145 NYS2d 449 (1st Dept 1955), is admissible but not conclusive of negligence or its absence, *Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982); *Mercogliano v Sears, Roebuck and Co.*, 303 AD2d 566, 756 NYS2d 472 (2d Dept 2003); *Galarza v Pacific Steel Boiler Corp.*, 147 AD2d 527, 537 NYS2d 829 (2d Dept 1989); *Stone v Sterling Drug, Inc.*, 111 AD2d 1017, 490 NYS2d 468 (3d Dept 1985).

Failure to test properly is not actionable unless plaintiff proves that proper testing would have revealed the defect in the component part, *Buria v Rosedale Engineering Corp.*, 7 AD2d 486, 184 NYS2d 395 (1st Dept 1959). Moreover, there must be proof that the part was in a defective condition while in the assembler's possession and that the assembler had knowledge or constructive notice thereof, *Smolen v Grandview Dairy*, 301 NY 265, 93 NE2d 839 (1950). Such proof may rest upon inference, see *Markel v Spencer*, 5 AD2d 400, 171 NYS2d 770 (4th Dept 1958), *aff'd*, 5 NY2d 958, 184 NYS2d 835, 157 NE2d 713 (1959). Where the assembler holds itself out as the manufacturer of the product as a whole, it will be held to the same liability as though it were in fact the manufacturer, see *Markel v Spencer*, *supra*; *Auld v Sears, Roebuck & Co.*, 261 App Div 918, 25 NYS2d 491 (2d Dept 1941), *aff'd*, 288 NY 515, 41 NE2d 927 (1942); *Gittelsohn v Gotham Pressed Steel Corp.*, 266 App Div 866, 42 NYS2d 341 (2d Dept 1943), and it "is not material in such a case whether the defect could have been discovered by inspection at the time of assembly," *Markel v Spencer*, *supra*.

PJI 2:125B. Products Liability—Negligence of Repairer of Product

An entity or individual that undertakes to make repairs on a product owes a duty to use reasonable care in repairing and inspecting the product for defects and in repairing the defects so that the product after repair will be reasonably safe for its intended or foreseeable uses. Reasonable care means that degree of care that a reasonably prudent repairer of [*state, equipment, product*] would use under the same circumstances.

If you find that, as inspected and repaired, the [*equipment, product*] was not reasonably safe for its intended or foreseeable use or uses and that the defendant failed to use reasonable care in inspecting or in repairing the [*equipment, product*], you will find that the defendant was negligent. If, however, you find that, as inspected and repaired, the [*equipment, product*] was reasonably safe for its intended or foreseeable uses or that the defendant did use the care that a reasonably prudent repairer of [*state equipment, product*] would use in inspecting for defects and making repairs, you will find that the defendant was not negligent.

Comment

Based on *Smith v Man Ho Rope Mfg. Co., Ltd.*, 233 AD2d 942, 649

NYS2d 880 (4th Dept 1996); *Wagner v Kenific*, 161 AD2d 1092, 557 NYS2d 650 (3d Dept 1990); *Kalinowski v Truck Equipment Co.*, 237 App Div 472, 261 NYS 657 (4th Dept 1933); see *Swensson v New York, Albany Despatch Co.*, 309 NY 497, 131 NE2d 902 (1956).

The pattern charge assumes that there is no issue as to causation. Where causation is disputed, the pattern charge must be modified accordingly, see PJI 2:70, *supra*.

Although a repairer who repairs a previously marketed product cannot be held liable under a strict products liability theory, see *Martinez v Gouverneur Gardens Housing Corp.*, 184 AD2d 264, 585 NYS2d 23 (1st Dept 1992); *Brumbaugh v CEJJ, Inc.*, 152 AD2d 69, 547 NYS2d 699 (3d Dept 1989); *Ayala v V & O Press Co.*, 126 AD2d 229, 512 NYS2d 704 (2d Dept 1987), a negligent repairer may be held liable for injuries to parties not in privity, *Olchovy v L.M.V. Leasing*, 182 AD2d 745, 582 NYS2d 764 (2d Dept 1992).

Liability for negligence may be predicated on the repairer's failure to use proper material and/or to do proper work or to make proper inspection, *Sutherland v Thering Sales and Service, Inc.*, 38 AD3d 967, 830 NYS2d 833 (3d Dept 2007); *Galarza v Pacific Steel Boiler Corp.*, 147 AD2d 527, 537 NYS2d 829 (2d Dept 1989); *Kalinowski v Truck Equipment Co.*, 237 App Div 472, 261 NYS 657 (4th Dept 1933), and/or for failure to exercise reasonable care in responsibilities collateral to repair, such as redelivery and reinstallation, *Miles v R & M Appliance Sales, Inc.*, 26 NY2d 451, 311 NYS2d 491, 259 NE2d 913 (1970); *Beasock v Dioguardi Enterprises, Inc.*, 117 AD2d 1015, 499 NYS2d 558 (4th Dept 1986). However, in the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of purported defects unrelated to the work for which it was retained, *Kleinberg v New York*, 27 AD3d 317, 811 NYS2d 642 (1st Dept 2006).

Negligent repair may be inferred from failure of the equipment to operate satisfactorily within a short time after it was reconditioned, *Sles v Heidelberg Eastern, Inc.*, 78 AD2d 521, 431 NYS2d 142 (2d Dept 1980) (paper cutter); see *Egan v Bradley*, 117 AD2d 777, 499 NYS2d 424 (2d Dept 1986) (car repair); *Jackson v Melvey*, 56 AD2d 836, 392 NYS2d 312 (2d Dept 1977) (car repair); *Condomanolis v Boiler Repair Maintenance Co., Inc.*, 44 AD2d 366, 355 NYS2d 135 (1st Dept 1974) (boiler repair). Concerning the doctrine of *res ipsa loquitur*, see *Rogers v Dorchester Associates*, 32 NY2d 553, 347 NYS2d 22, 300 NE2d 403 (1973); *Birdsall v Montgomery Ward and Co., Inc.*, 109 AD2d 969, 486 NYS2d 461 (3d Dept 1985), *aff'd* for reasons in AD opinion, 65 NY2d 913, 493 NYS2d 456, 483 NE2d 131 (1985); *Petro v New York Life Ins. Co.*, 277 AD2d 213, 715 NYS2d 725 (2d Dept 2000) (*res ipsa loquitur* inapplicable where elevator was not within exclusive control of defendants and plaintiff's own actions contributed to the accident).

Where the repairs do not concern the specific defect in question and

there is no evidence of a defect in the repairs, or that the repairs contributed to the accident, a repairer may not be held liable, *Kleinberg v New York*, 27 AD3d 317, 811 NYS2d 642 (1st Dept 2006); *Allen v Thompson Overhead Door Co.*, 3 AD3d 462, 771 NYS2d 521 (2d Dept 2004); *Dubecky v S2 Yachts, Inc.*, 234 AD2d 501, 651 NYS2d 602 (2d Dept 1996).

While the repairer is liable to third persons for negligent performance, the repairer is ordinarily liable for nonperformance, i.e., contractual breach, only to the person with whom he or she contracted, *B. L. W. Realty Holding Co. v Socony Mobil Oil Co.*, 32 AD2d 312, 301 NYS2d 389 (1st Dept 1969), *aff'd* and *app dismd*, 26 NY2d 1002, 311 NYS2d 36, 259 NE2d 500 (1970); *Koch v Otis Elevator Co.*, 10 AD2d 464, 200 NYS2d 700 (1st Dept 1960); *Rosenbaum v Branster Realty Corp.*, 276 App Div 167, 93 NYS2d 209 (1st Dept 1949); see *Hopps v Pengate Handling Systems Of New York, Inc.*, 307 AD2d 665, 763 NYS2d 856 (3d Dept 2003). An exception to this rule exists where the repairer performed or undertook to perform regular preventative maintenance inspections of the product. In that situation, the repairer has a duty to perform reasonably careful and prudent inspections, *Hopps v Pengate Handling Systems Of New York, Inc.*, *supra*; *Wroblewski v Otis Elevator Co.*, 9 AD2d 294, 193 NYS2d 855 (3d Dept 1959). This principle has frequently been applied in the context of contracts to maintain and service elevators, *Rogers v Dorchester Associates*, 32 NY2d 553, 347 NYS2d 22, 300 NE2d 403 (1973); *Birdsall v Montgomery Ward and Co., Inc.*, 109 AD2d 969, 486 NYS2d 461 (3d Dept 1985), *aff'd* for reasons in *AD* opinion, 65 NY2d 913, 493 NYS2d 456, 483 NE2d 131 (1985) (escalator); *Oettinger v Montgomery Kone, Inc.*, 34 AD3d 969, 824 NYS2d 447 (3d Dept 2006); *Ramos v Noveau Industries, Inc.*, 29 AD3d 555, 814 NYS2d 251 (2d Dept 2006); *Hall v Barist Elevator Co.*, 25 AD3d 584, 807 NYS2d 639 (2d Dept 2006). In contrast, in *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 848 NYS2d 585, 878 NE2d 1001 (2007), the Court of Appeals held that a New York State vehicle inspection shop has no liability to non-privy third-party motorists who may be injured in collisions with vehicles that were negligently certified as safe.

In the absence of a contract or ongoing relationship requiring the repairer to provide routine or systematic maintenance, the repairer has no duty to correct or warn of a design defect in the product, *Ward v Lithibar-Matik, Inc.*, 6 AD3d 424, 774 NYS2d 341 (2d Dept 2004); *Giustino v Hollymatic Corp.*, 202 AD2d 161, 608 NYS2d 179 (1st Dept 1994); *Ayala v V & O Press Co.*, 126 AD2d 229, 512 NYS2d 704 (2d Dept 1987); see *Dauernheim v Lendlease Cars, Inc.*, 238 AD2d 462, 656 NYS2d 671 (2d Dept 1997).

PJI 2:126. Products Liability—Negligent Design

**A (manufacturer, maker of a component part)
that has negligently designed and marketed a
product that is not reasonably safe is liable for**

injury that results from use of the product. A (manufacturer, maker of a component part) is negligent in designing and marketing a product when it knows or, in the exercise of reasonable care, should have known that the product is not reasonably safe.

As you have heard, the plaintiff AB claims that the [state product] manufactured and marketed by the defendant CD was negligently designed because [state plaintiff's contentions, such as the vehicle's wheel base was too narrow for safe use on highways, the cutting machine was dangerous without a hand guard]. CD denies that the [state product] was negligently designed and contends [state defendant's contentions].

A product is negligently designed and marketed if a reasonable person who knew or should have known of the product's potential for causing injury and of any feasible alternative design[s] would have concluded that the product should not have been marketed in that condition. Whether the product should have been marketed in that condition depends upon a balancing of the risks involved in using the product against (1) the product's usefulness and its costs, and (2) the risks, usefulness and costs of any feasible alternative design as compared to the product that CD did market. CD may be held liable for negligently designed and marketing the [state product] if CD knew of the [state product] potential for causing injury or, in the exercise of reasonable care, should have known of the [state product]'s potential for causing injury and if a reasonable person would have concluded that the [state product] should not have been marketed in that condition.

If you find that CD was negligent in designing and marketing the [state product], then you will proceed to consider whether CD's negligence was a substantial factor in causing AB's injury, that is, whether a reasonable person would regard it as a cause of the injury. If you find that CD's negligence was not a substantial factor in causing AB's injury,

you need proceed no further [*state where appropriate: on this claim*].

[*Where defendant has asserted an affirmative defense of culpable conduct on the part of plaintiff, insert the following three paragraphs:*]

If you find that CD's negligence was a substantial factor in causing AB's injury, then you will proceed to consider whether there was negligence on AB's part that contributed to (his, her) injuries. CD has the burden of proving that AB was negligent and that AB's negligence contributed to (his, her) injuries. If you find that AB was negligent and that AB's negligence was a substantial factor in causing AB's injuries, then you must apportion the responsibility of AB and CD for causing AB's injury.

Weighing all the facts and circumstances you must consider the total responsibility, that is, the responsibility of both AB and CD that contributed to causing the injury and decide what percentage is chargeable to each. In your verdict, you will state the percentages you find. The total of these percentages must equal one hundred percent. I will furnish you with a verdict sheet, on which you should write these percentages.

Comment

[*See also Introductory Statement to this Division.*]

Caveat: The Second Department has held that, where requested, it is error to decline to charge the jury on that theory, *Cekic v Royal-Pak Systems, Inc.*, 59 AD3d 485, 874 NYS2d 178 (2d Dept 2009); see *Giunta v Delta Intern. Machinery*, 300 AD2d 350, 751 NYS2d 512 (2d Dept 2002); see also *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 872 NYS2d 415, 900 NE2d 966 (2008); *Hall v Husky Farm Equipment, Ltd.*, 92 AD3d 1188, 939 NYS2d 604 (3d Dept 2012). However, the Court of Appeals has stated in dictum that causes of action for negligent design and defective design are "essentially identical" and that separate jury questions on each theory were "redundant," *Reis v Volvo Cars of North America*, 24 NY3d 35 (2014); see *Adams v Genie Industries, Inc.*, 14 NY3d 535, 903 NYS2d 318, 929 NE2d 380 (2010). Because it is unclear whether the Reis Court intended to eradicate all distinctions between negligent design and defective design, including

the former's requirement of the manufacturer's knowledge or constructive knowledge of the product's unsafe design, a separate pattern charge for negligent design has been provided for use in cases where plaintiff has proceeded on that theory of liability. It should be noted that, where the negligence design theory of liability is submitted to the jury, the jury must be told to consider the availability of feasible alternatives designs and to balance the risks of the design against its utility as set forth in the pattern charge; see *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 872 NYS2d 415, 900 NE2d 966 (2008); *Giunta v Delta Intern. Machinery*, 300 AD2d 350, 751 NYS2d 512 (2d Dept 2002).

Based on *Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545, 872 NYS2d 415, 900 NE2d 966 (2008); *Cekic v Royal-Pak Systems, Inc.*, 59 AD3d 485, 874 NYS2d 178 (2d Dept 2009); *Giunta v Delta Intern. Machinery*, 300 AD2d 350, 751 NYS2d 512 (2d Dept 2002).

Note: PJI 2:10 and 2:12 should be given in conjunction with this charge.

c. BREACH OF WARRANTY

PJI 2:140. Manufacturer's Liability for Breach of Express Warranty

A manufacturer which in (advertising, labeling) its product represents the quality to the public in such a way as to induce purchase or use, thereby makes an express warranty that it will conform to the representation. If the product does not conform to the representation, the warranty is breached.

Plaintiff claims that in its (advertisement, label) defendant represented that its *[state product]* was *[state representation]* and that the *[state product]* did not conform to the representation in that *[state how failed to conform]*. If you find that defendant did not so represent the *[state product]*, or that the *[state product]* in fact conformed to the representation, you will find that there was no breach of warranty and your verdict will be for defendant on this issue. If you find that the representation was made and the *[state product]* did not conform, you will find that defendant breached an express warranty.

In such case you will find for plaintiff on this issue provided that you additionally find all of the following: (1) that at the time of the occurrence plaintiff was using the

[state product] for the purpose and in the manner intended, (2) that plaintiff by the use of reasonable care would not have both discovered the breach and realized its danger, (3) that the breach of warranty was a substantial factor in bringing about plaintiff's injury. If you find that plaintiff misused the *[state product]*, or knew or by the use of reasonable care would have discovered the breach and realized its danger, or that the breach was not a substantial factor in bringing about plaintiff's injury, you will find for defendant on this issue.

Comment

[See also *Introductory Statement to this division.*]

Based on *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973); *Randy Knitwear, Inc. v American Cyanamid Co.*, 11 NY2d 5, 226 NYS2d 363, 181 NE2d 399 (1962); see Restatement, Second, Torts 402B; 1 Hursh, *American Law of Products Liability* 664 § 6:60; Spangenberg, *Aspects of Warranties Relating to Defective Prescription Drugs*, 37 U Cal L Rev 194; Dickerson, *The ABC's of Product Liability*, 36 Tenn L Rev 439; Annot: *Liability of manufacturer or seller for injury caused by drug or medicine sold*, 79 ALR2d 301, *Statements in advertisements as affecting manufacturer's or seller's liability for injury caused by product sold*, 75 ALR2d 112; and generally, as to warranty actions, see PJI 4:40.

The pattern charge language "substantial factor in bringing about plaintiff's injury" was taken from the *Codling Case*; the jury must be charged re proximate cause, see PJI 2:70.

The pattern charge relates to a manufacturer, but is equally applicable to an express warranty made by a wholesale or retail seller, UCC § 2-313; see *Chatham v Board of Fire Com'rs of Delmar Fire Dist.*, 90 AD2d 860, 456 NYS2d 494 (3d Dept 1982). The charge is based on the fact situation of the *Randy Knitwear Case* which involved a remote purchaser, but the principle is equally applicable where there is a direct contractual relationship; and an express warranty may be made in a manner other than by advertising or labeling, see this Comment *infra*. Express and implied warranties extend to any natural person, UCC § 2-318, which also forbids the exclusion of third parties from the benefits of a warranty made to the buyer, see *Introductory Statement*. The broad principle of strict products liability stated in *Codling v Paglia*, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973), and the court's citation and use of *Randy Knitwear*, make it clear that warranty liability, express or implied, does not depend on plaintiff being in privity with defendant, or even being a purchaser, see *Rivera v Berkeley Super Wash, Inc.*, 44 AD2d 316, 354 NYS2d 654 (2d Dept 1974), *aff'd*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975); *Cereo v Takigawa Kogyo Co., Ltd.*, 252 AD2d 963, 676 NYS2d 364 (4th Dept 1998).

The limitations stated in *Codling* will necessarily apply to the express warranty, thus it must appear that the product was being used for the purpose and in the manner intended, that the breach of warranty was a substantial factor in bringing about plaintiff's injury, and contributory fault will limit recovery, see *Introductory Statement*. Gross misuse or abuse of the product may preclude recovery, *Eisenbach v Gimbel Bros.*, 281 NY 474, 24 NE2d 131 (1939); *Fredendall v Abraham & Straus*, 279 NY 146, 18 NE2d 11 (1938), as may use of the product after plaintiff's discovery of a defect or breach of warranty, UCC § 2-715, Comment 5; *Bates v Fish Bros. Wagon Co.*, 50 App Div 38, 63 NYS 649 (4th Dept 1900), *aff'd*, 169 NY 587, 62 NE 1094 (1901); *Bruce v Fiss*,

Doerr & Carroll Horse Co., 47 App Div 273, 62 NYS 96 (2d Dept 1900). Prior to Codling the cases were not clear as to whether the rule applied was contributory negligence, assumption of the risk, or proximate cause, and analysis suggested that it was not really contributory negligence, rather misuse or deliberate use after knowledge of the defect that precluded recovery, 1 Hursh, American Law of Products Liability 415 § 3:9; 1 Frumer and Friedman, Products Liability 369 § 16:01(3); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale LJ 1099, 1147; Amram and Goodman, Some Problems in the Law of Implied Warranty, 3 Syracuse L Rev 259, 262, n. 63. However, in Codling the court held that contributory fault precluded recovery and did not define it as deliberate use after knowledge of a defect, but rather lack of reasonable care to discover the defect and perceive its danger, accord, Velez v Craine & Clark Lumber Corp., 33 NY2d 117, 350 NYS2d 617, 305 NE2d 750 (1973).

The pattern charge assumes that the plaintiff was a user of the product whether or not he or she purchased it. If plaintiff was a non-user or bystander, the charge will have to be changed, in the last paragraph, by deleting from the statement numbered (1) the words "plaintiff was using" and inserting after the bracketed word "[product]" the words "was being used," and by deleting the statement numbered (2) and substituting, "that plaintiff by the use of reasonable care would not have averted (his, her) injury." Also, though plaintiff was a user the charge will have to be amended if there was evidence in the case justifying a finding that, independently and apart from the defect in the product, plaintiff failed to use reasonable care for his or her own safety and such a lack of care was a substantial factor in producing the injury, Codling v Paglia, 32 NY2d 330, 345 NYS2d 461, 298 NE2d 622 (1973).

Express warranty is defined by UCC § 2-313(1)(a) as follows:

Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

It also classifies as express warranties the former implied warranty arising from a sale by description, UCC § 2-313(1)(b); or by sample, UCC § 2-313(1)(c). Moreover, subdivision 2 states that specific intention to make a warranty is not necessary thus incorporating the rule enunciated in Hawkins v Pemberton, 51 NY 198, 202, 44 How Pr 102 (1872), that if a representation, written or oral, as to the character or quality of a product be positive and not a mere matter of opinion, and the vendee understands it as a warranty and relies upon it and is induced by it, the vendor is bound by the warranty whether he or she intended it to be a warranty or not, 1 Hursh, American Law of Products Liability 479 §§ 3:38-3:40. Thus a mass media advertisement, Randy Knitwear, Inc. v American Cyanamid Co., 11 NY2d 5, 226 NYS2d 363, 181 NE2d 399 (1962) or a manufacturer's sales brochure, Friedman v Medtronic, Inc.,

42 AD2d 185, 345 NYS2d 637 (2d Dept 1973); *Funk v Kaiser-Frazer Sales Corp.*, 23 AD2d 771, 258 NYS2d 553 (2d Dept 1965), will be sufficient to make out a prima facie case of warranty. Note that Magnuson-Moss Warranty Act, which provides certain remedies with respect to warranties of consumer products, contains its own definition of written warranty, see 15 USC § 2301(6)(B); *Murphy v Mallard Coach Co.*, 179 AD2d 187, 582 NYS2d 528 (3d Dept 1992); see also Introductory Statement to this Division.

Parol evidence may, under some circumstances, be used to establish an express warranty. Under UCC § 2-202, it is a preliminary question of fact for the trial judge whether the writing was intended as a complete and exclusive statement of the terms of the agreement. If the trial judge finds it was so intended, parol evidence of warranty is inadmissible except as the warranty can be established by course of dealing or usage of trade (UCC § 2-205) or, conceivably, by course of performance (UCC § 2-208). If the trial judge finds it was not so intended, parol evidence of a warranty consistent with the written agreement is admissible. The New York Annotations to the Uniform Commercial Code indicate that in allowing proof by course of dealing, usage of trade or course of performance, the Code has modified New York law. Case law prior to the Code excluded evidence of a verbal warranty when the writing between the parties appeared to be complete in all respects, *Emmett v Penoyer*, 151 NY 564, 45 NE 1041 (1897); *Eighmie v Taylor*, 98 NY 288 (1885), although not where the writing did not purport to cover the whole agreement between them, *Filkins v Whyland*, 24 NY 338 (1862). The fact that some terms were ambiguous and could be explained by parol did not authorize proof of a parol warranty when the contract was otherwise complete, *Emmett v Penoyer*, supra; *William H. Waters, Inc., v March*, 240 App Div 120, 269 NYS 420 (1st Dept 1934). Moreover, writings subsequent to execution of the written contract, not executed in modification of the contract, are barred by the parol evidence rule, *Elm Coated Fabrics Co. v Krasnov*, 16 Misc2d 726, 185 NYS2d 145 (Sup 1959), aff'd, 10 AD2d 607, 197 NYS2d 413 (1st Dept 1960); see *Ellen v Heacock*, 247 App Div 476, 286 NYS 740 (4th Dept 1936). But a defendant whose answer admits the making of a warranty may not, on trial, object to parol evidence to establish it, *Kuester v Paige Sales Co.*, 209 App Div 294, 204 NYS 547 (4th Dept 1924).

A selling agent who has not been given express authority to make a warranty cannot give a warranty binding upon his or her principal unless the sale is one usually attended by a warranty, *Smith v Tracy*, 36 NY 79 (1867). The customary procedure in that respect is generally a question for the jury, *Peter Pan Mfg. Corp. v Lady Royal Mfg. Co.*, 272 App Div 418, 71 NYS2d 97 (1st Dept 1947); *Silverstein v R.H. Macy & Co.*, 266 App Div 5, 40 NYS2d 916 (1st Dept 1943).

It is a question of fact for the jury whether a seller made statements amounting to a warranty, *Friedman v Medtronic, Inc.*, 42 AD2d 185, 345 NYS2d 637 (2d Dept 1973); *Loonsk Bros. v Sinclair Motor Corp.*, 254 App Div 137, 4 NYS2d 416 (4th Dept 1938); see Annot: Question

whether oral statements amount to express warranty, as one of fact for jury or of law for court, 67 ALR2d 619. A jury may find that a seller who remains silent knowing that the buyer is acting under a mistaken belief as to the quality of the goods has thereby made an express warranty that the goods are of such quality, *Donovan v Aeolian*, 270 NY 267, 200 NE 815 (1936). When the evidence supports a finding that a retailer in making a sale adopted the manufacturer's warranty, the retailer may be held liable on an express warranty, *Silverstein v R.H. Macy & Co.*, 266 App Div 5, 40 NYS2d 916 (1st Dept 1943). But a warranty does not extend to defects known to the purchaser, *Studer v Bleistein*, 115 NY 316, 22 NE 243 (1889).

The time when the affirmation is made is not material under the Code, since even if made after close of the deal, it constitutes a warranty if it was fairly to be regarded as part of the contract, UCC § 2-313, Comment 7. Consideration is not required for a modification of the contract, UCC § 2-209.

Manufacturers and dealers of mobile homes must provide the warranties and protections provided for in General Business Law §§ 720-724.

As to disclaimer UCC § 2-316, subd 1, provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

This subdivision denies effect to language of disclaimer when inconsistent with language of express warranty, see Comments 1 and 2 to the section. A disclaimer of implied warranty must be written and conspicuous, UCC § 2-316(2); see Annot: Construction and effect of UCC sec. 2-316(2) providing that implied warranty disclaimer must be "conspicuous," 73 ALR3d 248. Under that provision the question of conspicuousness is for the court, *Carbo Industries Inc. v Becker Chevrolet Inc.*, 112 AD2d 336, 491 NYS2d 786 (2d Dept 1985). Although the statute is met, such disclaimer does not bind persons who are not parties to the contract and who were unaware of the disclaimer; in the absence of special circumstances, buyer and seller cannot contract to limit the sellers exposure under strict products liability to an innocent user or bystander, *Velez v Craine & Clark Lumber Corp.*, 33 NY2d 117, 350 NYS2d 617, 305 NE2d 750 (1973). General Business Law § 369-b voids any attempt to limit a manufacturer's warranty or guarantee solely for the reason that merchandise is sold by a particular dealer or dealers.

Reliance by the buyer had to be pleaded and proved under former

PPL § 93. UCC § 2-313 substituted “becomes part of the basis of the bargain” for the former language of inducement and reliance, and Comment 3 states:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. This issue normally is one fact.

The original version of the section was severely criticized by the Law Revision Commission, 1955 Report Law Rev. Comm., Vol. 1, pp 392393; 1 Frumer and Friedman, *Products Liability*, 532 § 19.04(4) n 14. As is stated in Historical Note to UCC § 2-313 in McKinney's, that criticism resulted in the insertion of the words “part of” to make clear that “basis of the bargain” did not mean “basic to the bargain,” which would have drastically restricted the scope of express warranties. Since little more was required under PPL § 93 than proof that the seller's statement was of a kind that would naturally induce purchase and that the buyer did purchase, see 1 Hursh, *American Law of Products Liability* 412 § 3:6, 1 Williston (Rev Ed) Sales 535 § 206, the change in language apparently does little more than make clear that such proof shifts the burden of going forward; but see *Wojcik v Empire Forklift, Inc.*, 14 AD3d 63, 783 NYS2d 698 (3d Dept 2004) and *Rosenfeld v A. H. Robins Co., Inc.*, 63 AD2d 11, 407 NYS2d 196 (2d Dept 1978) (requiring buyer to prove knowledge of, and reliance upon, the representations alleged); *Friedman v Medtronic, Inc.*, 42 AD2d 185, 345 NYS2d 637 (2d Dept 1973) (requiring buyer to show reliance); see also *CBS Inc. v Ziff-Davis Pub. Co.*, 75 NY2d 496, 554 NYS2d 449, 553 NE2d 997 (1990) (reliance not required in breach of contract action). Further, the express warranty must be shown to relate to the particular failure complained of, *Friedman v Medtronic, Inc.*, *supra*.

Recovery for personal injury or property damage is permissible under UCC §§ 2-714(3) and 2-715(2)(b). The vendor's liability is not limited to instances where the breach of warranty caused the accident, but extends to the case where the breach only aggravated the injuries, *Bolm v Triumph Corp.*, 33 NY2d 151, 350 NYS2d 644, 305 NE2d 769 (1973).

Notice of breach of warranty to the seller within a reasonable time after the buyer knew, or ought to have known, of the breach was required under PPL § 130, but that provision was held inapplicable to a claim for personal injuries, *Silverstein v R.H. Macy & Co.*, 266 App Div 5, 40 NYS2d 916 (1st Dept 1943); *Kennedy v F.W. Woolworth Co.*, 205 App Div 648, 200 NYS 121 (1st Dept 1923), and to an action by a remote purchaser against a manufacturer, see *Greenman v Yuba Power Products, Inc.*, 59 Cal 2d 57, 27 Cal Rptr 697, 377 P2d 897 (1963). Although the language of UCC § 2-607(3)(a) is substantially similar to for-

mer PPL § 130, the Official Comment to the Code indicates that notice to the seller of injury to a consumer is required. The comment apparently will not be followed. *Fischer v Mead Johnson Laboratories*, 41 AD2d 737, 341 NYS2d 257 (2d Dept 1973), held that in respect to goods sold for human consumption notice under UCC § 2-607 is not required.

Illegality affecting both buyer and seller is a defense to an action for breach of warranty, but illegality which affects only the seller is not, *Bolivar v Monnat*, 232 App Div 33, 248 NYS 722 (4th Dept 1931).

Pre-verdict interest is not recoverable in a personal injury case even though the complaint alleges a breach of warranty, *Gillespie v Great Atlantic & Pacific Tea Co.*, 26 AD2d 953, 276 NYS2d 372 (2d Dept 1966), *mod* on other grounds, 21 NY2d 823, 288 NYS2d 907, 235 NE2d 911 (1968) (implied warranty of fitness); *Hyatt v Pepsi-Cola Albany Bottling Co.*, 32 AD2d 574, 298 NYS2d 1005 (3d Dept 1969); *Raman v Carborundum Co.*, 31 AD2d 552, 295 NYS2d 534 (2d Dept 1968).

The firefighter's rule does not apply to products liability actions sounding in negligence, breach of warranty and products liability brought by a volunteer firefighter against a manufacturer of firefighters' safety equipment that failed to provide adequate protection against hazards foreseeably encountered by firefighters during rescue activities, *Shepard v Morning Pride Mfg., Inc.*, 217 AD2d 308, 636 NYS2d 173 (3d Dept 1996).

PJI 2:142. Liability for Breach of Implied Warranty

The law implies a warranty by a manufacturer (wholesaler, retailer) that places a product on the market that it is reasonably fit for the ordinary purposes for which such product is used. If the product is not reasonably fit to be used for its ordinary purposes, the warranty is breached.

Plaintiff AB claims that Defendant CD's [*state product*] was not fit for its ordinary purposes because [*state claim*]. If you find that the product was fit for its ordinary purposes, you will find there was no breach of warranty, and you will find for CD on this issue. If you find that the [*state product*] was not fit for its ordinary purposes, you will find that CD breached its implied warranty.

Comment

Based on UCC 2-314; *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Victorson v Bock Laundry Mach. Co.*,

37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975); *Di Prospero v R. Brown & Sons, Inc.*, 110 AD2d 250, 494 NYS2d 181 (3d Dept 1985); *Finkelstein v Chevron Chemical Co.*, 60 AD2d 640, 400 NYS2d 548 (2d Dept 1977); see *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985); see also Introductory Statement preceding PJI 2:120.

An action for implied warranty of merchantability under UCC 2-314 may also be brought upon the same claim sued on in strict liability, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975), even where the claim is one for wrongful death, *Greco v S. S. Kresge Co.*, 277 NY 26, 12 NE2d 557 (1938). Plaintiff must establish that the product was not reasonably fit for the purposes for which it was intended, and that the product was the proximate cause of plaintiff's injury, UCC § 2-314; *Denny v Ford Motor Co.*, supra; *Wojcik v Empire Forklift, Inc.*, 14 AD3d 63, 783 NYS2d 698 (3d Dept 2004); *Finkelstein v Chevron Chemical Co.*, 60 AD2d 640, 400 NYS2d 548 (2d Dept 1977). The elements of a cause of action based upon implied warranty differ from those in an action based upon strict products liability, see *Wojcik v Empire Forklift, Inc.*, supra; *Ribley v Harsco Corp.*, 57 AD2d 234, 394 NYS2d 741 (3d Dept 1977); see generally Introductory Statement preceding PJI 2:120; see also *Micallef v Miehle Co.*, Division of Miehle-Goss Dexter, Inc., 39 NY2d 376, 384 NYS2d 115, 348 NE2d 571 (1976). Of critical significance, the implied warranty claim focuses on the disappointed expectations of the purchaser or user of the product, while a cause of action based on strict products liability is concerned with social policy and risk allocation, *Denny v Ford Motor Co.*, supra; see *Wojcik v Empire Forklift, Inc.*, supra. In a cause of action based on breach of implied warranty, recovery may be obtained upon a showing that the product was not minimally safe for its expected purposes, without consideration of the feasibility of alternative designs or the manufacturer's reasonableness in marketing the product in an unsafe condition, *id.* Consideration of alternative designs and the prudence of marketing the product in its condition are hallmarks of a claim in strict products liability, see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); PJI 2:120.

While a plaintiff seeking to recover for injuries sustained due to a product defect has but a single claim, that claim may be based upon several theories of liability, see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395, 373 NYS2d 39, 335 NE2d 275 (1975). Where plaintiff asserts claims based upon strict products liability and breach of warranty, the court should charge the jury with respect to each theory of liability, when so requested. A verdict in which the manufacturer is held liable under a breach of warranty theory but is exonerated from strict products liability is not necessarily inconsistent, see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995); *Wojcik v Empire Forklift, Inc.*, 14 AD3d 63, 783 NYS2d 698

(3d Dept 2004). In *Denny*, a jury concluded that a small utility vehicle was not fit for its ordinary purposes because of a propensity to roll over and a lack of warning to consumers concerning such propensity, although the jury also concluded that the vehicle was not “defective” for purposes of strict products liability.

Both the strict products and breach of warranty theories of liability involve “defective” products, see *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250, 662 NE2d 730 (1995). Under both theories, the plaintiff must show that the defect complained of existed at the time that the product left the manufacturer or other entity in the chain of distribution being sued, *Fritz v White Consolidated Industries, Inc.*, 306 AD2d 896, 762 NYS2d 711 (4th Dept 2003).

In order to avoid confusing the jury with differing instructions as to what constitutes a “defective” product when both theories of liability are charged, the breach of warranty charge avoids the use of the word “defective.” That word is reserved for use in the strict products liability charge and verdict form, see PJI 2:120.

The following questions should be used in conjunction with the pattern charge. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a Court exhibit.

1. Did defendant breach its warranty in that its product was not reasonably fit for its ordinary purposes?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

If your answer is “Yes,” answer Question “2.” If your answer is “No,” do not answer Question “2.”

2. Was the breach of warranty a substantial factor in causing plaintiff's injuries?

At least five jurors must agree on the answer to this question.

Yes ____ No ____

Questions relating to the culpable conduct of plaintiff may be adapted from the special verdict form appearing in PJI 2:120.

With respect to warranty, as well as strict products liability, privity is no longer required in an action for personal injury, *Heller v U.S.*

Suzuki Motor Corp., 64 NY2d 407, 488 NYS2d 132, 477 NE2d 434 (1985). UCC § 2-318 provides that warranties run to “any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty,” see also Annot: 100 ALR3d 743.

The warranty of merchantability provided for in UCC § 2-314 arises even though the sale is of specific goods, not purchased by description, see UCC § 2-314, Official Comment paragraph 6. To be merchantable the goods must “pass without objection in the trade under the contract description”; as to fungible goods, must be “of fair average quality within the description”; must be “fit for the ordinary purposes for which such goods are used”; must run within the variations permitted by contract of even kind, quality and quantity; and must conform to affirmations of fact made on the container or label.

The rules governing plaintiff's conduct are the same in implied warranty and in strict liability, see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398, 450 NE2d 204 (1983); *Sheppard v Charles A. Smith Well Drilling and Water Systems*, 93 AD2d 474, 463 NYS2d 546 (3d Dept 1983); see Introductory Statement preceding PJI 2:120.

The warranty of merchantability may be disclaimed but the language of disclaimer must mention “merchantability” and, if written, must be conspicuous, UCC § 2-316. Whether a particular disclaimer is conspicuous is a question of law, *Carbo Industries Inc. v Becker Chevrolet Inc.*, 112 AD2d 336, 491 NYS2d 786 (2d Dept 1985).

Consequential damages, including damages for personal injuries, may be recovered in an action for breach of warranty, UCC § 2-715(2)(b); *Di Prospero v R. Brown & Sons, Inc.*, 110 AD2d 250, 494 NYS2d 181 (3d Dept 1985); *Robert T. Donaldson, Inc. v Aggregate Surfacing Corp. of America*, 47 AD2d 852, 366 NYS2d 194 (2d Dept 1975). Such damages may be limited or excluded by contract unless the limitation or exclusion is unconscionable, see *Cayuga Harvester, Inc. v Allis-Chalmers Corp.*, 95 AD2d 5, 465 NYS2d 606 (4th Dept 1983). Limitation of consequential damages for injury to the person in the case of consumer goods (defined by UCC §§ 2-103(3) and 9-109 as goods “used or bought for use primarily for personal, family, or household purposes”) is prima facie unconscionable, UCC § 2-719(3). Unconscionability is a matter for the court to determine after a hearing, *Zicari v Joseph Harris Co.*, 33 AD2d 17, 304 NYS2d 918 (4th Dept 1969). Recovery may be had for fright and psychic trauma occasioned by the condition of the product even though there was no physical contact, *Gay v A & P Food Stores*, 39 Misc2d 360, 240 NYS2d 809 (NY City Civ Ct 1963) (plaintiff made nauseous by sight of worm in canned corn). Recovery may also be had by an employer who has been compelled to pay compensation benefits to an employee injured by defendant seller's defective product; WCL § 29 does not limit the employer's subrogation rights to a negligence action; the employee may recover such damages in warranty, *General Aniline & Film Corp. v A. Schrader & Son, Inc.*, 12 NY2d 366, 239 NYS2d 868,

190 NE2d 232 (1963). Interest on personal injury damages recovered runs from the date of verdict only, *Gillespie v Great Atlantic & Pacific Tea Co. and O'Neil*, 21 NY2d 823, 288 NYS2d 907, 235 NE2d 911 (1968); *Hyatt v Pepsi-Cola Albany Bottling Co.*, 32 AD2d 574, 298 NYS2d 1005 (3d Dept 1969); *Raman v Carborundum Co.*, 31 AD2d 552, 295 NYS2d 534 (2d Dept 1968). But where the trial is bifurcated, interest runs from the date of the liability determination, *Love v State*, 78 NY2d 540, 577 NYS2d 359, 583 NE2d 1296 (1991).

The implied warranty of fitness for a particular purpose provided for in UCC § 2-315 concerns the specific use for which the buyer requires the product, rather than the ordinary purpose for which it is used. The Code raises such a warranty if “the seller at the time of contracting has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.” That the sale was by patent or trade name is, therefore, no longer decisive; it is just one of the factors to be considered on the question, of reliance see *Bichler v Willing*, 58 AD2d 331, 397 NYS2d 57 (1st Dept 1977) (consumer asking druggist to fill a prescription does not rely on pharmacist’s judgment, but rather consumer relies on physician’s choice; therefore, there is no implied warranty ascribable to druggist). If the buyer insists on a particular brand there will be no warranty because there has been no reliance; however, unless the buyer does insist, warranty results even though the purchase be of a brand name product, UCC § 2-315, Official Comment 5; *Zampino v Colgate-Palmolive Co.*, 10 Misc2d 686, 173 NYS2d 117 (Sup 1958), rev’d on other grounds by, 8 AD2d 304, 187 NYS2d 25 (3d Dept 1959), aff’d, 8 NY2d 1069, 207 NYS2d 284, 170 NE2d 415 (1960); *Pabellon v Grace Line*, 191 F2d 169 (2d Cir 1951). Note, however, that the warranty of fitness for particular purpose may be excluded or modified, UCC §§ 2-315, 2-316.

The bailor’s warranty, that the bailed chattel is fit for the purpose for which leased, is closely related to the warranty of fitness for particular purpose, but not grounded on any statutory provision, *Matter of People by Phillips*, 250 NY 410, 165 NE 829 (1929); *Hoisting Engine Sales Co. v Hart*, 237 NY 30, 142 NE 342 (1923); *Fili v Matson Motors, Inc.*, 183 AD2d 324, 590 NYS2d 961 (4th Dept 1992); *Inverso v Whitestone Transit Mix Corp.*, 30 AD2d 565, 290 NYS2d 953 (2d Dept 1968); *Gambino v John Lucas & Co.*, 263 App Div 1054, 34 NYS2d 383 (4th Dept 1942); and see Comment to PJI 2:220; 1 *Frumer & Friedman, Products Liability* 498, § 19.02(2); *Farnsworth, Implied Warranties of Quality on Non-Sales Cases*, 57 Col L Rev 653; Annot: 4 ALR2d 292, 306; 46 ALR2d 404; 68 ALR2d 850; 6 ALR4th 358. The duration of the warranty of fitness is the duration of the lease, *Cintrone v Hertz Truck Leasing and Rental Service*, 45 NJ 434, 212 A2d 769 (1965). Plaintiff will be denied recovery, however, if he or she used the chattel with knowledge of the defect, *Standard Oil Co. of New York v Boyle*, 231 App Div 101, 246 NYS 142 (4th Dept 1930), or if his or her own negligence or misuse of the chattel contributed to the injury, see *supra* this Comment, and see Comment to PJI 2:140, and Annot: 46 ALR2d 404, 422;

68 ALR2d 850, 866; 6 ALR4th 358. Where the bailment was gratuitously made for the sole benefit of the bailee, the only duty owed by the bailor is to warn of defects or hazards actually known to the bailor, *Daoust v Palmenteri*, 109 AD2d 774, 486 NYS2d 288 (2d Dept 1985). A gratuitous bailor does not owe a duty to use reasonable care to furnish safe chattels where the claimed defect is patent, *Sofia v Carlucci*, 122 AD2d 263, 505 NYS2d 178 (2d Dept 1986).

The firefighter's rule does not apply to products liability actions sounding in negligence, breach of warranty and products liability brought by a volunteer firefighter against a manufacturer of firefighters' safety equipment that failed to provide adequate protection against hazards foreseeably encountered by firefighters during rescue activities, *Shepard v Morning Pride Mfg., Inc.*, 217 AD2d 308, 636 NYS2d 173 (3d Dept 1996).

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